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The Law of Insurance In Texas

A TREATISE *on* INSURANCE *in* TEXAS, INCLUDING FIRE,
LIFE, ACCIDENT AND HEALTH, FRATERNAL BENEFIT,
AND OTHER BRANCHES, TOGETHER WITH
THE STATUTORY LAW

BY

FREDERIC C. MORSE
(OF THE AUSTIN BAR)

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PREFACE AND EXPLANATION

Insurance has not only become one of the greatest fields of modern endeavor, but it has become one of the most powerful factors in present day progress. Perhaps no other business can excel it in size, strength and importance to the social and business life of today. As a result, the legal profession is being constantly called upon to guide great corporations along the paths marked out for them by the commonwealth and to rectify differences between the insured and insurer. In the State of Texas the higher courts, as elsewhere, almost daily pass upon controversies between insurer and insured. In order that the labors of the bench and bar may be lightened this book has been written and published, in the hope that something may be done towards, not only making the work of the practitioner less arduous, but also towards placing the insurance law of Texas in such a light that a greater degree of harmony and usefulness may be brought about.

The book is largely based upon the Texas cases of the Southwestern Reporter annotations of the West Publishing Co., by special license from them, and is, of course, founded upon the key-number system, a system which has become essential to the perfection of the modern law book. Full reference is made to the Century Digest and title reference is made to Cyc. Little attempt is made to discuss the decisions, but the idea of the author has been to place before the attorney the law as it is, in such shape that he may get at it quickly and readily. Much as it may be deplored, the modern practitioner is not so much interested in the theory as he is in the point of the decision which may suit the case at bar. However, the writer has earnestly tried to make this work something more than a digest, although bearing in mind that the modern lawyer's needs are better filled by a digest than by a textbook. All insurance cases to be found in the Texas Reports and the Southwestern Reporter up to January 15, 1917, the statutory insurance law of the State, as well as the opinions of the Attorney General construing the statutory law, are included. The changes in the insurance laws of the State, made by the Thirty-fifth Legislature are taken account of and the new laws included. Separate indexes are included for each branch of insurance law treated, with cross references, and a general index to the book as a whole as well

as one to the notes are to be found at the end of the book. The statutory references are to Vernon's Sayles Texas Civil Statutes, 1914. The Southwestern key-number is inserted before each sub-division of the notes, and a full key-number index is to be found at the end of the book.

The author sincerely hopes that this work may be of use to the legal profession as well as the great insurance fraternity of Texas. If this result shall have been attained his efforts will have been sufficiently rewarded.

FREDERIC C. MORSE.

Austin, June 15, 1917.

TABLE OF CONTENTS

Fire Insurance—Index vii

Case Law 1

Statutory Law 195

Commissioner of Insurance and Banking 195

Duties of the Commissioner 196

Incorporation of Insurance Companies—Home Companies 207

General Provisions 211

*Funds That May Be Invested in Bonds Under Federal Farm
Loan Act 219*

Agents—Definitions of, License, Powers, Etc., 220

Fire and Marine Companies 228

*Mutual Fire, Lightning, Hail and Storm Insurance Com-
panies 256*

Mutual Hail Insurance Companies 265

Reciprocal or Inter-Insurance—Indemnity Contracts Etc., 269

Printers' Mutual Fire and Storm Insurance Associations 273

Arson and Wilful Burning (with notes) 274

Life Insurance—Index (275) i

Case Law 276

Statutory Law 399

Life, Health and Accident Insurance Companies—Home 399

Same—Foreign 422

*Investment and Premium Receipts Taxes of Life Insurance
Companies 426*

Assessment or Natural Premium Companies 434

Co-operative Life Insurance Companies 436

Mutual Assessment Accident Insurance—Home 445

Workmen's Compensation Act 451

Notes on Industrial Accident and Liability Insurance 479

Accident and Health Insurance—Index (482) i

Case Law 483

Statutory Law—See Above, Pages 399-482

Fraternal Benefit Insurance—Index (528) i

Case Law 529

Statutory Law 621

Fidelity, Guaranty and Surety Insurance 646*Statutory Law 646**Notes on 656***Casualty Insurance 660***Statutory Law 660**Notes on 670***Mutual Plan of Insurance Against Loss or Damage Resulting from Burglary, Robbery and Loss of Money and Securities in Transportation 671***Statutory Law 671**Notes on 674***Livestock Insurance 675***Statutory Law 675**Notes on 676***"Blue Sky" Laws Regulating the Sale of Stock of Corporation 679****Anti-Trust Law 688**

Table of Cases Cited 696**Key-Number Index to Notes Complete 732****General Index***Case Law 745**Statutory Law 772*

FIRE INSURANCE

Definition 1

I. Control and Regulation of Companies in General 1 (See pages 276, 483, 529)

Constitutional and Statutory provisions 1

- (a) *In General 1*
- (b) *As Regards Combinations of Insurance Companies 2*
- (c) *As Regards the Liability of Agents 3*
- (d) *Effect of Construction of Statute by Commissioner of Insurance 4*

Foreign companies 4

- (a) *Authority or License to Do Business—Statutory Regulations 4*
 - (1) *Case Law 4*
- (b) *License Fees and Taxes 4*
- (c) *Subjection to Special Requirements 5*
 - (1) *Statutory Regulations 5*
 - (2) *Case law 5*
- (d) *Local Funds and Securities 6*
- (e) *Appointment of Local Agents 7*

II. Insurance Companies 8 (See pages 276, 483, 530)

- (1) *Stock Companies—Incorporation, Organization and Existence—Statutory Regulations 8*
- (2) *Mutual Fire, Lightning, Hail and Storm Insurance Companies—Incorporation—Statutory Regulations 8*
 - Laws Applicable 9*
 - Foreign Mutual Companies May be Admitted, When—Statutory Regulations 9*
 - Law Does Not Apply to What Companies—Statutory Regulations 9*
 - (a) *Case Law 10*
 - Nature and Status in General—Statutory Regulations—Law Does Not Apply to Certain Companies 10*
 - (a) *Case Law 10*
 - By-Laws—Statutory Regulations 10*
 - Members—Right to Vote and Share in Benefits—Statutory Regulations 10*
 - Liability of Members—Statutory Regulations 11*
 - (a) *Case Law 11*
 - Special Funds 12*
 - Insolvency and Dissolution 12*
 - Proceedings to Enforce Dissolution 12*
 - Assets and Receivers 12*

III. Insurance Agents and Brokers 12 (See pages 283, 488, 536)

Agents Must Be Authorized to Solicit Insurance—Statutory Regulations 12

Who Are Agents—Statutory Regulations 13

Policies Must Be Issued Only Through Resident Agents, Except—Statutory Regulations 13

Solicitor of Insurance to Be Deemed Agent of Company—Statutory Regulations 13

Revocation of Agent's Authority—Statutory Regulations 13

The Relation in General 13

Appointment or Employment of Agent 14

Evidence as to Agency 14

Scope and Extent of Agency 14

Liabilities of Agents and Their Sureties 14

Compensation of Agents 15

Extent and Exercise of Powers of Agents 16

(a) *In General 16*

(b) *Effect of Provisions of the Policy 16*

(c) *Effect of Instructions to Agents 16*

(d) *Unauthorized and Wrongful Acts of Agent 16*

Ratification 17

Agency for Insurer—Notice to Agent 17

Agency for Insured 18

(a) *Creation of Agency to Procure Insurance in General 18*

(b) *Authority and Duties of Agent as to Principal 19*

a. *Actions for Breach of Contract 19*

(c) *Extent and Exercise of Powers of Agent 19*

(d) *Unauthorized and Wrongful Acts of Agent 20*

(e) *Notice to Agent 20*

IV. Insurable Interest 20 (See pages 294, 580)

What Constitutes Interest in Property 20

V. The Contract in General 21 (See pages 296, 489, 543)

(A) *Nature, Requisites and Validity 21*

Policies of Insurance shall contain Entire Contract—Statutory Regulations 21

Policies Governed by the Laws of Texas, Notwithstanding Stipulations to the Contrary—Statutory Regulations 21

Nature of the Contract 22

Executory Agreements to Insure 22

Application or Offer and Acceptance 22

Validity of Oral Contracts 23

Binding Slips or Memoranda 23

Form and Requisites of Policy 23

Papers Accompanying Policy 23

(a) *Statutory Regulations 23*

(b) *Case Law 23*

Delivery and Acceptance of Policy 24

Payment of Premiums or Dues 24

Validity of Policy in General 25

Estoppel as to Defects in Policy 26

Presumption of Knowledge of Contents of Policy 26

Ratification 26

Reformation 26

Modification 28

Renewal 28

(B) *Construction and Operation 30*

Application of General Rules of Construction 30

What Law Governs 32

Slip Attached to Policy 32

Property Covered by Insurance Against Fire or Other Cause of Loss 32

(a) *In General 32*

(b) *Description of Property 32*

(1) *Real Property 32*

(2) *Personal Property 33*

(c) *Description of Location 34*

Amount of Insurance—Valued Policies 35

Commencement of Risk 35

Term and Duration of the Risk

(a) *In General 36*

(b) *Term Fixed by Policy 36*

Entire or Severable Contract 36

VI. Premiums, Dues and Assessments 37 (See pages 306, 492, 564)

Unlawful to Accept Rebates—Statutory Regulations 37

Company to Furnish Policy Holder with Analysis of Rate—Statutory Regulation 37

As to Collection of Premiums—Statutory Regulations 37

The State Insurance Commission Law Not to Apply to Certain Companies—Statutory Regulations 38

Payment of Premiums 38

Premium Notes 38

VII. Assignment or Other Transfer of Policy 38 (See pages 312, 560)

Assignability of Policies 38

Consent of Insurer 39

Rights and Liabilities of Assignee 39

(a) *In General 39*

(b) *Transfer as Collateral Security 39*

VIII. Cancellation, Surrender, Abandonment or Rescission of Policy 40 (See pages 317, 493, 562)

When a Policy May Be Canceled 40

Right of Insurer to Cancel 40

Notice to Cancel 41

Repayment of Unearned Premium on Cancellation 41

Acts Constituting Cancellation 42

Validity of Cancellation 42

Evidence of Cancellation 43

Repayment and Recovery of Premiums 43

Rescission by Agreement of Parties 43

IX. Avoidance of the Policy for Misrepresentation, Fraud, or Breach of Warranty or Condition 43 (See pages 322, 494, 551)

Misrepresentations Shall Not Constitute Defense—Statutory Regulations 43

Breach or Violation by Insured of Policy on Personal Property Is Not a Defense, When—Statutory Regulations 43

No Defense Based Upon Misrepresentation Valid, Unless—Statutory Regulations 44

Grounds of Avoidance in General 44

(a) *Statutory Provision—Case Law 44*

(b) *Materiality—Misrepresentation Must Be Material to Avoid Contract—Statutory Regulations 45*

a. Case Law

(c) *Effect of Misrepresentations 45*

(d) *Fraud or False Swearing in Obtaining Insurance 46*

Warranties—Definition 46

Warranties in General 47

Warranties in Marine Insurance 47

Distinction Between Warranties and Representations 48

Fulfillment of Breach of Warranty 49

Matters Relating to Property or Interest Insured 50

(a) *Use of Building 50*

(b) *Occupation of Building 50*

(c) *Description and Condition of Goods 50*

(d) *Amount of Value 51*

(e) *Title or Interest of Insured—Statutory Regulation 51*
Case Law 52

(a) *Equitable Title 52*

(b) *Outstanding Lien or Mortgage 52*

(c) *Leasehold Interests 53*

(d) *Marital Interests 54*

(e) *Partnership Property 55*

(f) *Vendor's Right 56*

(g) *Vendee in Contract or Sale 56*

- (h) *Miscellaneous 56*
 - (1) *Fee Simple Title by Deed as a Condition Precedent 56*
 - (2) *Not Duty of Insurer to Make Further Inquiries 56*
 - (3) *As to When Condition of Ownership Refers 56*
- (i) *Incumbrance 56*
 - (1) *In General 56*
 - (2) *Mixed Personalty and Realty 57*
 - (3) *Rights of Mortgagee 57*
 - (4) *Miscellaneous 57*
 - (5) *Omission to Inform Insurer of Existence of Lien 58*
 - (6) *Notice and Inquiry of Insurer as to Existence of Lien 58*
- (j) *Special Circumstances Affecting Risk 59*
- (k) *Other Insurance 59*

X. Forfeiture of Policy for Breach of Promissory Warranty, Covenant or Condition Subsequent 60 (See pages 332, 496, 568)

Statutory Provisions 60

Covenants of Provisions of Policy 60

Temporary Breach of a Policy 61

Breach of Technical or Immaterial Provisions 61

Proceedings to Give Effect to Forfeiture 61

Rights of Creditors After Breach by Insured 61

Parties Affected by Forfeiture of Policy 61

Matters Relating to Property or Interest Insured 62

- (a) *Change in Use of Building 62*
- (b) *Change in Occupancy of Building 62*
- (c) *Change in Value of Goods Insured 63*
- (d) *Building Becoming Vacant 63*
- (e) *Keeping or Use of Prohibited Articles 65*
- (f) *Incumbrances 66*
- (g) *Change of Title or Interest 67*
 - (1) *In General 67*
 - (2) *As Between Partners 68*
 - (3) *Mortgages and Rights of Mortgagees 69*
 - (4) *What Constitutes a Change in Title 69*
 - (5) *Fraudulent Assignment 71*
 - (6) *Construction of a Cotton Contract 71*
 - (7) *Miscellaneous 72*
- (h) *Special Causes Increasing Risk 73*
- (i) *Precautions Against Loss 74*
 - a. *As Regards Marine Insurance 75*

FIRE INSURANCE

- (j) *Keeping Books, Papers and Safe* 75
 - (1) *In General* 75
 - (2) *The Iron-Safe Clause a Warranty* 76
 - (3) *Substantial Compliance Necessary* 77
 - (4) *Meaning of "Fire Proof Safe," "Last Inventory," etc.* 77
 - (5) *Certain Statutory Provisions Do Not Affect* 78
 - (6) *Books Not in Safe at Time of Fire* 78
 - (7) *Loss of Some of the Books* 79
 - (8) *Substantial Compliance With Iron Safe Clause* 80
 - (9) *Insufficient Compliance With Iron Safe Clause* 82
- (k) *Additional Insurance* 85
 - a. *Consent of Agent to Additional Insurance* 89
- (l) *Assignment of Policy* 89
 - (1) *Rights of Assignee* 89
 - (2) *Assignment as Collateral Security* 89
 - (3) *Restrictions on Assignment in General* 90
 - (4) *Invalid or Inoperative Assignment*
- (m) *Non-Payment of Premiums* 91
 - (1) *Default as Ground of Forfeiture in General* 91
 - (2) *Extension of Time of Payment* 91
 - (3) *Excuses for Non-Payment* 91

XI. Estoppel, Waiver, or Agreement Affecting Right to Avoid or Forfeit Policy 92 (See pages 344, 498, 556)

What Conditions May Be Waived 92

Liability of Insurer to Estoppel by Acts, Conduct or Statements of Agents 92

Estoppel of Insured 93

Powers of Agents Respecting Waiver 93

(1) *In General* 93

(2) *Effect of Provisions of Policy* 94

Knowledge or Notice of Facts—In General 96

Knowledge of or Notice to Officers or Agents 97

(1) *In General* 97

(2) *As to Additional Insurance* 98

(3) *As to Ownership of Property* 100

(4) *As to Incumbrances* 101

(5) *As to Miscellaneous Matters* 101

Insertion of False Answers in Application by Agent or Under His Direction 102

Mistake or Fraud of Agent 103

Form and Requisites of Express Waiver 103

- (1) *Oral Waiver 103*
- (2) *Waiver in Writing 104*
- (3) *Waiver of Provisions of Policy as to Mode of Waiver 104*
- (4) *Construction and Operation of Express Waiver 104*

Implied Waiver in General 105

Issuance and Delivery of Policy Without Objections 106

Failure to Assert Forfeiture or Cancel Policy 108

Demand, Acceptance, or Retention of Premiums 108

Consent to Assignment of Policy 109

Requiring, Accepting or Retaining Proofs of Loss 110

Participation in Adjustment of Loss 111

XII. Risks and Causes of Loss 111 (See pages 354, 501)

Marine Risks in General 111

Perils of the Sea 112

XIII. Extent of Loss and Liability of Insurer 113 (See pages 356, 505)

Policy Shall Be Considered a Liquidated Demand—Statutory Regulations 113

Total Loss 113

- (1) *What Constitutes 113*
- (2) *Effect of Statutory Regulation 114*

Provisions Making Insured a Co-Insurer—Co-Insurance Clauses—Statutory Regulations 115

a. Case Law 116

Value of Property Destroyed 116

Fraudulent Valuation of Goods 117

Valued Policies 117

Amount of Interest of the Insured 118

Effect of Other Insurance 119

Loss of Rent and Profits 121

XIV. Notice and Proof of Loss 121 (See pages 357, 509, 590)

Effect of Requirements of Policy 121

Necessity of Proof of Loss 122

Persons Who May Make Proofs of Loss 122

Persons to Whom Notice of Proof May Be Made 122

Time for Notice and Proof 122

Necessity of Certificate of Magistrate 123

Fraud or False Swearing 123

Estoppel or Waiver as to Notice and Proofs or Defects and Objections 124

- (1) *In General 124*

- (2) *Powers of Officers or Agents* 125
- (3) *Implied Waiver in General* 125
- (4) *Denial of Liability* 126
- (5) *Failure to Object or to State Ground of Objections* 127
- (6) *Adjustment of Loss and Negotiations for Settlement* 127

XV. Adjustment of Loss 128 (See page 359)

- Effect of Adjustment* 128
- Effect of Provisions of Policy for Appraisal or Arbitration* 128
- Demand of Appraisal or Arbitration* 128
- Proceedings on Appraisal or Arbitration* 129
- Validity and Effect of Appraisal or Award* 129
- Estoppel or Waiver as to Adjustment or Arbitration* 131
- Rights of Parties After Adjustment* 132

XVI. Right to Proceeds 133 (See pages 359, 512, 591)

- Policy Payable to Owner of Property or Interest Insured* 133
- Proceeds of Insurance on a Homestead* 133
- Proceeds of Insurance on a House Not a Homestead* 134
- Proceeds of Warehouse Insurance* 135
- Proceeds of Insurance on Tools of a Trade* 135
- Policy Payable to or for Benefit of Mortgagee* 135
- Policy for Benefit of Person's Interest in Property Insured* 137
- Assignment of Claim for Loss* 137

XVII. Payment or Discharge Contribution and Subrogation 138

(See pages 364, 512)

- Election to Rebuild or Replace Property* 138
- Interest on Amount of Loss* 138
- Recovery of Payment* 139
- Subrogation of Insurer* 139
 - (1) *On Payment of Loss in General* 139
 - (2) *Under Assignment of Rights of Insured* 141
- Insurance of Goods During Transportation* 142
- Insurance on Goods in Possession of Warehouseman* 142

XVIII. Actions on Policies 143 (See pages 371, 514, 596)

- Jurisdiction as Affected by Net Amount in Controversy* 143
- Joinder of Causes of Action* 144
- Conditions Precedent* 145
- Defense in General* 145
- Limitations by Provisions of Policy* 146
 - (1) *Time Before Action May Be Maintained* 146
 - (2) *Time Within Which Action Must Be Brought* 146
 - (3) *Waiver of Limitation* 147

Parties 148

Venue—Statutory Regulations 148

Process 148

Process Against Foreign Insurance Companies 149

The Petition

- (1) *Form and Requisites in General* 149
- (2) *Insurable Interest* 150
- (3) *Title of Interest of the Insured* 151
- (4) *Performance or Waiver of Conditions* 151
- (5) *Loss and Cause Thereof* 152
- (6) *Non-Payment* 152

Plea, Answer or Affidavit of Defense 153

Demurrer 154

The Reply of the Insured 155

Issues, Proofs and Variance 155

- (1) *In General* 155
- (2) *Issues and Proof in General* 155
- (3) *Variance* 157

Presumption and Burden of Proof 159

Admissibility of Evidence 160

- (1) *In General* 160
- (2) *Policy or Other Contract* 161
 - a. *As to Fraud and Misrepresentation* 161
- (3) *As to a Transfer of Policy* 161
- (4) *What Property Included* 162
- (5) *As to Additional Insurance* 162
- (6) *Interest or Title of Insured* 163
- (7) *As to Incumbrances*
- (8) *As to Inventories* 165
- (9) *Miscellaneous* 165
- (10) *Loss or Damage to Property and Cause Thereof* 166
 - (a) *Arson* 166
 - (b) *As to Use of Gasoline* 168
 - (c) *Condition of Insured Property* 168
- (11) *Valuation of Property* 168
- (12) *Amount of Loss* 169
- (13) *Notice and Proof and Adjustment of Loss* 170
- (14) *Persons Entitled to Proceeds* 171
- (15) *Estoppel of Waiver* 171

Weight and Sufficiency of Evidence 173

- (1) *As to the Policy* 173
- (2) *As to Additional Insurance* 174
- (3) *As to Ownership* 174
- (4) *Miscellaneous* 175

Amount of Recovery 176

Questions for the Court 177

Questions for the Jury 177

- (1) *As to Cancellation 177*
- (2) *As to Incumbrances 178*
- (3) *As to Additional Insurance 178*
- (4) *As to Increased Hazard 178*
- (5) *As to Iron-Safe Clause 179*
- (6) *As to Inventory 179*
- (7) *As to Proofs of Loss 179*
- (8) *Miscellaneous 179*

Instructions 181

- (1) *In General 181*
- (2) *As to Incumbrances 182*
- (3) *As to Ownership 183*
- (4) *As to Additional Insurance 183*
- (5) *As to Increase of Hazard 183*
- (6) *As to Waiver of Transfer of Property 185*
- (7) *As to Vacancy 185*
- (8) *As to Value of Insured Property 185*
- (9) *As to Total Loss 186*
- (10) *As to Compromise and Settlement 186*
- (11) *As to Fraud 186*
- (12) *As to Proofs of Loss 187*
- (13) *As to Contribution 188*
- (14) *As to Arson 188*
- (15) *As to Assignment 188*
- (16) *Miscellaneous 188*

*Argument of Counsel 188**Verdict and Findings 189**Judgment 189**Appeal and Error 190*

- (1) *As to Reformation of the Policy 190*
- (2) *As to Ownership 190*
- (3) *As to Payment of Premiums 191*
- (4) *As to Value of the Property 191*
- (5) *As to Arbitration and Total Loss 191*
- (6) *As to the Iron-Safe Clause 191*

XIX. Reinsurance 193 (See page 398)

- (1) *Statutory Reulation 193*
 - (2) *Knowledge of Agent 194*
 - (3) *Extent of Liability of Reinsurer 194*
-

Cross References

- Life Insurance—Index, 275-1*
- Accident and Health Insurance—Index, 482-1*
- Fraternal Benefit Insurance—Index, 528-1*
- Industrial Accident and Liability Insurance—Index, 479*
- Livestock Insurance—Index, 676*
- Burglary Insurance—Index, 674*
- Fidelity Guaranty and Surety Insurance—Index, 656*
- Casualty Insurance—Index, 670*

FIRE INSURANCE

Fire insurance is a contract by which the insurer, for a consideration, agrees to indemnify the insured against loss of or damage to property by fire. (19 Cyc. 583.)

CONTROL AND REGULATION OF COMPANIES IN GENERAL

CONSTITUTIONAL AND STATUTORY PROVISIONS

(A) In General, the policy of a statute, whether good or bad, is a question for the Legislature, and the courts cannot consider it.⁷ A foreign company cannot assail the constitutionality of the opening article of the chapter of the Revised Statutes creating the State Insurance Commission, since by the terms thereof it is deemed to have consented to its provisions.⁴ It has been held that Arts. 4874a and 4874b of the Revised Statutes of 1914, preventing companies from avoiding liability from loss under technical and immaterial provisions, when the breach has not contributed to the loss, are not violative of the constitutional provision^{12a} that "no bill shall contain more than one subject, which shall be expressed in its title."¹³ The act providing that a provision in an insurance contract that any answers made therein or in the application, if

CONTROL AND REGULATION IN GENERAL

4—Constitutional and Statutory Provisions. (See 28 Cent. Dig. Insurance, § 4.)

1. Executive construction of a law of doubtful meaning is entitled to great weight upon the construction of the same language by the court, but where the language to be construed is plain and unambiguous executive construction is entitled to little consideration; but the unambiguous language of the act should be given effect in order to arrive at the legislative intent, especially where the language construed by the court and by the executive officers is different. Rehearing, 108 S. W. 158, 101 Tex. 376, denied.—Fire Ass'n of Philadelphia v. Lowe, 108 S. W. 810, 101 Tex. 376.

2. Rev. St. 1895, Art. 3084, subd. 7, providing that the annual report of a fire insurance company shall exhibit the company's income, stating the amount received for premiums, deducting reinsurance, and the amount received for interest and from all other

sources, in so far as it is in conflict with Laws 1907, p. 482, c. 18, § 8, providing that "every fire insurance company . . . at the time of filing its annual statement shall report . . . the gross amount of premiums received in the state," etc., is superseded by the latter act. Rehearing, 108 S. W. 158, 101 Tex. 376, denied.—Fire Ass'n of Philadelphia v. Love, 108 S. W. 810, 101 Tex. 376.

3. Acts 33rd Leg. ch. 105 (Vernon's Sayles' Ann. Civ. St. 1914, Arts. 4874a, 4874b), to prevent fire insurance companies from avoiding liability from loss under technical and immaterial provisions, when the breach has not contributed to the loss, is not violative of the constitutional provision that, "no bill shall contain more than one subject, which shall be expressed in its title."—McPherson v. Camden Fire Ins. Co., 185 S. W. 1055.

4. A foreign insurance company cannot assail the constitutionality of Rev. St. 1911, Art. 4876, since by the terms thereof it is deemed to have consented to its provisions.—Reliance Ins. Co. of Philadelphia v. Dalton, 178 S. W. 966.

untrue or false, shall render the policy void, shall be of no effect unless the matter represented is material to the risk, is not unconstitutional^{12a} as denying insurance companies the equal protection of the law since the statute does not classify the companies, but classifies the contracts, and furnishes on its face sound reason for the classification.¹¹ Neither is such act unconstitutional as taking the insurance companies' property without due process of law.¹² Art. 3084, subd. 7 of the Revised Statutes of 1895, providing that the annual report shall exhibit the company's income, in so far as it is in conflict with the Laws 1907, p. 482, ch. 18, par. 8, providing that every company at the time of filing its annual statement shall report the gross premiums received, is superseded by the latter act.²

(B) As Regards Combinations of Insurance Companies.—The trust act of 1889 was held not to apply to a combination of insurance companies to fix uniform rates of insurance and agents' commissions throughout the state.⁹ Such a combination, though possibly unenforceable among its members is not enjoined by the public, nor a ground for forfeiting its members' franchises, since the

5. Rev. St. Art. 3093, provides that any person who solicits insurance on behalf of any insurance company shall be held to be the agent of the company, "as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter." This article is a copy of the act of the 16th Legislature entitled, "An Act to define who are agents of insurance companies," etc. Held, under the act authorizing the revision of the laws, which required the codifiers to include the former laws without making radical change therein, and Rev. St. p. 1105, par. 19, providing that the revised statutes, so far as they are substantially the same as the laws in force at the time the statutes shall go into effect, shall be construed as continuations thereof, that the "liabilities, duties and penalties" referred to in article 3093 are only those referred to in the act of 1879, from which the article was taken, and hence the article does not confer any power or authority on any person with reference to the making of insurance contracts, or make the insurance company liable for his acts, except as specified in that law. Judgment (Civ. App.) 60 S. W. 820, reversed.—Hartford Fire Ins. Co. v. Walker, 61 S. W. 711, 94 Tex. 473.

6. An act was entitled "An act to define who are agents of insurance companies, and to fix their liability for acting without authority of law." One article of the act related to the taxation of companies not legally qualified to do business in the state, but having agents therein. Held, that the constitutionality of other articles

fairly covered by the title were not affected, though the article as to taxation might be outside the title.—Price v. Garvin, 69 S. W. 985.

7. The policy of a statute, whether good or bad, is a question for the Legislature, and the courts cannot consider it.—Glenn Falls Ins. Co. v. Hawkins, 126 S. W. 1114.

8. Where a foreign insurance company has complied with the laws, and received permission to do business in Texas, an agent who receives and forwards premiums on policies issued by such company is not liable on the contract or to refund the premium, since by Rev. St. Art. 3095, he is so liable only when he is acting for a company which has not complied with the law.—Hudson v. Compere, 61 S. W. 389, 94 Tex. 449.

9. Act March 30, 1889, defines a trust as a combination to create restrictions in trade; to prevent competition in making, selling or buying merchandise or commodities; to fix, at any standard controlling its prices to the public, any article or commodity of merchandise or commerce intended for sale, use or consumption in the state; to make or perform any agreement not to sell or dispose of any article or commodity of trade, use merchandise, commerce, or consumption below a common standard, so as to prevent free competition, etc. Held, not to apply to a combination of fire insurance companies to fix uniform rates of insurance and agents' commissions throughout the state.—Queen Ins. Co. v. State, (Tex. Sup.) 24 S. W. 397, 86 Tex. 250. Digitized by Google

business is not one in which the public has an interest as in that of a common carrier, nor is it a professional service to which the public is entitled.¹⁰

(C) **As Regards the Liability of Agents.**—An agent of a foreign insurance company which has complied with the laws of this state and received permission to do business here, who receives and forwards premiums is not liable on the contract or to refund the premium, since by Art. 3095 of the Revised Statutes of 1895, he is so liable only when he is acting for a company which has not complied with the law.⁸ The “liabilities, duties and penalties” referred to in Art. 3093 of the Revised Statutes of 1895, providing that any person who solicits insurance on behalf of any insurance company shall be held to be the agent of the company as far as relates to all the liabilities, duties and penalties set forth in the chapter, were held to be only those referred to in the act of 1879

10. A combination of fire insurance companies to fix uniform rates of insurance and agents' commissions throughout the state, though possibly unenforceable among its members as an unreasonable restraint of trade at common law, is not enjoined by the public, nor a ground for forfeiting its members franchises, since the business is not one in which the public has an interest as in that of a common carrier or other corporation having the power of eminent domain, or of a dealer in a staple which is a prime necessity of life; nor is it a professional service to which the public is entitled.—22 S. W. 1048, reversed; *Queen Ins. Co. v. State*, 24 S. W. 397, 86 Tex. 250.

11. Rev. St. 1895, Tit. 58, as amended by Gen. Laws 1903, ch. 69, providing that any provision in an insurance contract that any answers or statements made therein or in the application, if untrue or false, shall render the policy void, shall be of no effect unless the matter represented is material to the risk, and that the provisions of the act shall not apply to policies of life insurance containing a clause making the policy indisputable after two years or less, provided premiums are duly paid, and that no defense based upon misrepresentation made in the application for life insurance shall be valid in any suit upon the contract two years or more after its issuance where the premiums are paid and received without notice to the assured of the intention to rescind the contract because of misrepresentation, unless it is shown at the trial to have been material to the risk and intentionally made, is not unconstitutional as denying insurance companies the equal protection of the law guaranteed by

Const. U. S. Amend. 14 § 1, since the statute does not classify the companies, but classifies the contracts, and furnishes on its face sound reason for such classification.—*Scottish Union & National Ins. Co. v. Wade*, 127 S. W. 1186.

12. Rev. St. 1895, Tit. 58, as amended by Gen. Laws 1903, ch. 69, providing that any provision in an insurance contract that any answers or statements made therein, or in the application, if untrue or false, shall render the policy void, shall be of no effect, unless the matter misrepresented is material to the risk, and that the provisions of the act shall not apply to policies of life insurance containing a clause making the policy indisputable after two years or less, provided premiums are duly paid, and that no defense based upon misrepresentation made in the application for life insurance shall be valid in any suit upon the contract two years or more after its issuance, where the premiums are paid and received without notice to the assured of the intention to rescind the contract because of misrepresentation, unless it is shown at the trial to have been material to the risk and intentionally made, is not unconstitutional as taking insurance companies' property without due process of law under Const. U. S. Amend. 14, § 1.—*Scottish Union & National Ins. Co. v. Wade*, 127 S. W. 1186.

12a. Acts 38d Leg. ch. 105, §§ 1-3, enacted to prevent insurance companies from avoiding liability for loss and damage to personal property under technical and immaterial provisions of policy where act breaching such provision has not contributed to bring about loss, is constitutional.—*Providence Washington Ins. Co. v. Levy & Rosen*, 189 S. W. 1035.

from which the article was taken and hence the article does not confer any power or authority on any person with reference to the making of insurance contracts, or make the insurance company liable for his acts, except as specified in that law.⁵ Where an act was entitled "An act to define who are agents of insurance companies, and to fix their liability for acting without authority of law," and one article of the act related to taxation of companies, it was held that the constitutionality of other articles fairly covered by the title was not affected, though the article as to taxation might be outside the title.⁶

(D) **Effect of Construction of Statute by Commissioner of Insurance.**—Executive construction of a law of doubtful meaning is entitled to great weight upon the construction of the same language by the court, but where the language is plain and unambiguous the contrary is the case.¹ The unambiguous language of an act should be given effect in order to arrive at the legislative intent, especially where the language construed by the court and the executive officer is different.¹

FOREIGN COMPANIES

(A) **Authority and License to Do Business—Statutory Regulations.**—All fire insurance companies not organized under the laws of this state, must, before obtaining a certificate of authority to transact any kind of insurance in this state, file a good and sufficient bond in a sum equal to twenty-five per cent of its premiums collected in this state during the preceding year, provided the bond shall not exceed fifty thousand dollars, nor be less than ten thousand, conditioned that the company will pay all its lawful obligations to the citizens of this state. This bond shall be subject to the successive suits which may be filed. Provision is also made, in case the company becomes insolvent, for reinsurance. A company may deposit securities in lieu of giving bond. (Art. 4870, Rev. St. 1914.) The same character of provision applies to foreign fire insurance companies desiring to transact any kind of insurance other than life insurance except that the bond must not be less than ten thousand dollars. (Art. 4871, Rev. St. 1914.)

(1) **Case Law.**—Where the Commissioner of Insurance and Banking is empowered to revoke an existing permit issued to a company because it violates the law, he may refuse to grant a permit for the same reason.¹²

(B) **License Fees and Taxes.**—Under the acts of the Thirty-first Legislature, providing a tax to pay the expenses of the State Fire

⁵—**Authority or License to Do Business.** (See 28 Cent. Dig. Insurance, § 5.)

¹² Where the Commissioner of Insurance is empowered to revoke an ex-

isting permit issued to an insurance company because it violates the law, he may refuse to grant a permit for the same reason.—*Glens Falls Ins. Co. v. Hawkins*, 126 S. W. 1114. See 28 Cent. Dig. Insurance, § 5.

Rating Board and that the Commissioner of Insurance shall collect such tax from each company doing business in the state during the preceding year, but providing that the section should not apply to companies which, during any one year should be liable to the payment of an occupation tax at the rate of not less than two and a half per cent of the gross premiums received, a company which had paid such an occupation rate in 1909 at the rate of two per cent under the existing law is not exempted as the provisions for such exemption referred to future legislation, and not to existing statutes.¹⁴ The words "gross amount of premiums" received, as used in the statute, providing for the levy and collection of an occupation tax on corporations and requiring every fire insurance company to annually report the gross amount of premiums received, include sums which a company paid for reinsurance and include the sums returned to policy holders on the cancellation of policies, the word "gross" meaning whole, entire, total and without deduction.¹⁵

(C) Subjection to Special Requirements—(1) Statutory Regulations.—No fire or fire and marine insurance company doing business in this state shall expose itself to any one risk, except when insuring cotton in bales and grain, to an amount exceeding ten per cent of its paid up capital stock, unless the excess shall be insured by such company in some other solvent insurance company legally authorized to do business in this state. (Art. 4875, Rev. St. 1914.)

(2) Case Law.—The article of the statute just quoted has been held not to forbid the taking of risks in excess of ten per cent of the capital stock but requires that the excess shall be reinsured.¹⁶

7.—License Fees and Taxes.

14. Under Acts 31st Leg. ch. 18, § 16, providing a tax to pay the expenses of the state fire rating board, and that the Commission of Banking and Insurance shall collect from each fire insurance company which transacted business in this state during the preceding year or any portion thereof such tax, but providing that the section should not apply to collections from insurance companies which during any year should be liable to the payment of an occupation tax at the rate of not less than 2 1/2 per cent. of the gross premiums received, an insurance company which had paid such occupation rate in 1909 at the rate of 2 per cent. under the existing law is not exempted; the provisions for such exemption referring to future legislation, and not to existing statutes.—*Fireman's Fund Ins. Co. v. Von Rosenberg*, 132 S. W. 467. See 28 Cent. Dig. Insurance, §6.

15. The words "gross amount of

premiums" received, as used in the statute, providing for the levy and collection of an occupation tax on corporations, etc., and requiring every fire insurance company to annually report "the gross amount of premiums received" in the state on property located there and from persons residing there, during the preceding year, and imposing an annual tax on the gross premium receipts, and declaring that the gross premium receipts are the premium receipts reported to the commissioner on the sworn statement, etc., include sums which a fire insurance company paid for reinsurance without proof that the companies in which it reinsured had the right to claim a portion of the premium at the time the insurance was effected, and include the sums returned to policy holders on the cancellation of policies, as provided therein; the word "gross" meaning the whole, entire, total, without deduction.—*Fire Ass'n. of Philadelphia v. Love*, 108 S. W. 158, 101 Tex. 376, rehearing denied, 108 S. W. 810, 101 Tex. 376.

Further, an insurer issuing a policy in another state in excess of the ten per cent stipulated without insuring the excess, violates the statute, even though it is authorized under the laws of such state to take the risk.¹⁵ (As to the construction (Acts of 1909, Laws 31st Leg., p. 182, par. 1) of the words "calendar year" in the provision of such act requiring that before any company shall issue a policy it shall have first filed during the calendar year in which such policy may issue, a bond, see Ann. 17.)

(D) **Local Funds and Securities.**—Under Art. 4870 of the Revised Statutes of 1914, providing that all foreign companies as a condition to doing business in the state, shall give a bond in a sum equal to twenty-five per cent of premiums collected during the preceding year, conditioned that such company will pay all its lawful obligations to citizens of the state and Art. 4871, Rev. St. 1914, which provides for a bond in the sum of ten thousand dollars, conditioned for obligations arising out of any policies or contracts issued, it was held that the two sections when construed together with the Senate Journal, were but complements of each other, and hence required the giving of only one bond.¹⁶ It was further held that the bond filed must contain all the conditions imposed by

15—**Foreign Underwriters or Companies and Their Agents. (A) Subsection to Special Requirements. (See 28 Cent. Dig. Insurance, §§ 13, 14.)**

16. Rev. St. 1895, Art. 3075, as amended by Laws 29th Leg. ch. 80, providing that no fire insurance company shall expose itself to any one risk exceeding 10 per cent. of its paid-up capital stock, unless the excess shall be reinsured by it in some other company authorized to do business in the state, and providing that any company authorized to do business in the state, shall forfeit its authority so to do by failing to comply with the act, does not forbid the taking of risks in excess of 10 per cent. of the capital stock, but requires that the excess shall be reinsured; and an insurance company, issuing a policy in a sister state on a building in excess of 10 per cent. of its capital stock without reinsuring the excess, violates the statute, though it is authorized under the laws of the sister state to take the risk.—*Glens Falls Ins. Co. v. Hawkins*, 126 S. W. 1114. See 28 Cent. Dig. Insurance, § 13.

17. Act March 20, 1909 (Laws 31st Leg. p. 182) § 1, requires that every fire insurance company shall, before obtaining certificate of authority, etc., file the prescribed bond. Section 3 requires that before any company shall issue any policy it shall first have filed, "during the calendar year in which such policy may be issued, a bond," etc. By practice and by statu-

tory provision, the state department did not issue the certificates to insurance companies until March. Held, that the words "calendar year," as used in section 3, would be read in connection with section 1, and construed to mean the year in which the certificate is to run, since it was obvious that the Legislature considered that the certificate was to run a calendar year, and since any other construction would leave an interval between January and March, during which time a policy issued by the company would not be preceded by a bond "filed during the calendar year."—*Aetna Ins. Co. v. Hawkins*, 126 S. W. 313. See 28 Cent. Dig. Insurance, § 7.

21—(B) **Local Funds and Securities. (See 28 Cent. Dig. Insurance, § 23.)**

18. Act March 20, 1909 (Laws 31st Leg. p. 182), requires in section 1 that fire insurance companies, as a condition to doing business in the state, shall give a bond in a sum equal to 25 per cent. of premiums collected during the preceding year, not to exceed \$50,000 nor to be less than \$10,000, conditioned that said company will pay all its lawful obligations to citizens of this state, and in section 3 requires that before any company shall issue any policy it shall first have filed during the calendar year in which such policy may issue a bond in a sum not less than \$10,000, conditioned for the payment of all lawful obligations to citizens of this state arising out of any

either section, except the bond mentioned in the first section would be limited by the language of the latter to include only lawful obligations arising out of insurance policies or contracts.²⁰ It is held that Art. 4870 of the Revised Statutes of 1914 requires the filing of the bond just mentioned whenever a certificate to do business is applied for.¹⁹

(E) Appointment of Local Agents.—The procuring for the insured of a policy from a foreign insolvent company, unauthorized to do business in the state, the transmission of the premium less the commission, the delivery of the policy and an unpaid loss by fire rendered a person liable under the Revised Statutes of 1895, Art. 3093 (Art. 4961, Rev. St. 1914) and Art. 3095, which provide that any person who acts as an agent for an unauthorized company shall be personally liable for any loss.²² Where there was a conspiracy to defraud the insured in such a case such agents made themselves liable for actual and exemplary damages without reference to the statutory provisions.²¹

policies or contracts issued by such company, and makes it a penal offense for any company to issue policies without having given bond. Held, that the two sections when construed with the Senate Journal, which showed that section 1 as it originally stood made no provision for a minimum or maximum penalty, which provision was entered by amendment without any other change in the bill, were but complements of each other, and hence required the giving of only one bond.—*Aetna Ins. Co. v. Hawkins*, 125 S. W. 313.

19. Certificate of authority for an insurance company to do business in the state must, under statutory provisions, be obtained annually. Act March 20, 1909 (Laws 31st Leg. p. 182) § 1, requires that every fire insurance company, etc., applying for a certificate of authority, etc., "shall, before obtaining such certificate," file the prescribed bond. Held, that the latter act required the filing of a bond whenever a certificate to do business was applied for.—*Id.*

20. Act March 20, 1909 (Laws 31st Leg. p. 182), requires in section 1 that fire insurance companies, as a condition to doing business in the state, shall give a bond conditioned that the company will pay all its lawful obligations to citizens of the state, and with other specified conditions, and requires in section 3 that, before any company shall issue any policy, it shall first have filed a bond conditioned for the payment of all lawful obligations to citizens of this state arising out of any policies or contracts issued by such company. Held, that the law requiring only one bond, there could only be

one condition in view, and hence a bond filed must contain all the conditions imposed by either section, except that the bond mentioned in section 1 would be limited by the language of section 3 to include only lawful obligations arising out of insurance policies or contracts.—*Id.* Also see 28 Cent. Dig. Insurance, § 23.

22—(C) Appointment of Local Agents.
(See 28 Cent. Dig. Insurance, § 26.)

21. A petition alleged that defendants, being the agents of a foreign insolvent fire insurance company unauthorized to do business in the state, and known by defendants to be so unauthorized, entered into a conspiracy with such company to defraud plaintiff, and procured for him a fire insurance policy in such company on his cotton gin in the sum of \$400; that during the life of such policy the gin burned, and the company refused to pay the loss, and that plaintiff had been compelled to employ an attorney. Held, that such allegations made a case for both actual and exemplary damages, without reference to Rev. St. Arts. 3093, 3095, providing that any person who acts as an agent for an unauthorized fire insurance company shall be personally liable for any loss caused by a policy in such company procured by him as agent.—*Price v. Garvin*, 69 S. W. 985.

22. The procuring for the insured of an insurance policy from a foreign company unauthorized to do business in the state; the transmission of the premium therefor, less 20 per cent. commission, to an insurance broker in

INSURANCE COMPANIES

(1) Stock Companies—Incorporation, Organization and Existence—Statutory Regulations.—Any number of persons desiring to form a company for the purpose of transacting insurance business shall adopt and sign articles of incorporation, and submit the same to the Attorney General; and, if said articles shall be found by him to be in accordance with the law of this state, and of the United States, he shall attach thereto his certificate to that effect, whereupon such articles shall be deposited with the Commissioner of Insurance and Banking. (Art. 4705, Rev. St. 1914.) (This article in its origin was, as in its language it is, a general provision applicable to all insurance corporations, except such as may be excluded by Arts. 4793, 4830, 4855 and 4860, Rev. St. 1914. *State v. Burgess*, 109 S. W. 923, 101 Tex. 524.)

The articles of incorporation shall contain (1) The name of the company, (2) the place of the principal business office, (3) the kind of insurance to be transacted, (4) the amount of capital stock, to be in no case less than one hundred thousand dollars. (Art. 4706, Rev. St. 1914.) The Commissioner of Insurance shall then examine into the company and the company must certify under oath that the capital is bona fide its property. The capital stock shall be divided into shares of one hundred dollars each, and the capital stock shall consist of (1) lawful money, (2) bonds, state, county, city or national bank stock or (3) in first mortgages on real estate. The surplus money of a company may be invested in or loaned upon the pledge of stocks, bonds of the United States or any of the states or those of any solvent dividend-paying corporations or in bills of exchange. (Art. 4712, Rev. St. 1914.) The affairs of the company shall be managed by not more than thirteen and not fewer than seven directors, who shall choose a president and other officers.

"The laws relating to and governing corporations in general shall apply to and govern insurance companies incorporated in this state in so far as the same may not be inconsistent with the provisions of this title." (Art. 4723, Rev. St. 1914.)

(2) Mutual Fire, Lightning, Hail, and Storm Insurance Companies—Incorporation—Statutory Regulations.—Any number of citizens of Texas, not less than seven, may form a company for the purpose of mutual insurance against fire, lightning, hail and storms. All companies incorporated under this act must embody the word "Mutual" in its title. The application for permit shall contain:

Chicago; the delivery of the policy to the insured; and an unpaid loss by fire occurring while the policy was in force,—clearly render the person so acting liable, under Rev. St. Arts. 3093, 3095, providing that any person who in any

way acts as an agent for an unauthorized fire insurance company shall be personally liable for any loss caused by a policy in such company in respect of which he so acted as agent.—*Price v. Garvin*, 69 S. W. 985.

the name of the company; the place of the principal business office; the kind of insurance to be transacted; the names and places of residence of not less than seven persons making application for such permit; an affidavit of at least one of the applicants, stating the places of residence and names of such applicants correctly. Upon this application being filed the Commissioner of Insurance and Banking will issue a permit authorizing the applicant to solicit insurance on the mutual plan, but not to issue policies of insurance. (Art. 4906, Rev. St. 1914.)

The company shall not be granted a charter until one hundred separate risks and a total amount of insurance of one hundred thousand dollars has been entered on the books of the company, together with an amount equal to not less than fifty per cent of the first premiums for such insurance has been paid in cash, premium notes being taken for the balance. Such mutual premiums must aggregate at least twice the maximum liability to be incurred on any one risk. No policy of insurance can be written until a sworn statement by the president and secretary of the company has been filed stating that the above provisions have been complied with, together with certified copies of the company's proposed charter and by-laws. (Art. 4907, Rev. St. 1914.)

The charter or articles of association shall be signed and acknowledged by at least four of the original applicants for said permit and shall contain the name of the company; the purpose for which it is formed; the place where its business is to be transacted, and the location of its principal business office; the term for which it is to exist; the number of its directors or trustees, and the names and residences of those who are elected for the first year. All of these conditions having been complied with the commissioner shall issue a certificate of authority authorizing it to do business. (Art. 4907, Rev. St. 1914.)

Laws Applicable—Statutory Regulations.—All mutual companies organized under this act are subject to the provisions of all laws of the state governing stock fire insurance companies in so far as they are applicable to mutual companies. (Art. 4907k, Rev. St. 1914.)

Foreign Mutual Companies May Be Admitted, When—Statutory Regulations.—Mutual companies incorporated under the laws of any other state, duly licensed there and having not less than \$100,000 assets in excess of liabilities, may, when they have complied with the provisions of this law, be admitted to do business in this state and shall be entitled to a permit accordingly. (Art. 4907m, Rev. St. 1914.)

Law Does Not Apply to What Companies—Statutory Regulations.—This act does not apply to the present law governing county mutual insurance, farmers' mutuals now operating under lodge systems or printers' mutuals. (Art. 4907, Rev. St. 1914.)

(A) Case Law.—A company whose permit has been canceled by the Commissioner of Insurance, has ceased to be a going concern.²³

Nature and Status in General—Statutory Regulations—Law Not to Apply to Certain Companies.—The fire insurance law does not apply to purely mutual or to purely profit-sharing fire insurance companies, carried on by the members solely for the protection of their property. Neither does it apply to purely co-operative inter-insurance and reciprocal exchange carried on by the members solely for the protection of their property and not for profit. (Art. 4902, Rev. St. 1914.)

(A) Case Law.—In fixing the legal status of the members of an unincorporated insurance association its application for membership and contract of insurance may be examined into to ascertain the nature of the association.²⁴ Where the plan of such an association provided that each member should make a deposit from which to pay losses, the expectation being that cheaper insurance would thereby be secured, while it contemplated mutual fire protection, it was also for mutual profit and not merely for benevolent purposes, though it contemplated the non-accumulation of profits.²⁵

By-Laws—Statutory Regulations.—The by-laws of such companies shall provide for the rules and regulations of the government, provide for the collection of adequate premiums or assessments, shall state clearly each member's liability to other members; shall provide for the accumulation of surplus fund; shall require bonding of company's officers; shall name other such provisions as may be necessary and shall provide finally that a notice in heavy print shall be printed on all policies calling to the attention of the insured that the by-laws are a part of his contract with the company. (Art. 4907e, Rev. St. 1914.)

Members—Right to Vote and Share in Benefits—Statutory Regulations.—All holders of policies shall be members of the company so long as the policy remains in force and shall be entitled to one vote at the meetings of the members of such companies. Each policyholder shall also be entitled to his equitable share of all

INSURANCE COMPANIES

52.—Mutual Companies—Incorporation, Organization and Existence. (See 28 Cent. Dig. Insurance, §§ 49, 64, 65.)

23. A mutual fire, storm, and lightning insurance company, whose permit to do business has been canceled by the commissioner of insurance, has ceased to be a going concern.—Oglesby v. Durr, 173 S. W. 275.

Nature and Status in General.

24. While the plan of an unincorporated insurance association, as disclosed by the application for membership and the contract of insurance entered into by the members with each

other, cannot affect third persons, yet in fixing the legal status of its members such plan may be examined to ascertain the nature of the association.—Sergeant v. Goldsmith Dry Goods Co., 159 S. W. 1036. See 28 Cent. Dig. Ins. § 1824.

25. Where the plan of an unincorporated insurance association provided that each member should make a deposit from which to pay losses, the expectation being that cheaper insurance would thereby be secured, while it contemplated mutual fire protection, it was also for mutual profit and advantage and not merely benevolent, charitable, etc., purposes, though it contemplated the nonaccumulation of profits.—Id.

benefits derived from being a member of such company. (Art. 4907c, Rev. St. 1914.)

Liability of Members—Statutory Regulations.—The by-laws of every company must provide that every member, in addition to his annual premium paid in cash, or in cash and premium notes, shall be liable for a sum equal to another annual premium. The by-laws may provide a sum equal to three or five annual premiums, such additional liability being assessable at the discretion of the Insurance Commissioner or the company's board of directors, for the members' proportionate share of losses and expenses, should the company's funds become impaired. (Art. 4907d, Rev. St. 1914.)

(A) Case Law.—The members of an unincorporated insurance association operating under a plan whereby the members make a deposit from which to pay losses, and the business is run by a manager, the object being cheaper insurance, are liable for any debts incurred during their period of membership and any agreement between the members limiting their liability would not affect third persons.²⁶ In such an organization, as between themselves the members are governed by the provisions of the application and the policy contract.²⁷ Their liability is based on the principle of agency and where the losses are paid from deposits made by the members but the policies provide that the members agree to pay any loss in the proportion that the amount of their deposits bear to the total deposits, they are liable upon such policies in that proportion.²⁹ The members of an unincorporated insurance association, such association being insolvent within their knowledge, who represented to a third party, who relied thereon, that his insurance would be placed in a solvent company, were held personally liable for a loss under the policy.³⁰

55—Members. (See 28 Cent. Dig. Insurance, §§ 67-69.)

26. The members of an unincorporated insurance association operating under a plan whereby members make a deposit from which to pay losses, and the business is run by a manager, the object being cheaper insurance, are liable for any debts incurred during their period of membership, and any agreement between the members limiting their liability would not affect third persons.—*Sergeant v. Goldsmith Dry Goods Co.*, 159 S. W. 1036. See 28 Cent. Dig. Insurance, §§ 1834, 1835.

27. The rights and liabilities of the members of an unincorporated mutual benefit insurance association as between themselves are governed by the provisions of the application for insurance and the policy contract issued thereon.—*Id.*

28. The liability of the members of an unincorporated insurance associa-

tion for losses under a plan whereby a manager was appointed to carry on the business, the losses being payable by the members, is based on the principle of agency, and a corporation cannot escape liability because it could not become a member of a partnership, as the arrangement did not constitute partnership.—*Id.*

29. Members of an unincorporated insurance association, the losses of which are paid from deposits made by the members, but the policies of which provide that the members agree to pay any loss in the proportion that the amount of their deposits bear to the total deposits, are liable upon such policies in that proportion; such plan being different from Lloyd's insurance.—*Sergeant v. Goldsmith Dry Goods Co.*, 159 S. W. 1036.

30. Defendants, operating an unincorporated insurance association which they knew was insolvent, and representing to plaintiff, who relied thereon, that his insurance would be placed

Special Funds.—Funds deposited with a state treasurer by a company, under Arts 4909 and 4910 (since repealed), in trust for the policy holders, are in custodia legis and not subject to garnishment.³¹

Insolvency and Dissolution.—Under Revised Statutes 1911, Arts. 4909 and 4910 (since repealed) the funds deposited with the treasurer of the state by a company which has become insolvent and ceased to be a going concern, cannot be garnished by a judgment creditor,³² the latter article authorizing garnishment only when the corporation is a solvent going concern.³³

Proceedings to Enforce Dissolution.—It was held that the district court of Travis county had jurisdiction to forfeit for cause the charter of a mutual fire insurance company, and appoint a receiver.³⁴

Assets and Receivers.—The funds of a mutual company deposited with the State Treasurer, after the appointment of a receiver, were held for the benefit of the policy holders and hence were not subject to garnishment.³⁵ (Arts. 4908-4918 of the Revised Statutes have since been repealed.)

INSURANCE AGENTS AND BROKERS

Agents Must Be Authorized to Solicit Insurance—Statutory Regulations.—Agents before soliciting insurance for any company must first procure a certificate from the Commissioner of Insurance. (Art. 4960, Rev. St. 1914; see also Arts. 4875-4.)

in a solvent company. Held, personally liable for a loss under the policy. —Hancock v. Wilson, 173 S. W. 1171.

58—**Special Funds.** (See 28 Cent. Dig. Insurance, §§ 84-88.)

31. In the absence of statutory authority, funds deposited with a state treasurer by an insurance company, in trust for the policy holders, are in custodia legis and not subject to garnishment.—Oglesby v. Durr, 173 S. W. 275.

64—**(A) Insolvency and Dissolution. (A) Remedies and Proceedings on Dissolution.** (See 28 Cent. Dig. Insurance, § 93.)

32. Under Rev. St. 1911, Arts. 4909, 4910, the funds deposited with the treasurer by an insurance company, which has become insolvent and ceased to be a going concern, cannot be garnished by judgment creditor.—Oglesby v. Durr, 173 S. W. 275.

33. Rev. St. 1911, Art. 4910, when construed with other sections of the same act, authorizes garnishment only when the corporation is a solvent going concern.—Id.

65—**(B) Proceedings to Enforce Dissolution.**

34. The district court of Travis county had jurisdiction to forfeit for cause the charter of a mutual fire insurance company whose domicile was at Houston, and appoint a receiver for the company.—Graham v. Sparks, 121 S. W. 597. See 28 Cent. Dig. Insurance, § 92.

70—**(C) Assets and Receivers.** (See 28 Cent. Dig. Insurance, § 93.)

35. Whether or not the funds of a mutual fire insurance company deposited with the State Treasurer under Acts 1903, p. 168, ch. 109, § 5, were in the custody of the law upon forfeiture of its charter and the appointment of a receiver, under section 9, providing that the securities in the hands of the State Treasurer over the amount necessary to pay losses incurred shall be divided among the policy holders at the date of forfeiture, such funds were held for the benefit of policy holders after forfeiture; and hence were not subject to garnishment.—Graham v. Sparks, 121 S. W. 597. See 28 Cent. Dig. Insurance, § 93.

Who Are Agents—Statutory Regulations.—A person is held to be an agent of an insurance company who solicits insurance, who takes or transmits an application for or policy of insurance, or who advertises or gives notice that he will do so, who receives or delivers a policy, who examines or inspects any risk, who collects or transmits any premium, who makes or forwards any diagram of any building or buildings, who performs any other act in the consummating of a contract of insurance, or who shall examine into or adjust any loss. This, however, does not make citizens who arbitrate in the adjustment of losses agents nor does it cover attorneys at law. (Art. 4961, Rev. St. 1914.)

Policies Must Be Issued Only Through Resident Agents, Except—Statutory Regulations.—All companies of whatsoever kind are prohibited from authorizing or allowing any person or agent who is a non-resident of Texas to issue or deliver any policy of insurance on persons or property located in this state. It is provided that this does not apply to common carriers or to persons who on oath state that they cannot obtain insurance on their person or property through agents in this state. (Art. 4963, Rev. St. 1914.)

Solicitor of Insurance to Be Deemed Agent of Company—Statutory Regulations.—A person who solicits an application for life insurance is to be regarded as the agent of the insurer in any controversy arising but such an agent does not have the power to waive, change or alter any of the terms or conditions of the application or policy. (Art. 4968, Rev. St. 1914.)

Revocation of Agents Authority—Statutory Regulations.—An agents authority to solicit insurance may be revoked for violation of any of the insurance laws, for knowingly deceiving or defrauding a policy holder or for unreasonably failing and neglecting to pay over to the company the premiums collected by him. (Art. 4971, Rev. St. 1914.)

The Relation in General.—A person authorized by an agent to represent him in negotiating insurance has the same power to bind the insurance company to a contract of insurance as has the agent.³⁵ An agent with general powers may exercise his powers through an assistant, who thereby becomes the agent of the company.³⁷ A clerk who can do everything but sign the policies is so far the agent of the company that notice to him in regard to the title to property insured through him is notice to the insurer.³⁶

INSURANCE AGENTS AND BROKERS. (SEE 19 CYC. 592.)

72—The Relation in General. (See 28 Cent. Dig. Insurance, §§ 99, 100.)

36. The clerk of the general agent of an insurance company, who has power to solicit insurance and issue policies, except that the signing of the policies is done by the general agent,

is so far the agent of the company that notice to him in regard to the title to property insured through him is notice to the company.—Phoenix Ins. Co. v. Ward, 26 S. W. 763.

37. An insurance agent who is authorized to contract for risks, to countersign and deliver policies in the name of the company, and to receive and collect premiums, may exercise

Appointment or Employment of Agent.—Where an agent is not charged with the duty of seeing to the cancellation of policies he cannot be charged with negligence in the performance of such duty, in an action on a written contract of appointment, unless it is shown that independent of such contract this additional matter of agency was conferred on him and by him accepted.³⁹

Evidence As to Agency.—An agent's testimony that his authority had not terminated when he issued a policy supported a finding for plaintiff though the circumstantial evidence tended to show the contrary.⁴⁰

Scope and Extent of Agency.—As a general rule, a person dealing with an agent without knowledge of limitation of authority is entitled to assume that he is authorized to issue a particular policy and the company is estopped to assert the contrary.⁴² Where the course of dealing between a cotton broker and an agent, under an open policy, was that the broker would notify the agent to insure a certain number of bales on receipt of an order to buy and the agent would accept and notify the company and when the cotton was bought would issue certificates covering it and a loss occurred on the same day that certain certificates were issued and the premium paid, unknown to the parties, it was held that the agent's acts in the matter were within the apparent scope of his authority and binding on the company.⁴¹ (As to determining territorial extent of agent's authority from correspondence, see Ann. 43.)

Liabilities of Agents and Their Sureties.—A general agent who takes a bond from a local agent, saying that if inquiry proved satisfactory the bond would be accepted, and retains such bond with-

his powers through an assistant, who thereby becomes an agent of the company.—*Hartford Fire Ins. Co. v. Josey* (Tex. Civ. App.) 25 S. W. 685, 6 Tex. Civ. App. 290.

38. A person authorized by an agent of a fire insurance company to represent him in negotiations for insurance has the same power to bind the insurance company to a contract of insurance as has the agent.—*Austin Fire Ins. Co. v. Brown*, 160 S. W. 973.

74.—**Appointment or Employment of Agent.** (See 28 Cent. Dig. Insurance, §§ 99, 100.)

39. In an action on a written contract of appointment, wherein an insurance agent was not charged with the duty of seeing to the cancellation of policies, evidence is inadmissible to charge the agent with negligence in the performance of such duty, unless it is shown, independent of the written contract, that this additional matter of agency was conferred on the agent, and by him accepted.—*Norwood v. Alamo Fire Ins. Co.* (Tex. Civ. App.) 35 S. W. 717.

76.—**Evidence as to Agency.** (See 28 Cent. Dig. Insurance, § 101.)

40. Insurance agent's testimony that his authority had not terminated when he issued a policy, held, to support finding for plaintiff, though circumstantial evidence tended to show that it had been terminated.—*International Fire Ins. Co. v. Black*, 179 S. W. 534.

78.—**Scope and Extent of Agency.** (See 28 Cent. Dig. Insurance, § 103.)

41. The course of dealing between a cotton broker and an insurance agent, under an open policy of insurance, was that the broker, on receipt of an order to buy cotton, would notify the agent to insure a certain number of bales provisionally, whereupon the agent would accept and notify the company, and when the cotton was bought and ready for shipment in the interior the agent would issue certificates covering it from the date of purchase to the end of the voyage. The company had accepted premiums earned, and paid losses incurred, by

out doing anything further, it will be treated as a satisfactory bond and enforceable.⁴⁴ A bond conditioned on the agent's paying all premiums collected and on well and truly performing all the duties of such agent, is breached by the agent agreeing with persons owing premiums payable in cash to credit the amount thereof on his personal indebtedness, and the sureties are liable thereunder.⁴⁵ A surety on a bond conditioned for the agent's faithfully paying over money received and performing other duties as agent is not liable for the failure of the agent to pay a premium note procured from an insured and indorsed and delivered to the general agent under the latter's instructions.⁴⁶

Compensation of Agents.—There was no novation of a contract to pay a fixed commission for procuring business by an agreement to reduce the rate, made in compromise of a suit for specific commissions on condition of payment of the commission on collection of the premium on which the commission was earned.^{48 47} An agent

insurance effected in this manner, for some time previous to the transaction in suit. On October 24th the broker requested additional insurance on a lot of cotton then in transit, which risk the agent accepted, promising to issue the certificates as soon as he got time, the risk to be covered meanwhile. The agent stated then that it was unnecessary to notify the company, and did not do so till he issued the certificates, on December 15th, on which day the cotton was lost in a wreck, and on which day the premium was paid, the fact of the loss being then unknown. Held, that the agent's acts in the matter of the insurance in question were within the apparent scope of his authority, and binding on the company.—*Insurance Co. of North America v. Bell*, 60 S. W. 262.

42. Person dealing with insurance agent without knowledge of limitation of authority held entitled to assume that he was authorized to issue particular policy and company was estopped to assert the contrary.—*International Fire Insurance Co. v. Black*, 179 S. W. 534.

43. Notwithstanding secretary's testimony as to custom, court held entitled to determine territorial extent of insurance agent's authority from correspondence, and it did not limit him to a particular county.—*Id.*

83—**Liabilities of Agents and Their Sureties.** (See 28 Cent. Dig. Insurance, §§ 107, 110.)

44. A general agent of an insurance company appointed a local agent, who, on failing to give a bond, was notified that his agency was suspended on that ground. He agreed to furnish a bond, and was informed that he could give a bond and continue his agency. * *

He subsequently delivered a bond to the general agent, who informed him that, if inquiry proved satisfactory, the bond would be finally accepted. The general agent kept the bond without doing anything further, and the local agent continued the agency. Held, that the bond was treated as a satisfactory bond, and was enforceable.—*Haupt v. James Cravens & Co.*, 120 S. W. 541.

45. A bond given by a local insurance agent conditioned on his paying all premiums collected, and on well and truly performing "all the duties of such agent" is breached by the agent agreeing with persons indebted for premiums payable in cash to credit the amount thereof on his personal indebtedness, and the sureties are liable therefor.—*Id.*

46. A surety in a bond of an insurance agent, conditioned for his faithfully paying over sums due for moneys received for premiums and performing other duties of agent, is not liable for the failure of the agent to pay a premium note procured from an insured, and indorsed and delivered to the general agent of insurer, the agent having taken the note and indorsed it pursuant to instructions from the general agent.—*McClary v. Trezevant & Cochran*, 112 S. W. 954. See 28 Cent. Dig. Insurance, §§ 107-110.

84—**Compensation of Agents.** (See 28 Cent. Dig. Insurance, §§ 111, 114.)

47. To constitute novation of an original contract, an agreement made thereunder must have fully discharged the same.—*Slaughter v. Hall*, 133 S. W. 496.

48. There was no novation of a contract to pay a fixed commission for procuring insurance business, by an

may sue for a premium in his own name where he is charged with it and becomes liable for it to the company on policies issued by him.⁴⁹

Extent and Exercise of Powers of Agents—(A) In General.—One who is agent only for the purpose of collecting and forwarding the premium, cannot on behalf of the company, consent to additional insurance.⁵⁰ Under the rule that the agent's acts within the scope of his real or apparent authority bind the principal, an agent who has authority to exercise discretion in issuing policies, binds the insurer under the policy issued where the risk assumed is a legal one and one which the insurer has power to accept.⁵¹

(B) Effect of Provisions of the Policy.—The Supreme Court held in an early case that when the policy defines and limits the authority of the agent no act of his exceeding his authority is binding on his company.⁵²

(C) Effect of Instructions to Agents.—The insured must have knowledge of a company's inhibition as to certain risks before policies on such risks will be avoided.⁵³ Where an insurer instructed its agent not to write policies on insolvent or financially crippled debtors such a policy will not be avoided unless the insured knew of the company's inhibition.⁵⁴

(D) Unauthorized and Wrongful Acts of Agent.—In a case where the agent was instructed by the insurer to cancel a vacancy permit at its expiration and the agent showed such instruction to one of the owners of the building the insurer was not liable for a loss occurring after the permit expired though the local agents had

agreement to reduce the rate, made in compromise of a suit for specific commissions on condition of payment of the commission on collection of the premium on which the commission was earned.—*Id.*

49. An insurance agent, who is charged with and becomes liable to the company for the premium on policies issued by him, may sue for the premium in his own name.—*Waters v. Wandless* (Tex. Civ. App.) 35 S. W. 184.

50.—**Extent and Exercise of Powers of Agents. (A) In General.** (See 28 Cent. Dig. Insurance, §§ 116, 121.)

50. One who is agent for an insurance company only for the purpose of collecting and forwarding the premium, cannot, in its behalf, consent to additional insurance.—*East Texas Fire Ins. Co. v. Blum*, (Tex.) 13 S. W. 572.

51. Where an agent has authority to exercise discretion in relation to the issuance of policies, and the risk assumed is a legal one which the company had power to accept, the insurer is bound by all the risks under the policy issued by the agent under the

rule that the agent's acts within the scope of his real or apparent authority bind the principle.—*Delaware Ins. Co. of Philadelphia v. Hill*, 127 S. W. 283. See 28 Cent. Dig. Insurance, §§ 116, 121.

52.—**(B) Effect of Provisions of Policy.**

52. When the policy defines and limits authority of company's agent no act of his exceeding his authority is binding on his company.—*First National Bank v. Lancashire Ins. Co.*, 62 Tex. 461.

53.—**(C) Effect of Instructions to Agents.**

53. Instructions from an insurance company to its agent, not to write policies on property of insolvent or financially crippled debtors, do not avoid a policy written on such a risk, unless it appear that insured had knowledge of such inhibition.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1063, rehearing denied 96 S. W. 760. See 28 Cent Dig. Insurance, § 120.

consented to temporarily extend the permit.⁵⁵ An instruction to an agent to eliminate a loss payable clause from a policy was not a notification to him that the insurer would cancel it if the insured should transfer it as collateral.⁵⁴ Therefore, if an agent accepted an assignment of the policy to a bank of which he was an officer to secure a loan it was not fraudulent so as to render him liable for the amount of the loss.⁵⁴

Ratification.—The act of an agent within the scope of his authority must be promptly repudiated or it will be binding on the insurer.⁵⁶ ⁵⁷ And this even though it does not conform to restrictions contained in the policy concerning the powers of agents.⁵⁶ Where an agent represents both parties the contract of insurance is voidable.⁵⁷ However, in such case if the insurer fails to refund the premium within a reasonable time after it learns of such a fact, it ratifies the contract.⁵⁷ If an agent is not authorized to effect insurance it cannot be made effective by being ratified by the insured after loss.⁵⁸

Agency For Insurer—Notice to Agent.—In general, the question of whether notice to the agent is notice to the insurer depends almost entirely on the extent of the agent's authority. A mere brokers information would not be imputed to the insurer.⁶¹ A broker who did not have full authority as an agent was held to be the agent of the insured under the policy and only the agent of the insurer for delivering the policy and collecting the premium so that notice to him that the property was mortgaged or was sit-

53—Unauthorized and Wrongful Acts of Agent. (See 28 Cent. Dig. Insurance, § 123.)

54—Ratification. (See 28 Cent. Dig. Insurance, § 124; 40 Cent. Dig. Prince and A, § 645.)

54. The refusal of an insurance company to allow a clause to be attached to a policy making the loss, if any, payable to a third person, and its instructions to its agent to eliminate such clause, were not a notification to him that it would cancel the policy if the insured should transfer it as collateral, so that his acceptance of an assignment of the policy to a bank of which, he was cashier to secure a loan was not fraudulent, so as to render him liable for the amount of the loss.—*Scottish-Union & National Ins. Co. v. Andrews & Matthews*, 89 S. W. 419.

55. Where a vacancy permit was attached to a policy on buildings owned by two persons, and defendant instructed its local agents to cancel said permit at the expiration thereof, and said instruction was shown to one of said owners, defendant was not liable for a loss occurring after the permit expired, though the local agents had consented to temporarily extend the permit.—*McLeary v. Orient Ins. Co.* (Tex. Civ. App.) 32 S. W. 583

56. Where an act done by an agent of the company in relation to the insurance is within the scope of his authority, and is not promptly repudiated by the company, the act will be binding upon it, notwithstanding it does not conform to restrictions contained in the policy concerning the powers of agents, and the manner of their exercise.—*Niagara Ins. Co. v. Lee*, (Tex.) 11 S. W. 1024.

57. A contract of insurance by an agent who acts for both parties is voidable, but, if the insurer fails to refund the premium within a reasonable time after he is apprised of the fact, he ratifies the contract.—*Georgia Home Ins. Co. v. City of Smithville*, 49 S. W. 412.

58. If insurance agents are not authorized to effect insurance, it cannot be made effective by being ratified by insured after the fire.—*Norwich Union Fire Ins. Society v. Dalton*, 175 S. W. 459.

uated on leased ground would not be notice to the insurer.⁵² Notice to an agent who has full authority in representing the insurer is notice to the company.⁶⁰ Therefore, notice to an agent who receives applications, inspects the property, determines the rate, fills out blanks sent by the insurer, countersigns and delivers the policies, and collects the premiums, of an incumbrance on property insured acquired in the transaction of the business of the company, is notice to the company.⁶⁰ An agent with power to renew and consent to the transfer of policies of insurance can properly receive notices of assignments of part of the money due on a loss so as to make such notice notice to the company.⁵⁹

Agency for Insured—(A) Creation of Agency to Procure Insurance in General.—An agent, procuring insurance at an owner's request through a broker in a company not authorized to do business in the state, which he had never before represented, was held the agent of such company under the statute. (Arts. 4961, 4962, Rev. St. 1914.)⁶⁴ An agent was held to represent the company and not the insured or the payee of the policy where he issued a policy to an owner of a stock of goods in which he was not interested and where a loss payable clause to the firm of which he was an employee was later inserted.⁶³

95—Agency for Insurer—Notice to Agent. (See 28 Cent. Dig. Insurance, §§ 96-113, 125.)

59. An agent of an insurance company whose power of attorney authorizes him "to renew and consent to the transfer of policies of insurance" is acting within his authority when he receives notices of an assignment by an insured of part of the money due on a loss, so as to make such notice to the company.—*Collins & Armstrong Co. v. United States Ins. Co.* (Tex. Civ. App.) 27 S. W. 147

60. Notice to an agent of a fire insurance company who receives applications for insurance, inspects the property, determines the rate, fills out the blanks sent him by the company, countersigns and delivers the policies, and collects the premiums of an incumbrance on property insured acquired in the transaction of the business of the company, is notice to the company.—*Mecca Fire Ins. Co. v. Smith*, 135 S. W. 688. See 28 Cent. Dig. Insurance, § 126

61. Where a person soliciting insurance was a mere broker, information which he obtained from the officers of assured would not be imputed to the insurers.—*Fire Ass'n. of Philadelphia v. American Cement Plaster Co.*, 84 S. W. 1116. See Cent. Dig. vol. 28, col. 628, § 125

62. Where an agent was acting as an insurance broker at the time an application for insurance was made,

and had not prior to that time been employed by an insurance company in all matters appertaining to the procuring of the policy, he was the agent of the assured under the policy, and only the agent of the company for the purpose of delivering the policy and collecting the premium, and notice to him that the property was mortgaged or was situated on leased ground would not be notice to the company.—*East Texas Fire Ins. Co. v. Brown* (Tex. Sup.) 18 S. W. 713.

96—Agency for Applicant or Insured. (A) Creation of Agency to Procure Insurance in General. (See 28 Cent. Dig. Insurance, § 126.)

63. An employee of a firm, who was also the local agent of an insurance company, on the application of the owner of a stock of goods, issued a policy thereon. The agent had no interest in the business of insured, and was not his creditor, and subsequently a clause was inserted in the policy making it payable to the firm. Held, that the agent, in issuing the policy, acted not as agent of insured or of the payee, but as that of the company.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 760. See 28 Cent. Dig. Insurance, § 126.

64. Under Rev. St. 1911, Arts. 4961, 4962, an insurance agent, who at an owner's request procured insurance through a broker in a company not

(B) Authority and Duties of Agent As to Principal.—Where a broker undertakes to keep property insured but neglects to renew the policies at their expiration he is liable for the loss of the property by fire.⁷² The fact that a policy in an insolvent company did not expire until sometime after the loss will not relieve a broker who undertook to keep it insured, from liability.⁶⁷

(a) Actions for Breach of Contract.—Where a broker procured a policy for an insured after application therefor and paid the premium thereon he can recover the same from such insured.⁶⁶ But where the insured did not apply to the broker and the broker never agreed to do so he cannot recover the premium advanced.⁶⁵ A broker was liable to his principal for failure to notify the latter that the insurance procured by the former was worthless, the insurer having become insolvent.⁷³ In such case the damages for failure to keep the property insured would be diminished by the amount of the unpaid premiums,⁶⁸ which, however, must be pleaded.⁶⁹ Further, the broker must prove the amount of such unpaid premiums.⁷⁰

(C) Extent and Exercise of Powers of Agent.—It was held that a broker's act in securing a policy to replace a worthless one insured to the owner, though he did not know of the act, where the broker agreed to keep the property insured for a certain time.⁷⁴

authorized to do business in the state, which he had never before represented, held, the agent of such company.—*Drummond v. White-Swearingen Realty Co.*, 165 S. W. 20. See 28 Cent. Dig. Insurance, § 126.

102—**(B) Authority and Duties of Agent as to Principal.** (See 28 Cent. Dig. Insurance, § 130.)

65. Where insured did not apply to a broker to obtain a policy for him, or the broker never agreed so to do, he cannot recover for premium paid by him on the policy procured.—*Holmes v. Thompson*, 61 S. W. 504, 25 Tex. Civ. App. 389.

66. Where insured applied to an insurance broker to procure a policy as his agent, and such broker agreed to procure such policy, and did so, and paid the premium thereon, he can recover the same from the insured.—*Holmes v. Thomason*, 61 S. W. 504, 25 Tex. Civ. App. 389.

67. Where a broker undertook to keep property insured, the fact that a policy in an insolvent company did not expire until three months after the destruction of the property by fire did not relieve the broker of liability for the loss sustained by the insured.—*Diamond v. Duncan*, 177 S. W. 955.

68. In insurer's action against insurance broker for negligence in not keeping property insured, damages re-

coverable held to be diminished by the amount of the unpaid premiums.—*Id.*

69. Right of broker to have damages diminished by unpaid premiums held defensive matter which should have been pleaded.—*Id.*

70. The burden was upon the broker to prove the amount of the unpaid premiums, if admissible in mitigation of damages on the general issue.—*Id.*

71. Court held not in error in failing to submit amount allowable in retention of damages, or to peremptorily instruct for defendant.—*Id.*

72. Where an insurance broker undertook to keep properties insured and after expiration of the policies neglected to secure new policies for a period during which the property was destroyed by fire, he was liable for the loss.—*Diamond v. Duncan*, 172 S. W. 1100.

73. An insurance broker held liable to his principal, with whom he had agreed to procure reinsurance, for failure to notify the principal that the present insurance on the property was worthless; the insurer having become insolvent.—*Diamond v. Duncan*, 138 S. W. 429. See 28 Cent. Dig. Insurance, § 130.

103—**(C) Extent and Exercise of Powers of Agent—In General.**

74. Where an insurance broker agreed with the owner to keep the

(D) Unauthorized and Wrongful Acts of Agent.—An agent is personally liable on a policy procured by him in a company not authorized to do business in this state.⁷⁵ However, any defense available to such a company is available to the agent.⁷⁶ Such an agent has the burden of negating the loss asserted.⁷⁷ He is also bound by the company's failure to give notice of its refusal to be bound by the policy because of misrepresentations.⁷⁸

(E) Notice to Agent.—A mortgagor is chargeable with notice of the provisions of policies which the mortgagee agreed to procure on the mortgaged premises and did procure, even though it retained them in its possession.⁸⁰ A person who procures a policy from an agent, with whom he is a stranger and forwards it to the applicant, is the agent of the latter.⁷⁹ However, his agency terminates when he delivers the policy and notice to him of cancellation is not notice to the policy holder.⁷⁹

INSURABLE INTEREST

What Constitutes Interest in Property.—A contractor has an insurable interest sufficient to sustain a policy on the building under construction to the extent of whatever is due him even though he is paid by the week and has no rights other than the statutory one of filing a mechanic's lien.⁸² A bailee in possession may take out a policy in his own name for the benefit of the owner, under an agreement to keep the property insured.⁸⁴ One having a lien on property and to whom the policy is payable as his interest may appear, has an insurable interest, entitling him to sue on such

property insured for a certain time, the broker's act in securing a policy to replace a worthless one insured to the owner, though he did not know of the act.—*Hanover Fire Ins. Co. v. Turney*, 147 S. W. 625. See 28 Cent. Dig. Insurance, § 132.

company Held bound by the company's failure to give notice of its refusal to be bound by the policy because of misrepresentations.—Id.

113—**(E) Notice to Agent.** (See 28 Cent. Dig. Insurance, § 135.)

111—**(D) Unauthorized and Wrongful Acts of Agent.**

75. An agent held personally liable on a policy procured by him in a company not authorized to do business in the state.—*Drummond v. White-Swearingen Realty Co.*, 165 S. W. 20.

76. Under Rev. St. 1911, Arts. 4961, 4962, any legal defense available to an insurance company is available to a person held personally liable as its agent pursuant to such articles.—Id.

77. Under Rev. St. 1911, Arts. 4874, 4962, agent sued on policy written by him in unauthorized company, held to have the burden of negating the loss asserted.—Id.

78. Under Rev. St. 1911, Arts. 4948, 4962, agent for unauthorized insurance

79. A person who is applied to for insurance in a given amount, and who obtains a policy therefor from the agents of the company to which he is a stranger, and forwards it to the applicant, is agent for the latter; but his agency terminates when he delivers the policy, and notice to him of its cancellation is not notice to the policy holder.—*East Texas Fire Ins. Co. v. Blum*, (Tex.) 13 S. W. 572.

80. Where a mortgagee agreed to attend to the insurance on the mortgaged premises and procured policies of insurance thereon and retained them in its possession, the mortgagor was chargeable with notice of their provisions.—*Commonwealth Fire Ins. Co. v. Obenchain*, 161 S. W. 611. See 28 Cent. Dig. Insurance, § 135.

policy.⁸⁵ A grantor who has deposited a deed in escrow, has an insurable interest in the property conveyed and can recover on a policy thereon if the conditions remain unperformed at the time of loss.⁸⁶ A person buying an interest in a stock of goods, giving his note, acquires an insurable interest in the stock, though he inadvertently never signed the note.⁸⁷ A husband has an insurable interest in property owned by the wife and her minor children by a former marriage and occupied at the time as the homestead of husband and wife.⁸¹

THE CONTRACT IN GENERAL

(A) NATURE, REQUISITES, AND VALIDITY

Policies of Insurance Shall Contain the Entire Contract—Statutory Regulations.—All insurance policies now sold in Texas are to contain the entire contract between the insurer and insured and the application for such policy may be made a part thereof. (Art. 4953, Rev. St. 1914.)

Policies Governed By the Laws of Texas, Notwithstanding Stipulations to the Contrary—Statutory Regulations.—All contracts of insurance payable to any citizen of this state are held to be contracts entered into by virtue of the laws of this state and governed thereby although such policy may provide that the contract was executed and is payable together with the premiums outside this state or at the home office of the company issuing the same. (Art. 4950, Rev. St. 1914.)

INSURABLE INTEREST. (SEE 19 CYC. 563.)

115—What Constitutes Interest in Property. (See 28 Cent. Dig. Insurance, §§ 129-157, 177.)

81. A husband has an insurable interest in property owned by his wife and her minor children by a former husband, and occupied at the time as the homestead of husband and wife.—*Continental Fire Ass'n v. Wingfield*, 73 S. W. 847.

82. A contractor for a building may have an insurable interest sufficient to sustain a policy on the building under construction to the extent of whatever is due him, even though he is to be paid by the week and has no rights other than the statutory one of filing a mechanic's lien.—*Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.*, 167 S. W. 816.

83. Where the owner of a stock of goods forms a partnership with another, and sells him one-half interest in the goods, to be paid by note, the note to be paid from the proceeds of

the business, the other acquires an insurable interest in the goods, though through inadvertence he never signed the note.—*Hanover Fire Ins. Co. v. Shrader* (Tex. Civ. App.) 81 S. W. 1100, 11 Tex. Civ. App. 255.

84. A bailee having possession of property under an agreement to keep it insured may take out a policy in his own name for the benefit of the owner. Judgment (Civ. App. 1898) 48 S. W. 49, reversed.—*Wagner v. Westchester Fire Ins. Co.*, 50 S. W. 569, 92 Tex. 549.

85. One having a lien on insured property at the time of its loss, to secure a debt due him, and to whom the policy is payable as his interest may appear, has an insurable interest, entitling him to sue on the policy.—*Sun Mut. Ins. Co. v. Tufts*, 50 S. W. 180, 20 Tex. Civ. App. 147.

86. A grantor who has deposited a deed in escrow for delivery upon the performance of certain conditions has an insurable interest in the property conveyed, and, if the conditions remain unperformed at the time of a loss under the policy, he is entitled to recover therefor.—*Merchants' Ins. Co. of New Orleans v. Nowlin*, 56 S. W. 198.

Nature of the Contract.—In an early case it was held that the contract is complete when the policy is issued.⁸⁷ It was further held that an application made and signed thereafter, at the request of the company did not relate back and become a part of the original contract, unless there was a consideration for such subsequent act.⁸⁷

Executory Agreements to Insure.—An executory agreement to insure on the part of a mutual company which leaves nothing to be done but to deliver the policy, is valid, in the absence of any statutory or by-law requirement.⁸⁸ Where there was an agreement between the agent and the insured that if the latter desired additional insurance after night-time he should post a letter to the agent, asking for such insurance and it should take effect for the amount named in the letter from the time it was posted, it was held that an unstamped letter deposited in the postoffice will not effect the insurance unless the applicant notified the agent of such deposit and of its contents before loss.⁸⁹ Such a notice given after the fire began is not sufficient where the plaintiff knew the property was on fire.⁸⁹

Application or Offer and Acceptance.—A contract of insurance may be consummated by letters deposited in the postoffice.⁹⁰ The agreement is complete when a letter is properly mailed accepting an offer.⁹⁰ To be properly mailed the letter must be duly posted and the date of the posting must determine the date of the contract.⁹⁰

THE CONTRACT IN GENERAL.

(A) NATURE, REQUISITES, AND VALIDITY.

(SEE 19 CYC. 583-604.)

124. Nature of the Contract. (See 28 Cent. Dig. Insurance § 172, 173.)

87. The contract is complete when the policy is issued; and an application made and signed thereafter, at the request of the company, does not relate back and become a part of the original contract, unless there is a consideration for such subsequent act.—*Fire Ass'n of Philadelphia v. Bynum*, 44 S. W. 579.

128. Executory Agreements to Insure. (See 28 Cent. Dig. Insurance, § 183-193.)

88. In the absence of any requirement in the by-laws or charter of a mutual insurance company, or of any statutory provision, its executory agreement to insure which leaves nothing to be done but to deliver the policy is valid.—*State Mut. Fire Ins. Co. v. Taylor*, 157 S. W. 950.

89. Where there was an agreement between the agent and the insured

that, if he desired additional insurance after night-time, he should post a letter to the agent, asking for such insurance, and that the insurance should take effect for the amount named in the letter, from the time it was posted, held, that such a letter deposited in the postoffice unstamped is not posted so as to effect insurance unless the plaintiff notified the agent of the depositing of the letter and of its contents before the loss; and such notice, given after the fire began, the plaintiff knowing at the time that the property was on fire, is not sufficient.—*Blake v. Hamburg-Bremen Fire Ins. Co.*, (Tex.) 2 S. W. 368.

130. Application or Offer and Acceptance. (See 28 Cent. Dig. Insurance, §§ 195-202.)

90. A contract may be consummated by letters deposited in the postoffice; and when an offer is made contemplating an acceptance in this manner, and a letter accepting it is properly mailed, the agreement is complete. However, to be properly mailed the letter must be duly posted and the date of the posting must determine the date of the contract.—*Blake v. Hamburg-Bremen Fire Ins. Co.*, 67 Tex. 160.

Validity of Oral Contracts.—A contract of insurance can be effected by parol.⁹¹ An oral contract of insurance which leaves nothing to be done but to issue and deliver the policy is valid, in the absence of any by-law or statutory requirement of a mutual company.⁹¹ A preliminary oral contract will also bind the insurer and where the insurer ordered a policy canceled before the loss without having attempted to deliver it, and denied liability such a contract controlled.⁹²

Binding Slips or Memoranda.—A “binder” is defined as a verbal contract of insurance in praesenti, of which the insurance agent makes a memorandum temporary in its nature and intended to take the place of an ordinary policy until the same can be issued.⁹³ It is held that the mere request of an insured to agents to keep him protected may authorize them, without notice to him, to cancel a binder in one company and issue one in another if in so doing they are following the custom of all insurance offices.⁹⁴

Form and Requisites of Policy.—Where the application contained a description of the goods to be insured and was made a part of the policy the fact that a slip of paper which contained such description, was not made a part of the policy did not prevent the making of a contract of insurance.⁹⁵

Papers Accompanying Policy—(A) Statutory Regulations.—A copy of the questions and answers of the application must accompany every policy, either photographic or printed. (Art. 4951, Rev. St. 1914.)

(B) Case Law.—In an early case it was held that if the policy contained no words of reference to the application, the representations in the application would not form a part of the policy and

131—Validity of Oral Contracts. (See 28 Cent. Dig. Insurance, §§ 203-209.)

91. A contract of insurance can be effected by parol, and in the absence of any requirement in the by-laws or charter of a mutual insurance company, or of any statutory provision its oral contract of insurance which leaves nothing to be done but to issue and deliver the policy, is valid.—State Mut. Fire Ins. Co. v. Taylor, 157 S. W. 950. See 28 Cent. Dig. Insurance, § 203-209.

92. A preliminary oral contract of insurance will bind the insurer.—Austin Fire Ins. Co. v. Brown, 160 S. W. 973. See 28 Cent. Dig. Insurance, § 203.

Where a complete preliminary oral contract of insurance was entered into and the insurer ordered the policy cancelled before the fire without having attempted to deliver it and denied liability, the oral contract controlled.—Id.

132—Binding Slips or Memoranda. (See 28 Cent. Dig. Insurance, § 210.)

93. A “binder” is a verbal contract of insurance in praesenti, of which the insurance agent makes a memorandum, temporary in its nature, and intended to take the place of an ordinary policy till the same can be issued.—Norwich Union Fire Ins. Society v. Dalton, 175 S. W. 459.

94. The mere request of insured to insurance agents to keep him protected may authorize them, without notice to him, to cancel a binder in one company, and issue one in another company, if in so doing they are following the custom of all insurance offices.—Id.

133—Form and Requisites of Policy. (See Cent. Dig. Insurance, §§ 203, 211-13.)

95. Fact that description of goods contained in paper sent to insured was not part of policy did not prevent

would not be warranties,⁹⁶ even though the application provided that it should form a part of the policy when issued.⁹⁸ A paper containing an iron-safe clause inclosed in the envelope in which the policy on a stock of goods was sent to the insured was held no part of the policy.⁹⁷ (See Ann. 232.)

Delivery and Acceptance of Policy.—A delivery of a policy to the broker or agent appointed by the insured to procure it is a delivery to the insured.¹⁰⁰ If an iron-safe clause is a part of the policy accepted by an insured the fact that he did not know there was to be one in the policy is immaterial.⁹⁹ An agent has no authority to ratify an attempted contract and issue a certificate after loss if no binding contract has been made up to that time.⁹⁸ If a jury determines a sufficient contract has been made a certificate is not necessary to make the insurer liable.⁹⁸

Payment of Premiums or Dues.—While the rate is an element of the insurance contract which must be agreed on, yet where the policy is for one year the approximate amount of the premium is known, the exact amount is a mere matter of calculation, and the applicant agreed to pay whatever amount the premium should be, the contract can be enforced.¹⁰² And, though the application did not promise to pay the premium, the obligation to pay is held a consideration on which the insurer could sue.¹⁰³ A general agent may give credit for premiums though in violation of the regulations of the insurer.¹⁰¹

the making of a contract of insurance, where application containing description was made part of policy.—*Merchants' & Bankers' Fire Underwriters v. Brooks*, 188 S. W. 243.

134—Papers Accompanying Policy. (See 28 Cent. Dig. Insurance, §§ 214-217.)

96. Though a policy of insurance is conditioned that it shall be void if insured has concealed or misrepresented any material fact regarding the subject of the contract, and though the application provides that it shall form a part of the policy upon the issuance of the latter, if the policy contains no words of reference to the application, representations in the application do not form a part of the policy, and are not warranties.—*Queen Ins. Co. of America v. May* (Tex. Civ. App.) 35 S. W. 829.

97. Paper containing an iron-safe clause inclosed in envelope, in which policy on stock of goods, etc. was sent to insured, held no part of policy.—*Merchants' & Bankers' Fire Underwriters v. Brooks*, 188 S. W. 243.

136—Delivery and Acceptance of Policy. (See 28 Cent. Dig. Insurance, §§ 219-230.)

98. If no binding contract is made up to the time of loss, the agent of

the insurance company has no authority to ratify an attempted contract, and issue a certificate after the loss. It is for the jury to determine whether a sufficient contract had been made; and, if there had been, a certificate is not necessary to make the company liable.—*Blake v. Hamburg-Bremen Fire Ins. Co.*, (Tex.) 2 S. W. 368.

99. Fact that insured did not know that there was to be an iron-safe clause in policy would be immaterial, if it was in fact a part of the policy accepted by him.—*Merchants' & Bankers' Fire Underwriters v. Brooks*, 188 S. W. 243.

100. A delivery of a policy to the broker or agent appointed by the insured to procure it is a delivery to the latter.—*Holmes v. Thomson*, 61 S. W. 504, 25 Tex. Civ. App. 389.

137—Payment of Premiums or Dues. (See 28 Cent. Dig. Insurance, §§ 231, 245.)

101. A general agent of an insurance company, even though in violation of the rules and regulations of his principal, may give credit for premiums.—*State Mut. Fire Ins. Co. v. Taylor*, 157 S. W. 950. 28 Cent. Dig. Insurance, §§ 231-245.

102. While the rate is an element of the contract which must be agreed

Validity of Policy in General.—An erroneous belief that a prior policy had been terminated was held merely collateral and not an essential element of the contract evidenced by the new policy which had been procured, and the new policy was valid.¹⁰⁵ A policy on a building described as two-story is not avoided by the fact that part of it was one-story where it appears that the property was insured as a whole, that it was the building in the minds of the parties and the one intended to be covered by the policy.¹⁰⁷ Where recovery is sought on the ground that a mistake has been made in describing the property it must be alleged not only that the mistake has been made but that it was a mutual one.¹⁰⁴ A policy is not invalidated because issued in the name of a firm after such firm has been dissolved, the agent procuring and countersigning the policy knowing the circumstances and it being merely a renewal.¹⁰⁶ In the absence of misrepresentation as to ownership the mere fact that goods owned by an individual are insured in a firm name will not avoid a policy; even though the other member of the firm is a clerk in the store.¹⁰⁹ An absolute unconditional policy issued by a mutual company will not be abrogated by the courts where neither the charter of the company nor the statute prescribe the manner in which it shall do business.¹⁰⁸

on, yet where the policy is for one year and the approximate amount of the premium is known, and the exact amount is a mere matter of calculation, and the applicant agreed to pay whatever amount the premium should be, the contract can be enforced.—Id.

103. Though an application for a fire policy did not promise to pay the premium on the delivery of the policy, the obligation to pay the premium held a consideration for the policy on which insurer could sue.—*Ginners' Mut. Underwriters of San Angelo, Tex., v. Willey & House*, 147 S. W. 629. See 28 Cent. Dig. Insurance, §§ 231-245.)

133—**Validity in General.** (See 28 Cent. Dig. Insurance, §§ 246-249.)

104. Where recovery on a fire insurance policy is sought on the ground that a mistake has been made in describing the property, it is necessary to allege and prove not only that the mistake has been made, but that it was a mutual one.—*Underwriters' Fire Ass'n. v. Henry*, 79 S. W. 1072.

105. Where insured erroneously believing that a prior fire policy had terminated, procured a new policy, the erroneous belief was merely collateral and not an essential element of the contract evidenced by the new policy, and the new policy was valid.—*National Union Fire Ins. Co. v. Dorroh*, 133 S. W. 475. See 28 Cent. Dig. Insurance, §§ 246-249.

106. The fact that a policy on property—Ins.

erty formerly owned by a firm was issued in the name of such firm, after its dissolution by the death of one of the members thereof, does not invalidate the policy; the agent who procured the policy and countersigned it knowing the circumstances, and no application or representation being made in order to procure the policy, which was merely a renewal of one issued to the firm.—*Fire Ass'n of Philadelphia v. Laning* (Tex. Civ. App.) 31 S. W. 681.

107. A policy of fire insurance written on property described as the "Hotel Central, a two-story, metal-roof building," is not avoided by the fact that a part of it was only one story, where it appears that the property was insured as a whole, and that it was the building in the minds of the parties, and the one intended to be covered by the contract of insurance.—*Hartford Fire Ins. Co. v. Moore* (Tex. Civ. App.) 36 S. W. 146.

108. Where neither the charter of a mutual insurance company nor the statute under which it was organized prescribes the mode and manner in which it shall do business, an absolute unconditional policy issued by the company undertaking for a fixed premium to insure property for a stated sum, will not be abrogated by the courts as ultra vires.—*Continental Fire Ass'n v. Masonic Temple Co.*, 62 S. W. 930, 26 Tex. Civ. App. 139.

109. The mere fact that goods owned by a single individual are in-

Estoppel as to Defects in Policy.—An insurer is estopped from using the act of an agent in incorrectly reducing to writing a correct statement of an applicant as to description of property, such statement being signed by the applicant with a warranty as to its correctness, and being made a part of the policy, as a defense.¹¹⁰

Presumption of Knowledge of Contents of Policy.—The rule is that the insured is presumed to know the contents of his policy and its contents are obligatory upon him.¹¹¹ Even if the policy is delivered to another, at insured's request, the latter is chargeable with notice of its provisions, though he did not read it and though when so delivered it was sealed in an envelope.¹¹²

Ratification.—A repudiation of a policy after two years is not sufficiently prompt where the insurer had knowledge during all of such time that its agent had acted as the agent of the insured in issuing the policy.¹¹³ Where a contract is voidable the insured may ratify and enforce it by bringing suit on it before his premiums are returned.¹¹⁴

Reformation.—In general, equity will reform a contract of insurance where there has been an innocent omission or insertion of a material stipulation,¹¹⁵ contrary to the intention of the parties, the same as any other contract. The general rule is that a policy which, by reason of mutual mistake, does not embody the real intention of the parties, may be reformed in equity, or where the court exercises the functions of law and equity at the same time, on proper pleadings, may be reformed on a trial of an action thereon in which the mistake is shown.¹¹⁶ It is held that one suing on a

sured in a firm name does not avoid the policy in the absence of misrepresentation as to ownership, and the fact that the other member of the firm is a clerk in the store does not affect the case.—*American Cent. Ins. Co. v. Heath*, 69 S. W. 235.

141.—**Estoppel or Waiver as to Defects or Objections.** (See 28 Cent. Dig. Insurance, §§ 75, 252-262.)

110. Where an agent incorrectly reduces to writing a correct statement of applicant as to description of property and the application is signed by applicant with a warranty of its correctness, such mistaken description being made a part of the policy, the company is estopped from using the act of agent as a defense.—*Home Ins. & Banking Co. of Texas v. Lewis*, 48 Tex. 622.

Presumption of Knowledge of Contents of Policy.

111. The insured is presumed to know the contents of his policy, and its conditions are obligatory upon him.—*Guinn v. Phoenix Ins. Co. of Brooklyn* (Tex. Civ. App.) 31 S. W. 566.

112. Where an insurance policy is delivered by the agent of the insurer, at the request of the insured, to a person designated by him, the insured is chargeable with notice of its provisions though he did not read it, and though, when so delivered, it was sealed in an envelope.—*Aetna Ins. Co. v. Holcomb* (Tex. Sup.) 34 S. W. 915, 89 Tex. 404.

142.—**Ratification.**

113. Where for two years before the insurer in a fire policy repudiated the same, on the ground that its agent had acted as agent for insured in issuing the policy, it had knowledge of all the facts on which it relied for repudiation, the repudiation was not sufficiently prompt.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 760. See 28 Cent. Dig. Insurance, §§ 263, 264.

114. Where an insurance contract is voidable, the insured, by bringing suit on the contract before his premiums are returned, ratifies it, and may enforce it.—*Georgia Home Ins. Co. v. City of Smithville*, 49 S. W. 412.

policy which misdescribes the location of the property destroyed, need not, in order to recover, first secure a reformation of the policy; but he may, in his petition, set up the facts showing the mistake and demand judgment for the loss.¹¹⁹ In such a case when the agent of the insurer stated on delivery of the policy that it was all right, the insured was not precluded from having the mistake corrected.¹¹⁷ Further, when the petition sets up the facts in regard to such misdescription it is not bad for failing to pray for a reformation of the policy, and evidence to establish the mistake or fraud is admissible.¹¹⁸ A policy returned to the insurer and canceled is not a subject of reformation.¹²¹ Where the petition alleged that by mutual mistake the policy failed to show ownership of goods in a consignee, the testimony however, being conflicting as to what information had been given the agent, and that the plaintiff had accepted and retained the policy for several months and until after loss without discovering the mistake, it was held that the plaintiff could not have the policy reformed and recover thereon.¹¹⁶ (For facts held not sufficient to authorize the reformation of a policy see Ann. 115.)

143—Reformation. (See 22 Cent. Dig. Insurance, §§ 265-272.)

115. A policy named "P & Bro.," a firm composed of P and a widow, as the insured—loss, if any, payable to P. & P., who paid the premiums—and was issued on an application by A, stating the title in the property in P. & Bro. signed "P. & Bro." The property was operated by "P. & P." who assumed the debts of "P. & Bro." A. was to receive an interest in the property in a certain event. Held, that the testimony of A. that it was his intention to insure only the interests of P. & P. in the property is not sufficient to authorize the reformation of the policy to that effect, and thereby prevent a forfeiture thereof, on account of a conveyance by P. and the widow to a third person of their interest in the property.—*Snow v. National Cotton Oil Co.* (Tex. Civ. App.) 34 S. W. 177.

116. A complaint on a policy of insurance payable to W. on goods consigned to him to be sold on commission, alleged that defendant's agent, being informed of the facts, agreed to insure the goods in the name of plaintiff as consignee of the owners, but that, by mutual mistake, the policy failed to show the ownership of the consignee. The only evidence of such mistake was plaintiff's own testimony, contradicted by defendant, that he told the agent the goods belonged to the consignor, and that plaintiff accepted and retained the policy for several months, and until after loss, without discovering the mistake. Held, that

plaintiff could not have the policy reformed, and recover thereon.—*Westchester Fire Ins. Co. v. Wagner* (Tex. Civ. App.) 38 S. W. 214.

117. An insured accepted a policy without noticing a mistake therein in the description of the building in which the property sought to be covered by the policy was located. When the agent of the insurer delivered the policy he stated that it was all right. Held, that the insured was not precluded from having the mistake corrected.—*Aetna Ins. Co. v. Brannon*, 89 S. W. 1057.

118. A petition, in an action on a fire policy for a loss, which alleges the contract as agreed to was one for the insurance of property while in a certain building, and that by mistake or fraud of the agent of the insurer, and without the knowledge of the insured, the agreement was misstated in the policy by misdescribing the building in which the property was located, is not bad for failing to pray for a reformation of the policy, and evidence to establish the mistake or fraud is admissible.—*Id.*

119. One suing on a fire policy which misdescribes the building in which the property insured was located need not, in order to recover, first secure a reformation of the policy; but he may in his petition set up the facts showing the mistake and demand judgment for the loss.—*Aetna Ins. Co. v. Brannon*, 89 S. W. 1057.

120. An insurance policy will not be reformed on the ground of mistake in inserting the name of a wrong person as owner, where the company's

Modification.—An agent may agree to a modification of a policy so as to make it apply to a stock of goods which had been transferred to another building and the act of the insured in removing such stock to another building was not a breach of the policy.¹²⁵ The modification is supported by a consideration consisting of the forbearance of the insured to demand a cancellation of the policy and a return of the unearned premium. The insurer could not deny liability in such a case on the ground that the writing delivered to the insured covering the change in the location, was not attached to the policy.¹²⁴ Where a tornado policy was written on a fire policy blank, providing that it should be void until the premium was paid, the fact that the regular tornado blank permitted postponement of payment until a future day did not warrant a reformation of the contract so that the provisions in the tornado blank should govern.^{125a}

Renewal.—An authorized agent may contract by parol for the renewal of a policy even though it be stipulated on the face of the existing policy that it shall not be renewed in that manner.¹²² An agent, as defined in the statute (see Art. 4961, Rev. St. 1914), who has authority to issue and deliver policies, has authority to bind

agent made no statement to mislead insured or throw them off their guard, and they held the policy for eight months without discovering the mistake till after the property was burned.—*Wagner v. Westchester Fire Ins. Co.*, 48 S. W. 49, reversed 50 S. W. 569.

121. A fire policy, not accepted by insured, but returned to insurer and canceled by insurer, held not the subject of reformation.—*Jefferson Fire Ins. Co. of Philadelphia v. Greenwood*, 141 S. W. 319. See 28 Cent. Dig. Insurance, §§ 265-272.

122.—A policy which, by reason of mutual mistake of the parties, does not embody their real intention, may be reformed in equity, or where the court exercises the functions of law and equity at the same time, on proper pleadings, may be reformed on a trial of an action thereon in which the mistake is shown.—*Delaware Ins. Co. of Philadelphia v. Hill*, 127 S. W. 283. See 28 Cent. Dig. Insurance, §§ 265-272.

123. Equity will reform a written contract of insurance where there has been an innocent omission or insertion of a material stipulation contrary to the intention of the parties the same as any other contract.—*Home Ins. Co. & Banking Co. v. Lewis*, 48 Tex. 622.

144.—**Modification.** (See 28 Cent. Dig. Insurance §§ 273-275.)

124. Where the insurer in policy, covering a stock of merchandise while located in a designated building, agreed in a writing delivered to insured that

the policy should cover the stock while in another building, it could not deny liability on the ground that the writing was not attached to the policy.—*Texas Nat. Fire Ins. Co. v. White, Blakeney & Fuller Dry Goods Co.*, 165 S. W. 118.

125. The act of insured, who procured a fire policy on a stock of merchandise while located in a designated building, in removing the stock to another building, was not a breach of the policy, and an agent may agree to a modification of the policy so as to make it apply to the stock while in the second building.—*Id.* See 28 Cent. Dig. Insurance, § 273.

Such modification is supported by a consideration consisting of the forbearance of insured to demand a cancellation of the policy and a return of the unearned premium.—*Id.*

125a. Plaintiff procured from defendant's agent a tornado policy written on a fire insurance blank; the word "fire" being erased and "tornado" substituted. By agreement with the agent, payment was to be made on the 1st of the following month. The policy provided that it should be void until the premium was paid. Under a clause in a regular tornado policy, the payment could be postponed until a future day. The fire blank was used because the agent had no tornado blanks. Neither of the parties had seen a tornado blank. Held, insufficient to warrant a reformation of the contract so that the provisions in the tornado blank as to payment of policy should govern.—*German Ins. Co. v. Daniels*, (Tex. Civ. App.) 33 S. W. 549.

the company by the re-delivery of a policy theretofore canceled.¹²³ In general, where a contract between the insured and the insurer is to renew a policy and there is no evidence introducing new terms, the presumption is that the renewal is for the same time, terms, premium, property and with the same insurer.¹²⁶ The request to renew a policy implies that the new policy shall be similar to the old.¹²⁶ The payment of the premium is not essential to the validity of a new contract to renew a policy.¹²⁸ In ascertaining whether payment of the premium was waived the course of dealing between the parties may be looked to.¹²⁸ An action may be maintained on a contract to renew a policy, where no renewal policy is issued.¹²⁷ In case of total loss the measure of damages is the amount of the old policy, in the absence of evidence of change in the property insured or its value.¹²⁷ Where the testimony of the insured and the insurers agent is conflicting as to the existence of a contract to renew, the jury is authorized to find a contract to renew, as against the objection that there was no mutuality of agreement.¹²⁹ The fact that the contract to renew a policy was entered into a number of months before the policy expired did not affect the validity of the contract.¹³⁰ (As to when interest, in such case, began to run on the amount recovered, see Ann. 131.)

145—Renewal. (See 28 Cent. Dig. Insurance, §§ 276-291.)

126. Where a contract between insured and an agent representing the insurer and other insurance companies is to renew a policy of insurance, and there is no evidence introducing new terms, the presumption is that the renewal is for the same time, terms, premium, property, and with the same insurer, for a request to renew a policy implies that the new policy shall be similar to the old.—*Orient Ins. Co. v. Wingfield*, 108 S. W. 788. See 28 Cent. Dig. Insurance, §§ 276-291

127. An action may be maintained on a contract to renew a fire policy, where no renewal policy is issued; and in case of total loss the measure of damages is the amount of the old policy, in the absence of evidence of change in the property insured, or its value.—*Id.*

128. Payment of premium is not essential to the validity of a new contract to renew a fire policy, and in ascertaining whether payment of the premium was waived the course of dealing between the parties may be looked to.—*Id.*

129. Where, on the issue of the existence of a contract to renew a fire policy insured testified that he called on the agent of the insurer and requested him to renew the policy, and that the agent agreed so to do, and the agent testified that he understood insured to state that he did not de-

sire a renewal of the policy, the jury were authorized to find a contract to renew as against the objection that there was no mutuality of agreement because insured understood one thing and the agent the other.—*Id.*

130. The fact that a contract to renew a fire policy was entered into in August, while the policy did not expire until the following March, did not affect the validity of the contract.—*Id.*

131. In an action on a contract to renew a fire policy, which made a loss payable 60 days after proof of loss, it appeared that the renewal policy, if issued, would have terminated within 60 days after the loss, and that within the 60 days the insurer denied liability. Held, that interest on the amount recovered by insured did not commence to run until the date of the denial of liability.—*Id.*

132. A company, through its authorized agent, may contract by parol for the renewal of a fire policy, although it be stipulated on the face of the existing policy that it shall not be renewed in that manner.—*Cohen v. Continental Fire Ins. Co.*, 3 S. W. 296, 67 Tex. 325.

133. An agent of an insurance company, as defined by Rev. Civ. St. 1911, Art. 4961, who has authority to issue and deliver policies, has authority to bind his company by the redelivery of a policy theretofore canceled.—*Austin Fire Ins. Co. v. Sayles*, 157 S. W. 272. 28 Cent. Dig. Insurance, §§ 276-291.

(B) CONSTRUCTION AND OPERATION

Application of General Rules of Construction.—Insurance contracts are governed by the same rules as contracts between individuals.¹³⁸ Where a policy is capable of two interpretations equally reasonable, that construction most favorable to the insured must be adopted, the insured having prepared the obligation and chosen the language used.^{135 137 140 142 147 148} A substantial compliance with the terms of the policy will satisfy the obligation of the insured,¹⁴⁰ and the construction will be adopted which will tend to preserve the protection afforded by its general terms.¹³⁵ In all cases the construction should be adopted which will preserve the intention of the parties after considering the subject-matter of the contract, the business of the parties and the purpose they had in view.¹³⁸ Conditions of forfeiture must be strictly construed against the insurer.^{139 143} Where any reasonable construction can be placed on the provisions of a policy that will prevent a forfeiture that construction should be adopted.^{145 146} Forfeitures are not favored in law and will not be given effect unless the facts on which they depend bring the case clearly within the terms of the provisions of the policy relied on to defeat recovery.¹⁴¹ An ambiguity in a policy

(B) CONSTRUCTION AND OPERATION. (SEE 19 CYC. 685.)

146—Application of General Rules of Construction. (See 28 Cent. Dig. Insurance, §§ 292, 294-298.)

134. Where the court can give a policy that construction which, while preserving the protection given insured under its general terms, will also relieve insurer from the increased hazard against which it undertook to provide, such construction must be adopted.—(Civ. App.) *Royal Ins. Co. v. Texas & G. Ry. Co.*, 115 S. W. 117, writ of error denied 116 S. W. 46, 102 Tex. 306. See 28 Cent. Dig. Insurance, §§ 292, 294-298.

135. Where the language of a fire policy is susceptible of another than the literal construction, that will be adopted which is most favorable to insured and which will tend to preserve the protection afforded by its general terms.—Id.

136. In all cases that construction of a policy should be adopted which will preserve the intention of the parties after considering the subject-matter of the contract, the business of the parties, and the purpose they had in view.—Id.

137. Where the language of an indemnity contract is susceptible of more than one construction, that construction, most favorable to the party indemnified should be adopted; the company having prepared the obligation and chosen the language used.—*Griffin v. Zuber*, 113 S. W. 961. See 28 Cent. Dig. Insurance, §§ 292, 294-298.

138. Insurance contracts are governed by the same rules as contracts between individuals.—*Royal Ins. Co. v. Okasaki*, 177 S. W. 200.

139. Conditions of forfeiture contained in an insurance policy must be strictly construed as against the company.—*Dumphy v. Commercial Union Assur. Co. Limited*, of London, 174 S. W. 814.

140. Where a contract was prepared by an insurance company to express the terms of its own undertaking, it must be construed most favorably to the assured, and a substantial compliance with such terms will satisfy the obligation.—(Sup. 1911) *Dorroh-Kelly Mercantile Co. v. Orient Ins. Co.*, 135 S. W. 1165, affirming judgment *Orient Ins. Co. v. Dorroh-Kelly Mercantile Co.* (Civ. App. 1910) 126 S. W. 616. See 28 Cent. Dig. Insurance, §§ 292, 294-298.

141. Forfeitures are not favored in law, and will not be given effect, unless the facts on which they depend bring the case clearly within the terms of the provisions of the policy relied on to defeat a recovery.—*Norwich Union Fire Ins. Society v. Cheaney Bros.*, 128 S. W. 1163.

142. Where a policy is capable of two interpretations equally reasonable, that construction most favorable to insured must be adopted.—*Hartford Fire Ins. Co. v. Dorroh*, 133 S. W. 465.

143. A forfeiture clause in an insurance policy should be strictly construed.—*Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.*, 167 S. W. 816.

must be construed in favor of indemnity and against a forfeiture.¹⁴⁴ It is competent for the insurer to prescribe the terms and conditions upon which he will assume the risk, and as long as these conditions are not in violation of law or contrary to public policy, they are binding upon the insured, and any violation thereof by him releases the insurer from liability, whether the loss resulted from such violation or not.¹⁵² Where the court can give a policy that construction which, while preserving the protection given the insured under its general terms, will also relieve the insurer from the increased hazard against which it undertook to provide, such a construction will be adopted.¹⁵⁴ So when the written portion of the policy describes the property insured as of a certain class and this would embrace a class of articles which the printed terms of the policy term extra hazardous or specially hazardous and are prohibited thereby, the written will overcome the printed portions of the policy and the keeping of such articles would not operate as a breach of the conditions of the policy.¹⁴⁹ However, if it be shown that it is usual to keep, as a part of the class insured, articles that are denominated extra hazardous in the printed conditions of the policy then it will be considered that the printed prohibitory clause is overcome by the written description.¹⁵⁰ To place fireworks, which are termed in the printed conditions of a policy extra hazardous, in the class of "family groceries," and thus avoid the effect of the printed conditions, would be unauthorized.¹⁵¹

144. A policy of insurance being a contract for indemnity, an ambiguity in it must be construed in favor of indemnity and against a forfeiture.—*Home Mut. Ins. Co. v. Tomkies*, 71 S. W. 812.

145. A condition of forfeiture must be construed against the insurer, and so as to prevent a forfeiture if the language used will admit of such a construction.—*Hartford Fire Ins. Co. v. Walker*, 153 S. W. 398. See 28 Cent. Dig. Insurance, § 292.

146. Where any reasonable construction can be placed on provisions of an insurance policy that will prevent a forfeiture, that construction should be adopted.—*Insurance Co. of North America v. O'Bannon*, 170 S. W. 1055.

147. The language of an insurance policy, being chosen by the insurance company, should be construed most favorably to the insured.—*London & L. Fire Ins. Co. v. Davis*, 84 S. W. 260.

148. When a policy is inconsistent or ambiguous in its provisions it must be construed most favorably for the assured.—*Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69.

149. The general rule is that where the written portion of the policy describes the property insured as of a certain class and this would embrace a class of articles which the printed

terms of the policy term extra hazardous or specially hazardous and are prohibited thereby, the written will overcome the printed portion of the policy and the keeping of such articles would not operate as a breach of the conditions of the policy.—56 Tex. 366, *Georgia Home Ins. Co. v. Jacobs*.

150. If it be shown that it is usual to keep, as a part of the class insured, articles that are denominated extra hazardous in the printed conditions of the policy then it will be considered that the printed prohibitory clause is overcome by the written description.—*Id.*

151. Fireworks are termed in the printed conditions of the policy extra hazardous and to place them in the class of "family groceries, wines, etc." and thus avoid the effect of the printed conditions, would be unauthorized.—*Id.*

152. "It is competent for the insurer to prescribe the terms and conditions upon which he will assume the risk, and as long as those conditions are not in violation of law or contrary to public policy, they are binding and obligatory upon the assured, and any violation thereof by him releases the insurer from liability, whether the loss resulted from such violation or not."—*Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366.

What Law Governs.—The Supreme Court held in an early case that a company electing to do business in Texas under the terms of the statute, must be held to have assented, as to such business, to be governed by the laws of this state, to have its contracts evidenced by policies here made complete, and here to be enforced and construed as would be a like contract made by a home company.¹⁵³

Slip Attached to Policy.—The fact that a slip of paper containing a stipulation is pinned to a policy does not make it a part of the policy.¹⁵⁴ It has been held that a slip of paper containing a description of the property, a warranty known as the "iron-safe" clause, and a statement "attached to and forming part of the policy," pasted on a policy, made the warranty a part of the policy.^{155, 156, 157}

Property Covered By Insurance Against Fire or Other Cause of Loss—(A) In General.—Fire insurance covers gifts.¹⁵⁸

(B) Description of Property—(1) Real Property.—Where an applicant described his buildings and gave the lot numbers correctly but gave the wrong block number and it was proven that he owned the lots and buildings as described in another block while

147.—**What Law Governs.** (See 28 Cent. Dig. Insurance, § 293.)

153. An insurance company electing to do business here under the terms of the statute, must be held to have assented, as to such business, to be governed by the laws of this state, to have its contracts evidenced by policies here made complete, and here to be enforced, construed as would be a like contract made by a home company.—*Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578.

150.—**Matter on Margin of, or Slip Attached to, Policy.** (See 28 Cent. Dig. Insurance, §§ 305-307.)

154. A slip of paper containing a stipulation is not a part of an insurance policy merely because pinned thereon.—*Co-operative Ins. Ass'n of San Angelo v. Ray*, 138 S. W. 1122. See 28 Cent. Dig. Insurance, §§ 305-307.

155. In the first part of a fire policy the company agreed to insure plaintiffs against loss to an amount stated, "to the following described property, while located and contained as described herein, and not elsewhere, to wit." Immediately following was pasted a piece of paper on which was a description of the property insured, and the amount for which it was insured, and containing a warranty known as the "iron-safe clause." At the bottom of such paper was the following statement signed by the local agent: "Attached to and forming part of policy." Held, that such warranty

was a part of the policy.—*Allred v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 37 S. W. 95.

156. Where a slip attached to an insurance policy contained a description of the property, a stipulation that the insurance was subject to the "following conditions" as warranties, then a three-fourths loss clause, an iron-safe clause, and a statement that it was made a part of the policy, and the policy contained the provision that it was subject to the provisions, agreements, or conditions "added" thereto, and, in referring to a mortgagee's interest, provided that the conditions of the policy should apply to such interest as should be "appended" to it, the iron-safe clause was made a part of the policy, and was a binding warranty on the insured.—*Couch & Gilliland v. Home Protection Fire Ins. Co.*, 73 S. W. 1077.

157. Where a paper describing the property insured, and pasted across the face of policy, made the insurance subject to an iron-safe clause attached to the policy in the same manner, the latter clause was made a part of the contract, so as to constitute a warranty.—*City Drug Store v. Scottish Union & National Ins. Co.*, 44 S. W. 21.

162.—**Property Covered by Insurance Against Fire or Other Cause of Loss. (A) In General.**

158. Fire insurance covers gifts.—*Milwaukee Mechanics' Ins. Co. v. Froesch*, 130 S. W. 600. See 28 Cent. Dig. Insurance, §§ 338, 352.

the block given was wholly unimproved it was held that there was enough of the description given to correct the mistake in the block number by construction,¹⁷¹ and the fact that the total insurance permitted had already been taken in the correct block but by a party who had forfeited his policy before the mistake was made will not vary the rule permitting the mistake to be corrected.¹⁷² The materiality in the number of the block to the making of the contract of insurance was a question of fact for the jury.¹⁷³ A question, "Are walls on sides and between each tenement without openings?" which applicant had answered in the affirmative, was held to mean as to whether the walls between each tenement had openings, and not whether there were openings in the outside walls of the building.¹⁶¹

(2) **Personal Property.**—A policy on household furniture, running for three years, includes furniture acquired subsequent to the issuance of the policy.¹⁵⁹ But it was held in a case where the value of the furniture far exceeded the amount of the policy at the time of loss the policy would not attach to new furniture purchased after the policy was issued.¹⁶³ A policy on a stock of grain in a warehouse covers bran;¹⁶² an iron safe in a bank is furniture in a policy insuring the banks furniture;¹⁶⁵ goods stored with one are within a policy on goods held in trust;¹⁶⁹ furniture and fixtures include light fixtures and globes, ceiling fans, electric meters, mirror door and wiring of a building;¹⁷⁰ and a policy on merchandise consisting of clothing made and in the process of making, and materials for the same, embraces all goods, wares, and merchandise on hand and the tools and implements of the business as conducted by the insured.¹⁶⁰ But a policy on the furniture, apparatus, appliances and

163.—(B) Description of Property. (See 28 Cent. Dig. Insurance, §§ 339-346.)

159. An insurance policy upon household and kitchen furniture, which was to run for three years, includes furniture acquired subsequent to the issuance of the policy.—*Delaware Ins. Co. v. Wallace*, 160 S. W. 1130, 28 Cent. Dig. Insurance, §§ 338-353.

160. A policy "on merchandise consisting of clothing made and in process of making, and materials for same," embraces all goods, wares, and merchandise on hand and the tools and implements of the business as conducted by insured.—*Oklahoma Fire Ins. Co. v. McKey*, 152 S. W. 440.

161. The insured gave an affirmative answer to the following question in the application: "Are walls on sides and between each tenement without openings?" Held, that the question was as to whether the walls between each tenement had openings, and not whether there were openings in the outside walls of the building.—*Phoenix Ins. Co. v. Padgett*, 42 S. W. 800.

162. A fire policy on stock of "grain" in a warehouse covers "bran."—*German Fire Ins. Co. of Peoria v. Walker*, 146 S. W. 606. See 28 Cent. Dig. Insurance, §§ 339-346.

163. A policy on furniture whose value far exceeds the amount of the policy at the time of the loss does not attach to new furniture purchased by insured after the policy was issued.—*Phoenix Ins. Co. v. Dunn* (Tex. Civ. App.) 41 S. W. 109.

164. A policy covered specified contents of a saloon, "and such other furniture and fixtures as is usual to saloons," and provided that the policy should be void if the subject of insurance should be incumbered by mortgage. After the policy was issued, the insured bought a safe to be used in their business, and gave a mortgage thereon. Held, that the safe was not covered by the policy, and therefore the mortgage did not avoid it.—*Moriarty v. United States Fire Ins. Co.*, 49 S. W. 132, 19 Tex. Civ. App. 669.

165. An iron safe contained in a bank was "furniture" within a policy

material incidental to a dental office does not include dental books,¹⁶⁸ nor will a fire policy cover either electrotype plates, from which pictures of the articles insured were reproduced, or a traveling salesman's trunk.¹⁶⁶ Where a policy insured so many railroad stock cars at so much per car and provided that all losses on rolling stock should be settled by the rules of the Master Car Builders' Association it was held that such provision did not exclude cars which were not in good repair, although the evidence showed the cars lost were so out of repair as not to be interchangeable under the Master Car Builders' rules.¹⁶⁷ A policy covering specified contents, furniture and fixtures of a saloon but providing the policy should be void if the subject of insurance should be incumbered by a mortgage was held not to include a safe bought after the policy was issued and which was mortgaged, such policy therefore not being avoided by the mortgage.¹⁶⁴

(C) **Description of Location.**—A policy issued to a railroad company, which covered in general terms all cotton on or in depots, platforms, or grounds adjacent thereto and in transit, but which provided that cotton in open cars was not covered, insured cotton on a stationary flat car placed on a spur track adjacent to a depot

issuing the bank's furniture and fixtures.—*Mecca Fire Ins. Co. (Mut.) of Waco v. First State Bank of Hamlin*, 135 S. W. 1083.

166. A fire policy held not to cover either electrotype plates, from which pictures of the articles insured were reproduced, or a traveling salesman's trunk.—*Agricultural Ins. Co. v. Collins*, 175 S. W. 1120.

167. A policy insured, among other things, "283 stock cars; rate per car, \$125." The insured owned but 283 stock cars insured at that rate, including the ones burned. At the time the policy was issued, the cars lost were so out of repair as not to be interchangeable under the master car builders' rules, and were standing on storage tracks, where they remained until the fire. They were worth \$250 each. The policy provided that all losses on rolling stock should be settled in accordance with the rules of the Master Car Builders' Association. Held, that such provision did not exclude cars which were not in good repair, and that these cars were included by the policy.—*Philadelphia Underwriters v. Ft. Worth & D. C. Ry. Co.*, 71 S. W. 419.

168. A fire policy on the furniture chairs, gas apparatus, pictures, paintings, "instruments, appliances, and material incidental to a dental office," does not include dental books.—*American Fire Ins. Co. v. Bell*, 75 S. W. 319.

169. Goods stored with one are within the insurance policy taken out

by him on goods "held in trust."—*Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.*, 73 S. W. 545.

170. "Furniture" and "fixtures," as used in a fire insurance policy, include light fixtures and globes, ceiling fans, electric meters, mirror door, and wiring of a building.—*Fire Ass'n of Philadelphia v. Powell*, 188 S. W. 47.

171. Where applicant described his property as two story frame dwellings on lots 11, 14, and 15 in block number 309 and it was proven that he owned lots corresponding in number on block number 609 on which were situated buildings belonging to applicant of the description given, while block 309 was wholly unimproved, it was held that there was enough of the description which was true to correct the mistake in the number of the block, by construction, if open to correction at all.—*Home Insurance & Banking Co. of Texas v. Lewis*, 48 Tex. 622.

172. The fact that the rules of the company prevented it from taking a risk of over \$3000 on one block and that amount had already been taken on block number 609, but in favor of a party who had forfeited his policy by removal before the mistake in the new policy was made will not vary the rule which would permit the mistake to be corrected. The materiality in the number of the block to the making of the contract of insurance was a question of fact for the jury.—*Home Ins. & Banking Co. of Texas v. Lewis*, 48 Tex. 622.

to remain there about twelve hours, though it was subsequently to be transported on the car.¹⁷³ Where a carrier's bill of lading for cotton exempted it from loss by fire and such carrier placed the cotton in the yards of a compress company where it was destroyed by fire the carrier was entitled to recover on a policy insuring it against loss by fire on cotton for which it had issued bills of lading and "for which it shall be liable," while in compress yards; the words quoted referring to liability in general.¹⁷⁵ Cotton for which bills of lading are issued by a carrier while in possession of a compress company, to which it has been delivered by the shipper for transportation over such carrier's line, and which is marked as the cotton described in the bills, is covered by a policy insuring cotton consigned to the compress company by the carrier.¹⁷⁴

Amount of Insurance—Valued Policies.—A policy is not a valued policy where it does not indicate an intention on the part of the insurer to value the risk and loss.^{176a}

Commencement of Risk.—Where an insurance risk is by contract to begin with the deposit of a letter in the postoffice such an arrangement must be construed to mean a proper deposit of such letter and in a manner to insure its delivery.¹⁷⁶ The risk begins only after the letter is stamped, as evidence that it is post paid.¹⁷⁶

165—(C) Description of Location. (See 28 Cent. Dig. Insurance, § 381.)

173. A policy issued to a railroad company, which covered in general terms all cotton on or in depots, platforms, or grounds adjacent thereto, and in transit, but which provided that cotton in open cars was not covered, insured cotton on a stationary flat car placed on a spur track adjacent to a depot to remain there about twelve hours, though the cotton was subsequently to be transported on the car, since the "open cars" referred to meant cars of that description commonly used for transportation, as the company sought to relieve itself from the increased hazard incident to the transportation of cotton on open cars due to sparks from locomotives in actual transportation, and since the words "in transit" meant in course of passing from point to point.—(Civ. App.) Royal Ins. Co. v. Texas & G. Ry. Co., 115 S. W. 117, writ of error denied 116 S. W. 48, 102 Tex. 308.

174. Cotton for which bills of lading are issued by a carrier while in possession of a compress company to which it has been delivered by the shipper for transportation over such carrier's line, and which is marked as the cotton described in the bills, is covered by a policy insuring cotton consigned to the compress company by the carrier.—Missouri, K. & T. Ry. Co. v. Union Ins. Co., 39 S. W. 975.

175. A carrier whose bills of lading for cotton exempted it from liability for loss by fire placed the cotton in the yards of a compress company, where it was destroyed by accidental fire. Held, that the carrier was entitled to recover on a policy insuring it against loss by fire on cotton for which it had issued bills of lading, "and for which they [it] shall be liable," while in compress yards; the words quoted referring to liability in general.—Germania Ins. Co. v. Anderson, 40 S. W. 200.

175—Amount of Insurance—Valued Policy

175a. Where a policy did not indicate an intention on the part of the insurer to value the risk and loss, it was not a "valued policy."—Delaware Ins. Co. of Philadelphia v. Hill, 127 S. W. 288. See 28 Cent. Dig. Insurance, §§ 359, 360.

175—Commencement of Risk. (See 28 Cent. Dig. Insurance, §§ 362-371.)

176. If an insurance risk is by contract between the parties to be affected, to begin from the deposit of a letter in the postoffice, such an arrangement must be construed to mean the proper deposit of such a letter and in a manner to assure its delivery, and the risk begins only after letter is stamped, as evidence that it is post paid.—Blake v. Hamburg-Bremen Fire Ins. Co., 67 Tex. 160.

Term and Duration of the Risk—(A) In General.—If an insured made an agreement with the agent to continue a policy in force, after having received notice of instructions to the agent to cancel it, such an agreement would not bind the insurer.¹⁷⁷

(B) Term Fixed By Policy.—When a policy provides that it may be terminated at will by the insurer it is avoided from the time the insured receives notice from a local agent that the insurer's instructions are that it will no longer be bound.¹⁷⁸ The instruction to the agent to cancel the policy is, when communicated to the insured, as effective as the most express notice.¹⁷⁸

Entire or Severable Contract.—In general where a policy covers a house, furniture and merchandise, it is divisible.¹⁸⁰ A policy covering a house and furniture, each to a specific amount is divisible, so that a breach of warranty as to either the house or the furniture will not affect the insurance on the remainder of the property.^{179 180 181 182 183 186 187 188 189} And it is further held, that where a policy covers many articles of furniture, one of which is mortgaged contrary to the provisions of the policy, the insurance is invalidated as to that article alone.¹⁸⁴

176—Term and Duration of Risk.

177. If, after insured received notice of the instructions to the agent to cancel the policy, he had made an agreement with the agent to continue the policy in force, such an agreement would not be binding on the company.—*Springfield F. & M. Ins. Co. v. McKinnon & Call*, 59 Tex. 507.

177—Term and Duration of Risk— Term Fixed by Policy. (See 28 Cent. Dig. Insurance, §§ 372-378.)

178. When an insurance policy provides that the insurance may be terminated at any time by the company it is avoided from the time the insured receives notice from the local agent that the company's instructions are that it would no longer be liable. The direction to the agent to cancel the policy was, when communicated to the assured, as effective as would have been the most express notice that the policy had been terminated. *Springfield F. & M. Ins. Co. v. McKinnon & Call*, 59 Tex. 507.

178—Entire or Severable Contract.

179. Where a policy insured a building and furniture each for a separate amount, the right of the insured to recover for loss of the building was not affected by breach of his warranty in respect to the unconditional ownership of the furniture.—*Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.) 41 S. W. 513.

180. A policy issued for a gross

premium covered store fixtures, furniture, and a stock of goods, for specific sums each, and provided that insured should make an inventory of the stock, and keep a correct set of books of purchases and sales, and lock such inventory and books in a fireproof safe at night. Held, that the policy was divisible, and hence violation of an inventory and iron safe clause did not preclude a recovery for the loss of fixtures and furniture.—*Sun Mut. Ins. Co. v. Tafts*, 50 S. W. 180, 20 Tex. Civ. App. 147.

181. A contract of insurance upon a house in a certain amount, and upon household furniture in another amount, is divisible, so that the procurement of additional insurance upon the personal property did not affect the validity of the insurance upon the house.—*Aetna Ins. Co. v. Dancer*, 181 S. W. 722.

182. Policy covering house and furniture each to a specific amount held divisible, so that a breach of warranty as to either the house or the furniture would not affect the insurance on the remainder of the property.—*Id.*

183. A fire policy covering a house and personal property, separately valued, is not avoided as to the personal property, though the building is on leased ground, by a clause that the "entire policy shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple."—*Home Ins. Co. of New Orleans v. Smith*, 32 S. W. 240.

184. Where a policy of fire insurance covers many articles of furniture,

PREMIUMS, DUES AND ASSESSMENTS

Unlawful to Accept Rebates—Statutory Regulations.—Any person knowingly accepting from any insurance company or agent any rebate of premium payable on a policy or any special advantage or valuable consideration not specified in the policy is subject to a fine or imprisonment. (Art. 4897, Rev. St. 1914.)

Company to Furnish Policy Holder With Analysis of Rate—Statutory Regulation.—When a policy of fire insurance is issued the insurer must furnish the insured with a written or printed analysis of the rate or premium charged for such policy. (Art. 4888, Rev. St. 1914.)

As to Collection of Premiums—Statutory Regulations.—The statute does not regulate the collection of premiums but each company is permitted to make such regulations as it may deem just in regard to this matter. No good bona fide extension of credit is to be con-

one of which is mortgaged contrary to the provisions of the policy, the insurance is invalidated as to that article alone.—*German Ins. Co. v. Luckett* (Tex. Civ. App.) 34 S. W. 173; 12 Tex. Civ. App. 139.

186. Under Rev. St. 1895, Art. 3089, providing that a fire insurance policy, in case of total loss, shall be deemed to be a liquidated demand for the full amount of the policy, but that this shall not apply in the case of personal property, a policy insuring plaintiff's dwelling house and household furniture in separate amounts is divisible; and a false affidavit, made by the plaintiff, as to the value of the personal property destroyed, will not avoid the entire policy, under a clause providing that the policy shall be void in the case of false swearing by the insured touching the subject of insurance, either before or after loss, but only such portion of the policy as relates to the personal property.—*Sullivan v. Hartford Fire Ins. Co.* (Tex. Sup.) 36 S. W. 73, 89 Tex. 665.

187. A policy of fire insurance, partly on real property and partly on personalty, is divisible; and where there was no fraud or misrepresentation in procuring the policy, and that portion on the real estate is not avoided by any other defenses set up, the policy is not invalidated, as to the real property, by subsequent false statements in regard to the personalty destroyed.—*Sullivan v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 34 S. W. 999.

188. Though a failure to comply with the iron-safe clause forfeits the policy so far as it covers a stock of goods, it does not necessarily forfeit the portion on the storehouse.—*Roberts, Willis & Taylor Co. v. Sun. Mut.*

Ins. Co. (Tex. Civ. App.) 23 S. W. 955; *Same v. Lancashire Ins. Co.*—*Id.*

189. In an action on a fire policy covering a building and personal property therein, and providing that, if the interest of the assured be other than sole ownership, the policy should be void, where it appeared that insured owned all of the building, but only part of the personalty, and the application stated that he was sole owner of both, it was error to render judgment for plaintiff for the value of the personal property, since the policy is divisible, and, as to such property, is void.—*Springfield Fire & Marine Ins. Co. v. Green* (Tex. Civ. App.) 36 S. W. 143.

190. Where an insurance policy covers a house, furniture and merchandise it is divisible.—*Georgia Home Ins. Co. v. McKinley* (Tex. Civ. App.) 37 S. W. 606.

PREMIUMS, DUES AND ASSESSMENTS.

196—*Payment of Premium.* (See 28 Cent. Dig. Insurance, §§ 396-398.)

191. Banks which associated themselves with a natural person to deal in cotton and executed a written agreement in the firm name to pay premiums for insurance thereon, were liable on such agreement, since the insurance contract was distinct from the partnership agreement, and was not in itself ultra vires.—*Dexter v. First Guaranty State Bank*, 180 S. W. 1172.

192. Banks which formed a partnership to deal in cotton with a natural person, who in the name of the firm procured insurance on cotton purchased by the firm, were liable upon an implied contract for premiums.—*Id.*

strued as a discrimination or in violation of the law. (Art. 4898, Rev. St. 1914.)

The State Insurance Commission Law Not to Apply to Certain Companies—Statutory Regulations.—The state Insurance Commission Act does not apply to purely mutual or to purely profit-sharing fire insurance companies, incorporated or unincorporated under the laws of this state, and carried on by members thereof solely for the protection of their property and not for profit; nor to purely co-operative inter-insurance and reciprocal exchange carried on by the members thereof solely for the protection of their property and not for profit. (Art. 4902, Rev. St. 1914.)

Payment of Premium.—Banks which associated themselves together with a natural person to deal in cotton and executed a written agreement in the firm name to pay premiums for insurance thereon, are liable on such agreement, since the insurance agreement was distinct from the partnership agreement and was not in itself ultra vires.^{191 192} Where, after a partial loss the full amount of the premium was deducted from the amount awarded insured, including the premium due on a part of the property which was not destroyed, the insured had a paid-up policy on such undestroyed property for the time covered by the premium.¹⁹³

Premium Notes.—There is full consideration for premium notes when the agent pays the money to the insurer and takes the insured's notes therefor, though the company was in fact insolvent and was soon after placed in the hands of a receiver.¹⁹⁴

ASSIGNMENT OR OTHER TRANSFER OF POLICY

Assignability of Policies.—A policy of insurance is such an instrument in writing as may be assigned and on which the assignee may maintain an action in his own name.^{195 196}

193. Where full amount of premium was deducted from amount awarded insured, including the premium due on a warehouse which was not destroyed, insured had a paid-up policy on warehouse, for time covered by premium. —*Merchants' & Bankers' Fire Underwriters v. Brooks*, 188 S. W. 243.

189.—**Premium or Deposit Notes.**

194. Where an insurance agent, pursuant to an agreement with the insured, issued a policy, and paid the premium to the insurance company, and took the notes of the insured therefor, the transaction, was in effect, a loan by the agent to the insured, and there was therefore full consideration for the notes, though the company was then in fact insolvent, and was soon after placed in the hands of

a receiver.—*Hudson v. Compere*, 61 S. W. 389, 94 Tex. 449.

ASSIGNMENT OR OTHER TRANSFER OF POLICY. (SEE 19 CYC. 631.)

195.—**Assignability of Policies.** (See 28 Cent. Dig. Insurance, § 463.)

196. Under Rev. St. 1895, Art. 308, permitting the obligee of any written instrument not negotiable by the law merchant to assign his interest therein, insurance policies are assignable in the same manner as other choses in action.—*Prentice v. Security Ins. Co.*, 153 S. W. 925. See 28 Cent. Dig. Insurance, 468.

196. A policy of insurance is such an instrument in writing as may be assigned and on which the assignee

Consent of Insurer.—Where the insured has the right under the policy to transfer it as collateral security the refusal of the insurer to allow a clause to be attached making loss payable to another person does not affect his right.¹⁹⁷ A local agent who wrote and countersigned a policy, received the premium and delivered the policy had apparent authority to transfer the insurance in case of a transfer of the property.¹⁹⁹ When the time for which the premium has been paid has not expired there is a sufficient consideration for the insurer's consent to the transfer.¹⁹⁸ The consent of the insurer to the transfer of a policy to a purchaser of the property inures to the benefit of a co-owner, though his name be not expressly mentioned.²⁰⁰

Rights and Liabilities of Assignee—(A) In General.—When policies are endorsed to a mortgagee as its interest might appear, such mortgagee has an interest in the policies of which it could not be deprived by the owner and insurers in canceling such endorsement and making new policies to the owner without the mortgagee's consent.²⁰² An assignee who knows the policy has never been delivered and accepted and the premiums have not been paid is not entitled to recover.²⁰¹

(B) Transfer as Collateral Security.—The Supreme Court held in an early case that if the assignor has an equitable interest in a

may maintain an action in his own name.—*East Texas Fire Ins. Co. v. J. M. Coffee*, 61 Tex. 287.

207—Consent of Insurer.

197. Where the insured had the right under his policy to transfer it as collateral security, the subsequent act of the insurance company in refusing to allow a clause to be attached making loss payable to another person did not affect such right.—*Scottish-Union & National Ins. Co. v. Andrews & Matthews*, 82 S. W. 419.

198. The time for which premium was paid for a policy not having expired when consent to transfer thereof was given, there was a sufficient consideration for the company's consent to the transfer, though it might have insisted on forfeiture of the policy for previous transfer of the property.—*North British & Mercantile Ins. Co. v. Gunter* (Tex. Civ. App.) 35 S. W. 715; 12 Tex. Civ. App. 598.

199. Local agents of an insurance company who wrote the policy sued on on one of the company's blank forms, which provided on its face that it should not be valid until countersigned by the company's duly authorized agent at the place of issuance, such agent having countersigned the policy, received the premium, and delivered it to assured, had apparent authority to transfer the insurance in case of a transfer of the property.—

Delaware Ins. Co. of Philadelphia v. Hill, 127 S. W. 283. See 28 Cent. Dig. Insurance §§ 475-77.

200. The consent of the insurer to the transfer of a fire policy to a purchaser of the property inures to the benefit of a co-owner, though his name be not expressly mentioned.—*Palatine Ins. Co. v. Boyd*, 50 S. W. 643.

219—Rights and Liabilities of Assignee. (A) In General. (See 28 Cent. Dig. Insurance, §§ 488-492, 494-496.)

201. Assignee of policy of fire insurance, knowing that the delivery of the policy was unauthorized, that it had never been accepted by the insured, and that on failure to pay premiums it was automatically canceled, held not entitled to recover.—*Polk v. State Mut. Fire Ins. Co.*, 151 S. W. 1126. See 28 Cent. Dig. Insurance, §§ 488, 494.

202. Where fire insurance policies were endorsed payable to a mortgagee as its interest might appear, such mortgage had an interest in the policies, of which it could not be deprived by acts of the owner and insurers in canceling such endorsement and making new policies to the owner without its consent. Judgment *Delaware Ins. Co. v. Security Co.* (Civ. app. 1900), 54 S. W. 916, reversed.—*Security Co. v. Panhandle Nat. Bank*, 57 S. W. 22; 93 Tex. 575.

claim he may be a proper party to the suit but he cannot prosecute as sole plaintiff.²⁰⁴ The assignment of a policy after loss, passes the legal title and clothes the assignee with the sole power to sue on it.²⁰⁵ He is, however, bound to allow every discount and defense which it would have been subject to in the hands of the previous owner before notice of the assignment was given to the insurer.²⁰⁵ The fact that the policy was collateral security for debt does not change the rule.²⁰⁵ (For evidence as to the real assignee of an insurance policy see Ann. 205.)

CANCELLATION, SURRENDER, ABANDONMENT OR RESCISSION OF POLICY

When a Policy May Be Canceled.—By agreement between the parties, a policy may be canceled at any time before loss, independent of the terms of the policy.²⁰⁶

Right of Insurer to Cancel.—When a policy provides it may be canceled on return of the unearned premium actually paid, the provision must be carried out even though the insured gave his notes to the agent who paid the premium in cash.²⁰⁷ A mortgagee may waive an extension of time for his benefit in case of cancellation as provided in the policy.²⁰⁸

222—Transfers as Collateral Security. (See 28 Cent. Dig. Insurance, § 492.)

202. The assignment of a policy, after a loss, passes the legal title to it, and clothes the assignee with the sole power to sue upon it, he, however, being bound to allow every discount and defense, against which it would have been subject in the hands of the previous owner before notice of the assignment was given to the company. That it was a collateral security for a debt does not change the rule.—*East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287.

204. If assignor has any equitable interest in the claim he may be a proper party to the suit, but he cannot prosecute as sole plaintiff.—*East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287.

205. The court properly permitted plaintiffs to show that when L., to whom the policy was assigned, purchased an interest in the insured property in his own name, and by a written contract, he in fact purchased it as agent, and for the benefit of his partner, and that the firm of L. & Co. thereafter owned the insured property, as alleged in the petition. Such evidence did not change the written contract.—*Niagara Ins. Co. v. Lee*, (Tex.) 11 S. W. 1024.

CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY. (SEE 19 CYC. 642.)

226—When a Policy May Be Canceled.

206. A policy of fire insurance may be canceled at any time before loss, by agreement between the parties, independent of the terms of the policy.—*Westchester Fire Ins. Co. v. McMinn*, 188 S. W. 25.

228—Right of Insurer to Cancel. (See 28 Cent. Dig. Insurance, §§ 492, 499.)

207. A fire policy authorizing the underwriter to cancel it on return of the unearned premium actually paid was issued by an agent, who took notes for the premium, which he paid to the company in cash, retaining the notes as his individual property. Held, that the company could cancel the policy only on returning the entire unearned premium. Judgment (Civ. App. 1898) 49 S. W. 271, affirmed.—*Phoenix Assur. Co. of London v. Munger Improved Cotton-Mach. Mfg. Co.*, 49 S. W. 222, 92 Tex. 297.

208. Where a fire policy provided for an extension of time for the benefit of the mortgagee in case of cancellation, the mortgagee may waive that provision for his benefit.—*Glens Falls Ins. Co. v. Walker*, 166 S. W. 122.

Notice to Cancel.—Where the policy provides for notice to the mortgagee before cancellation, a cancellation is not binding on such mortgagee where no such notice is given.²⁰⁹

Repayment of Unearned Premium on Cancellation.—A legal tender of the unearned premium is essential to a valid cancellation under a provision of a policy authorizing cancellation and providing that the unearned premium should be returned.²¹² In such a case the retention by the insured of an express money order mailed by the insurer with notice of cancellation, until after the fire is not a waiver of the insured's right under the policy to receive a legal tender of the unearned premium.²¹³ Where a policy provides for five days notice before canceling and a return of the unearned premium the notice without the premium does not cancel the obligation of the policy.²¹⁴ In a case where the policy is canceled by agreement the immediate payment of the unearned premium may not be required to make the cancellation valid.²¹¹ An insured who, desiring his policy canceled pro rata, connived with the agent so that his name did not appear and the agent canceled the policy, signed the insured's name to the receipt for the unearned premium and sent the policy in, could not claim that the cancellation was unauthorized, afterwards, because the unearned premium was not returned to him at the time of cancellation for he had waived the payment of such unearned premium as a prerequisite to cancellation.²¹⁰

229—Notice to Cancel. (See 28 Cent. Dig. Insurance, §§500-503.)

209. Under provisions of fire insurance policy, cancellation held not binding upon the mortgagee, to whom loss was payable, but to whom no notice of cancellation was given.—*Glasscock v. Liverpool, London & Globe Ins. Co.* 188 S. W. 281.

230—Repayment of Unearned Premium on Cancellation. (See 28 Cent. Dig. Insurance, §§ 509-512.)

210. An insurance policy provided that it might be canceled at the request of insured or by the company by giving five days' notice, and that if it was canceled at the request of insured the company should retain the customary short rate, while if it was canceled by the company it should retain only a pro rata premium. Desiring to have the policy canceled, insured arranged with the agent, who procured the policy, that the agent should cancel it without the name of the insured appearing in the transaction, in order that only the pro rata premium should be retained by the company. The agent canceled the policy, signed the name of insured to the receipt for unearned premium, and sent the policy to the insurer from whom it was obtained.

5—Ins.

Before the unearned premium was sent to insured the property which had been covered by the policy was burned. Held, that insured could not be heard to claim that the cancellation was unauthorized and without effect because the unearned premium was not returned to him at the time of the cancellation, but that insured had waived the payment of the unearned premium as prerequisite to cancellation.—*Ragley Lumber Co. v. Insurance Co. of North America*, 94 S. W. 185.

211. On cancellation of a policy of fire insurance at any time before loss, by agreement between the parties, independent of the terms of the policy, immediate payment of the unearned premium may not be required in order to make cancellation valid.—*Westchester Fire Ins. Co. v. McMinin*, 188 S. W. 25.

212. Under a provision of a fire policy authorizing cancellation, and providing that the unearned premium should be returned, held, that a legal tender of the unearned premium was essential to a valid cancellation.—*Niagara Fire Ins. Co. v. Mitchell*, 164 S. W. 919. See 28 Cent Dig. Insurance, §§ 509-512.

213. The retention by an insured of an express money order mailed to him by the company for unearned premiums, with a notice of cancellation,

Acts Constituting Cancellation.—It was held not error to find that a policy had in fact been canceled when the insurer sent a notice of cancellation and a draft for the unearned premium which were received by the insured who, however, did not return the policy or cash the draft for some trivial reason of his own.²¹⁶ The insurer should immediately return a premium if it wishes to avoid a contract, on discovery that the agent who procured and signed the policy was also the beneficiary, as well as repudiate the act of the agent.²¹⁷ (For facts showing that certain assigned policies constituted valid and existing insurance see Ann. 215.)

Validity of Cancellation.—A cancellation of a policy was held ineffective where the mortgagee consented to it solely on faith of the unintentional misrepresentation by the agent that the policy was avoided by the institution of foreclosure proceedings, under a clause which he incorrectly stated was in the policy.²¹⁸

until after a fire, when it was returned by the insured's attorney, he having previously refused a check, and demanded money, held not a waiver by the insured of his right under the policy to receive a legal tender of the unearned premium.—*Id.*

214. Under the clause of an insurance policy providing that the company may cancel it on five day's notice, and that the insured shall be entitled to a return of the unearned premium, notice of cancellation by the company, where there has been no payment or tender back of the unearned premium, does not cancel its obligations under the policy.—*Hartford Fire Ins. Co. v. Cameron*, 45 S. W. 158, 18 Tex. Civ. App. 237.

223—Acts Constituting Cancellation.
(See 23 Cent. Dig. Insurance, § 504.)

215. An agent, representing the several companies insurers of plaintiff's property, under instructions from them, went to plaintiff to cancel the policies. Plaintiff told him that they were transferred as security to two of his creditors, and declined to accept the unearned premiums. The agent thereupon mailed drafts for the same to said creditors, and one draft was accepted and paid. The other was declined by the creditor, on the ground that the fire had already occurred. It appeared that this creditor had recovered judgment on the policies involved, and the insurers had also compromised with plaintiff for his interest in them. Held, that these policies constituted "valid and existing insurance," within the prohibitory condition of a policy taken out by plaintiff the day of his talk with the agent.—*East Texas Fire Ins. Co. v. Flippin*, (Tex. Civ. App.) 23 S. W. 550, 4 Tex. Civ. App. 576.

216. One thoroughly familiar with the insurance business received a let-

ter containing a draft for the amount of the premium on the unexpired policy, and stating that the policy had been canceled. The letter further directed him to sign the cancellation receipt on the back of the policy, and return the same, and informed him that another policy, in a different company, had been written by the canceling agent, which was being held for approval. The draft was not cashed, and the policy was not returned, but the holder testified that after receiving this letter he was in doubt as to the amount of insurance then carried on his property, and endeavored to obtain additional insurance elsewhere. Held, that it was not error to find that the policy had been in fact canceled, and was so treated by the insurer.—*Lampasas Hotel & Park Co. v. Home Ins. Co.*, 43 S. W. 1081, 17 Tex. Civ. App. 615.

217. When the premium on an insurance policy is received by the company, if it wishes to avoid the contract it should, on discovery that the agent who procured and signed the policy was also the beneficiary, repudiate his act as agent, and tender back the premium.—*Hanover Fire Ins. Co. v. Shrader* (Tex. Civ. App.) 31 S. W. 1100, 11 Tex. Civ. App. 255.

223 Validity of Cancellation. (See 23 Cent. Dig. Insurance, § 505.)

218. A cancellation of a fire policy upon mortgaged property held ineffective as to the mortgagee, who consented to the cancellation solely on faith of the unintentional misrepresentation by the agent of the insurer that the policy was avoided by the institution of foreclosure proceedings, under a clause which he incorrectly stated was in the policy.—*Glens Falls Ins. Co. v. Walker*, 166 S. W. 122.

Evidence of Cancellation.—(For facts sustaining a verdict that a policy was not canceled by mutual consent see Ann. 219.)

Repayment and Recovery of Premiums.—In an early case it was held that the insurer need not offer to return the premiums paid before insisting upon the invalidity of the policy by reason of breach of condition.²²¹ The repayment of the proper proportion of the premiums was, unless waived, essential to a valid cancellation under a provision of the policy authorizing cancellation and providing that the unearned premium should be returned.²²⁰

Rescission By Agreement of Parties.—A policy may be canceled by mutual consent, regardless of the provisions of a policy as to cancellation.²²²

AVOIDANCE OF THE POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION

Misrepresentations Shall Not Constitute Defense, Unless Shown—Statutory Regulations.—Any provision in a policy which provides that the same is void or voidable if any misrepresentations or false statements be made in proofs of loss or of death, shall be of no effect. Such provisions shall not constitute any defense unless it is shown upon the trial that the false statements made in such proofs of loss were fraudulently made and misrepresented a fact material to the question of the liability of the insurer upon the contract sued on and that such insurer was thereby misled and caused to waive or lose some valid defense to the policy. (Art. 4949, Rev. St. 1914.)

Breach or Violation By Insured of Policy on Personal Property Is Not a Defense, When—Statutory Regulations.—No breach or violation by the insured of any of the warranties, conditions or provisions of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the

225—Evidence of Cancellation. (See 28 Cent. Dig. Insurance, § 507.)

219. Evidence held to sustain a verdict that a fire insurance policy was not canceled by mutual consent.—Glens Falls Ins. Co. v. Walker, 187 S. W. 1036.

244—Repayment and Recovery of Premiums or Paid Up Value on Surrender. (See 28 Cent. Dig. Insurance, §§ 194, 524.)

220. Under a provision of policy authorizing cancellation and providing that the unearned portion of the premium should be returned, held that, unless waived, the repayment of the proper proportion of the premium was

essential to a valid cancellation.—Polemanakos v. Austin Fire Ins. Co., 160 S. W. 1134. See 28 Cent. Dig. Insurance, §§194, 524-530.

221. The company need not offer to return premiums paid on a policy before insisting upon its invalidity by reason of breach of conditions.—Phoenix Ins. Co. v. Willis (Tex.) 6 S. W., 825.

246—Rescission by Agreement of Parties.

222. Regardless of the provisions of a policy as to cancellation, the policy may be cancelled by mutual consent.—Polemanakos v. Austin Fire Ins. Co., 160 S. W. 1134.

policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property. (Art. 4874a, Rev. St. 1914.) This provision in no way affects Article 4874, Rev. St. 1914, in so far as it relates to fire insurance policies upon real or mixed property. (Art. 4874b, Rev. St. 1914.)

No Defense Based Upon Misrepresentation Valid, Unless—Statutory Regulations.—No defense based upon misrepresentations made in the applications for or in securing a contract of insurance, shall be valid, unless the defendant shall show on the trial that, within a reasonable time after discovering the falsity of such misrepresentations so made, it gave notice to the insured or to the beneficiaries under said contract, that it refused to be bound by such contract or policy. Ninety days is defined as a reasonable time. It is provided further that this article shall not be construed to render available any immaterial misrepresentation, nor to in any wise affect Article 4947. (Art. 4948, Rev. St. 1914.)

Grounds of Avoidance in General—(A) Statutory Provisions—Case Law.—Articles 4874a and 4874b of the Revised Civil Statutes of 1914, relating to warranties in policies, the breach of which do not contribute to a loss, have been held unconstitutional.²²³ Article 3096 of the Revised Statutes of 1895, providing that any provision of any contract of insurance declaring that answers or statements in the application or contract, if untrue or false, shall render the contract void, shall be of no effect and be no defense in a suit upon the contract, unless it is shown on the trial that the misrepresentation was material to the risk or actually contributed to the event upon which the policy became payable, such question to be one of fact, was held to cover every kind and class of insurance and was not limited to life insurance.²²⁴ This article was further held to apply only where there are misrepresentations by the insured either in the application or in the policy itself and does not apply to a provision in the policy

AVOIDANCE OF THE POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION. (SEE 19 CYC. 677.)

250—Grounds in General. (A) Statutory Provisions. (See 28 Cent. Dig. Insurance, § 539.)

223. Acts 33d Leg. c. 105 (Vernon's Sayles' Ann. Civ. St. 1914, Arts. 4874a, 4874b, concerning warranties in fire insurance policy the breach of which do not contribute to a loss, held constitutional.—*McPherson v. Camden Fire Ins. Co.*, 185 S. W. 1055.

224. Rev. St. 1895, tit. 58, relating to the subject of Insurance, comprises four chapters, and by Gen. Laws 1903, c. 69, a separate chapter was added embracing a number of articles, of

which article 3096aa provides that any provision in any contract of insurance, issued or contracted for that answers or statements in the application or contract, if untrue or false, shall render the contract void, shall be of no effect, and be no defense in a suit upon the contract, unless it is shown on the trial that the misrepresentation was material to the risk, or actually contributed to the event upon which the policy became payable, which question shall be a question of fact for the court or jury trying the case. Held, that the language of article 3096aa indicates that it was the intent of the Legislature that it should cover every kind and class of insurance, and was not limited to life insurance.—*Scottish Union & National Ins. Co. v. Wade*, 127 S. W. 1186. See 28 Cent. Dig. Insurance, § 539.

making it void if the property be or become incumbered by a chattel mortgage, there being no representation made by the insured.²²⁵ (See Ann. 309, 311.)

(B) Materiality—Misrepresentation Must Be Material to Avoid Contract—Statutory Regulations.—Any provision in any contract or policy of insurance issued or contracted for in this state, which provides that the answers or statements made in the application for such contract, or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case. (Art. 4947, Rev. St. 1914.)

(a) Case Law.—A misrepresentation "material to the risk" has been defined to be one concerning a fact which would induce the insurer to decline the insurance or to charge a higher premium.²²⁶ In an early case it was held that a clause in a policy that the entire policy shall be void if the insured conceals or misrepresents any material facts or circumstances causes other statements in the application to operate as representations only, though they are sufficient in themselves to constitute warranties.²²⁷ (See Ann. 309-311.) A statement in a policy that a corporation had earned certain dividends is not material to the risk.^{228a}

(C) Effect of Misrepresentations.—It has been held that where the insured unintentionally made a false statement, which, if in-

^{225.} Rev. St. 1895, Art. 3096aa (added by Gen. Laws 1903, p. 94), provides that any provision in any contract or policy of insurance that the answers or statements made in the application or in the contract, if false, shall render the contract or policy void or voidable, shall be of no effect, and shall not be a defense to a suit on the contract, unless it be shown on the trial thereof that the matter represented was material to the risk, etc. Held, that while the act relates to fire, as well as life, policies, it applies only where there are misrepresentations by insured, either in the application or in the policy itself, and does not apply to a provision in the policy making it void if the property be or become incumbered by a chattel mortgage; there being no representation made by insured.—*Hartford Fire Ins. Co. v. Wright*, 125 S. W. 363.

²²⁵—**(B) Representation—Materiality.** (See 28 Cent. Dig. Insurance, § 543.)

^{226.} A misrepresentation "material

to risk" is one concerning a fact which would induce the insurer to decline the insurance or to charge a higher premium.—*St. Paul Fire & Marine Ins. Co. v. Huff*, 172 S. W. 755.

^{226a.} Under Rev. St. § 4947, statement in policy indemnifying against loss of dividends from burning of corporation plant, that for three years the corporation had earned dividends of 25 to 30 per cent. Held, not material to the risk, so that its falsity was no defense.—*Liverpool & London & Globe Ins. Co. v. Lester*, 176 S. W. 602.

^{227.} A clause in a fire policy that the entire policy shall be void if the insured conceals or misrepresents any material facts or circumstances causes other statements in the application to operate as representations only, though they are sufficient in themselves to constitute warranties.—*Deleware Ins. Co. v. Harris*, 64 S. W. 867, 26 Tex. Civ. App. 537.

tionally made, would have avoided the policy, the fact that he had failed to use due diligence to ascertain the truth does not avoid the policy.²²⁸ Where a policy provided that the insurer should only be liable for a certain portion of the actual loss, in the absence of actual fraud, false representations as to the value of goods insured and the time of the last inventory are immaterial.²²⁹ The falsity of representations will not avoid an indemnity policy where the insurer would have issued the policy had it known the truth and was not influenced by the representations made.^{229a}

(D) Fraud or False Swearing in Obtaining Insurance.—An issue of false swearing was not raised within a clause voiding the policy for fraud or false swearing where the insured testified that an inventory of the stock insured had been made and shown the agent and the agent's testimony was directly contradictory.²³⁰

Warranties—Definition.—No technical words or form of expression are necessary to constitute a warranty.²³¹ Words of affirmation or statements imputing conditions or undertakings on the part of the insured, relating to the risk or affecting its character and extent, upon which it must be inferred the insurer contracted, will ordinarily be construed and held to be a warranty.²³¹ To constitute any statement or promise of the insured a warranty it must be made a part of the policy, either by appearing in the body of the instrument or by a proper reference in the policy to some other paper in which it is to be found.²³¹ It is in the nature of a condition precedent and must form part of the contract between the parties.²³¹ When there is doubt as to the intention of the parties to treat a paper as part of the policy, the courts give the benefit

228—(C) Representation—Effect of Misrepresentations (See 28 Cent. Dig. Insurance, §§ 540, 549.)

228. Where the insured unintentionally made a false statement, which, if intentionally made, would have avoided the policy, the fact that he had failed to use due diligence to ascertain the truth does not avoid the policy.—*Phoenix Ins. Co. v. Swann*, 41 S. W. 519.

229. Where the policy provides that the insurer shall be liable only for a certain portion of the actual loss, false representations as to the value of the goods insured and the time of the last inventory are immaterial, in the absence of actual fraud.—*Liverpool & London & Globe Ins. Co. v. Stern*, 29 S. W. 678.

229a. Where an insurer would have issued an indemnity policy knowing the truth as to the matters claimed to have been misrepresented, and was not influenced by the representations made, their falsity would not avoid the contract.—*Liverpool & London & Globe Ins. Co. v. Lester*, 176 S. W. 602.

230—(D) Fraud or False Swearing in Obtaining Insurance. (See 28 Cent. Dig. Insurance, § 557.)

230. Insured testified that an inventory of the stock insured had been made and entered in a book which was shown to insurer's agent. The agent testified that insured told him that no inventory had been taken, and there was none in the book when it was first handed to him. Held, not to raise an issue of false swearing, within a clause voiding the policy for any fraud or false swearing by insured as to the property insured.—*Sun Mut. Ins. Co. v. Tufts*, 50 S. W. 180, 20 Tex. Civ. App. 147.

231—(E) Warranties. (1) In General. (See 28 Cent. Dig. Insurance, §§ 558-569.)

231. To constitute any statement or promise of the insured a warranty it must be made part of the policy, either by appearing in the body of the instrument, or by a proper reference in the policy to some other paper in which it is to be found. Since it is in the

of the doubt to the insured, and construe the policy liberally in his favor.²³²

Warranties in General.—Words purporting to be a condition on which the policy is issued must be set forth in such a place and in such a manner in the policy as to leave no doubt that they were so intended.²⁴⁰ Words inserted promiscuously in a policy, having no connection with the other conditions of the policy, although the word condition is used, will not be treated as a condition of such policy.²⁴⁰ The Supreme Court held in one of the earliest cases that it was a cardinal principle of insurance law that, in order to constitute a warranty, it must be made a part of the policy.²⁴¹ The statement or promise of the insured must either appear in the body of the instrument or by a proper reference in the policy to some other paper in which it is to be found. It is not sufficient that it is contained in a paper annexed to the policy but to which no reference is made therein.²⁴¹

Warranties in Marine Insurance.—In all ordinary policies of marine insurance, there is an implied warranty that the vessel shall be seaworthy at the commencement of the voyage assured.²³⁴ Incidentally, the want of an experienced master or of a competent crew will render a vessel unseaworthy.²³⁵ An implied warranty may be modified or superseded by express agreement as where a ship is admitted to be unseaworthy.²³⁶ Also, the ordinary terms of the policy may be dispensed with by special agreement of the parties.²³⁹ A special clause insuring goods on all vessels approved by the company was held to mean those to which the insurers had given certificates, or which they held out to the public as seaworthy for the purposes of the trade.²³⁷ In this way the underwriters selected the vessels for themselves and no choice was left to the shippers.²³⁸

nature of a condition precedent it must form part of the contract between the parties.—*Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69.

^{232.} When there is doubt as to the intention of the parties to treat the paper as part of the policy, the courts give the benefit of the doubt to the insured, and construe the policy liberally in his favor.—*Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69.

^{233.} No technical words or form of expression are necessary to constitute a warranty. Words of affirmation or statements imputing conditions or undertakings on the part of the insured, relating to the risk or affecting its character and extent, upon which it must be inferred the insurer contracted, will ordinarily be construed and held to be a warranty.—*Texas Banking & Ins. Co. v. Stone*, 49 Tex. 4.

^{234.} It is a well settled principle of law, that in the ordinary policies of marine insurance, whether the same be upon the ship or its cargo, there is an implied warranty that the vessel

shall be seaworthy at the commencement of the voyage assured.—*Marine Ins. Co. v. Burnett*, 29 Tex. 433.

^{235.} It is also well settled, that the want of an experienced master, or of a competent crew, will render a vessel unseaworthy.—*Marine Ins. Co. v. Burnett*, 29 Tex. 433.

^{236.} An implied warranty may be modified or superseded by express agreement, as, for instance, where, by the policy, the ship is admitted to be unseaworthy.—*Marine Ins. Co. v. Burnett*, 29 Tex. 433.

^{237.} A special clause in a general policy "on board all steamboats or vessels approved by the company" must have meant those to which the underwriters had given certificates, or which they had held out to the public as seaworthy for the purposes of the trade.—*Marine Ins. Co. v. Burnett*, 29 Tex. 433.

^{238.} The underwriters thus selected the vessels for themselves, and left no choice for the shippers.—*Marine Ins. Co.*, 29 Tex. 433.

Distinctions Between Warranties and Representations.—A warranty is a statement susceptible of being construed only as meaning that the parties intended that the policy should not be binding unless, such statement was literally true.²⁴³ An iron-safe clause printed on a slip of paper and attached to the margin of a policy is merely a representation and not a warranty where it is not referred to in the body of the policy so as to identify it as a part of the contract.²⁴⁵ A promissory warranty has reference to something to be done or omitted in the future and does not include that which exist at the time, or relates to the past and it must embody an agreement to do or not to do something in the future.²⁴⁶ Thus, where no additional insurance was procured after the issuance of

239. Any of the ordinary terms of a policy may be dispensed with by the special agreement of the parties.—29 Tex. 433.

240. Words purporting to be a condition on which a policy is issued must be set forth in such a place and in such a manner in the policy as to leave no doubt that they were so intended, and words inserted promiscuously therein, having no connection with the other conditions of the policy, although the word condition is used, will not be treated as a condition of the policy.—Goddard v. East Texas Ins. Co., 67 Tex. 69.

241. It is a cardinal principle of insurance law that, in order to constitute any statement or promise of the insured a warranty, it must be made part of the policy, either by appearing in the body of the instrument, or by a proper reference in the policy to some other paper in which it is to be found. If contained in a paper annexed to the policy, but to which no reference is made therein, it is not sufficient.—Goddard v. East Texas Fire Ins. Co., (Tex.) 1 S. W. 906.

265—(2) Distinctions Between Warranties and Representations. (See 23 Cent. Dig. Insurance, § 560.)

242. An application for a fire policy stated that insured warranted that the answers and representations therein were true. The policy made the application a part of itself, designating it as insured's warranty. It stated that insured warranted that he was the sole and undisputed owner, that he would not permit the factory covered by the policy to be worked at night, and that he would take certain precautions against fire. Nothing was said as to the materiality of the representations and by subsequent clauses it was provided that the policy should be void on the happening of certain contingencies, or if insured had misrepresented or concealed any material circumstances concerning the insur-

ance. Held, that the statements with reference to incumbrances on the property, night work in the factory, and precautions to be taken against fire were not warranties.—Judgment (Civ. App. 1898) 49 S. W. 271, affirmed. Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co., 49 S. W. 222, 92 Tex. 297.

243. A warranty in an insurance contract is a statement susceptible of being construed only as meaning that the parties intended that the policy should not be binding unless such statement was literally true.—Judgment (Civ. App. 1898) 49 S. W. 271, affirmed. Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co., 49 S. W. 222, 92 Tex. 297.

244. An answer of the insured to the question in the application, "Are walls on sides and between each tenement without openings?" will not be held a warranty, where, after the issuance of the policy, a special agent of the insurer inspects the premises, cancels the policy, and issues a new one for an additional premium.—Phoenix Ins. Co. v. Padgett, 42 S. W. 800.

245. An iron-safe clause, printed on a slip of paper and attached to the margin of an insurance policy, but not referred to in the body of the policy so as to identify it as a part of the contract of insurance, is merely a representation, and not a warranty.—Georgia Home Ins. Co. v. McKinley (Tex. Civ. App.) 37 S. W. 606

246. A promissory warranty has reference to something to be done or omitted in the future, and does not include that which exists at the time, or relates to the past, and it must embody an agreement to do or not to do something in the future; hence where no additional insurance was procured after a policy was issued, and the false representation or statement, if any was made, related to conditions existing at the time, it did not constitute a promissory warranty.—Scottish Union & National Ins. Co. v. Wade, 127 S. W. 1186.

the policy and the false representations, if any were made, related to conditions existing at the time, they did not constitute promissory warranties.²⁴⁶ Where a "keeping books, papers and iron safe" clause, on a different kind of paper was pasted to a blank space on the face of a policy in the midst of a sentence with which it had no connection and the existence of such clause was not known to the insured, the court held that the method of attaching the clause to the policy precluded it from being regarded as other than a mere representation and not as a warranty.²⁴⁸ It further held that aside from the method of attaching it, it could not be regarded as other than a representation.²⁴⁸ Where an application stated that the insured warranted the representations therein to be true, the policy making the application part of itself and designating it as the insured's warranty, nothing however being said as to the materiality of such representations but subsequent clauses provided that the policy should be void on the happening of certain contingencies or if the insured had misrepresented or concealed any material circumstance concerning the insurance, it was held that statements with reference to incumbrances, night work in the factory, and precautions to be taken against fire were not warranties.²⁴² An answer of an insured as to the openings in a building will not be considered a warranty where, after the issuance of the policy a special agent of the insurer inspected the premises, canceled the policy and issued a new one for an additional premium.²⁴⁴ Representations in a new application, made after the removal of goods and the issuance of the policy, the insurer having refused to permit such removal without a new application being made, do not constitute warranties.²⁴⁷

Fulfillment or Breach of Warranty.—A warranty that the land on which the insured building stands is owned in fee simple is not broken if the insured is in a condition to enforce specific performance.²⁴⁹

247. After the issue of a policy, which provided that representations in an application, if any should be made, should constitute warranties, the insurer refused to ratify the action of his agents who issued the policy in consenting to the removal of the goods unless an application was made by insured. Held, that the representations in the application thereupon made by insured did not constitute warranties.—*Liverpool & London & Globe Ins. Co. v. Stern* (Tex. Civ. App.) 29 S. W. 678.

248. This clause, on a different kind of paper was attached by muclage to a blank space on the face of a policy, "It is understood and agreed that the assured shall keep a set of books . . . warranted to be kept in an iron safe at night." The clause was pasted in the midst of a sentence on the face of the policy with which it had no connection and which purported to contain the promises entered into by

the insurance company and not those made by the assured. The existence of the clause was not known to insured, and in suit brought it appeared that the stipulation regarding the iron safe clause was not observed, there being no evidence of fraud by insured or of resulting injury to insurer from failure to keep the safe. The Court held that the method of attaching the clause to the policy precluded it from being regarded as other than a mere representation and not as a warranty. Aside from the method of attaching it could not be regarded other than as a representation.—*Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69.

267—(3) **Fulfillment or Breach.** (See 28 Cent. Dig. Insurance, § 567.)

249. Warranty that the land on which the insured building stands is owned in fee simple is not broken if the insured is in a condition to enforce specific performance.—*East Texas Ins. Co. v. Dyches*, 56 Tex. 565.

Matters Relating to Property or Interest Insured—(A) Use of Building.—A policy on a building while being used for a certain purpose does not warrant such use to continue but a more hazardous use is of course material to the insurance.²⁵⁰ Where other words in the policy identify the building which contained the insured property, the terms "occupied as a store house" are held to properly express a fact as to a risk and implied the house was not occupied for any other purpose than as stated.²⁵²

(B) Occupation of Building.—"Vacant" in a fire policy means empty, while "cessation of occupancy" means change of use.²⁵³ A statement in a policy that the premises were occupied by the insured was not false because of the occupancy of a portion of such premises by one who was there for the benefit of the premises and who was a part of the establishment maintained thereon.^{254 255}

(C) Description and Condition of Goods.—Although the machinery in a mill has been in use much longer than represented in the application but it has been rebuilt, is practically new and of the

278—**Matters Relating to Property or Interest Insured. (A) Use of Building.** (See 28 Cent. Dig. Insurance, § 592.)

250. A fire policy on a building "while occupied as Park Terrace Sanitarium" does not warrant such use to continue; a clause allowing vacancy for ten days, and another contemplating change of occupancy, except to one more hazardous.—*Southern National Ins. Co. v. Cobb*, 180 S. W. 155.

251. A fire policy, providing that it shall be void if insured has concealed or misrepresented any material fact or circumstance concerning the insurance or the subject thereof, is not avoided by the fact that insured said nothing about a gambling concern being connected with his insured saloon; it not being shown that the fact that such a connection was regarded as increasing the risk was known by insured, or that he consciously neglected to speak of it, and no inquiry having been made of him concerning it.—*American Cent. Ins. Co. v. Nunn*, 79 S. W. 88, reversed 82 S. W. 497. See 28 Cent. Dig. vol. 28, cols. 1206-1209, § 593.

252. Where there are other words in the policy as there are in the one in question, to identify the building which contained the property insured, the terms "occupied as a store house" are held to properly express a fact as to a risk, could not be regarded as employed for any other purpose and implied the house was not occupied for any other purpose than as thus stated.—*Texas Banking & Ins. Co. v. Stone*, 49 Tex. 4.

279—**(B) Occupation of Building.** (See 28 Cent. Dig. Insurance, § 594.)

253. "Vacant," in a fire policy, means empty, while cessation of "occupancy" means change of use.—*Southern Nat. Ins. Co. v. Cobb*, 180 S. W. 155.

254. A statement in a policy that the premises were occupied by the assured was not false, by reason of the occupancy of a part thereof by one who was there for the benefit of the premises, and who belonged to and was a part of the establishment thereon maintained.—*Fire Ass'n of Philadelphia v. Colgin* (Tex. Civ. App.) 33 S. W. 1004.

255. Insured having answered that he occupied the building, it was not a misrepresentation, because of the fact that a small room, cut off from the upper story of the building, was occupied by a milliner, where the room was occupied rent free, and was under the control of the insured, and the milliner was kept there by him for the benefit that would result in the sale of goods.—*Liverpool, London & Globe Ins. Co. v. Colgin* (Tex. Civ. App.) 34 S. W. 291.

280—**(C) Description and Condition of Goods.** (See 28 Cent. Dig. Insurance, § 595.)

256. When the machinery in a mill has been in use much longer than represented in an application for insurance thereon, but has been rebuilt, and is practically new and of the represented value, the representation is substantially correct, and will not avoid the policy.—*Delaware Ins. Co. v. Harris*, 64 S. W. 867, 26 Tex. Civ. App. 537.

represented value, the representation is practically correct and the policy will not be avoided.²⁵⁵ Where it is impossible to determine from a required inventory, either the quantity, the number of items included in a summarized entry, the value per item, the reasonableness of the valuation, or whether the articles were within the purview of the policy, such an inventory will not be regarded as a compliance with the policy requiring a complete inventory of stock.²⁵⁷

(D) Amount or Value.—A misrepresentation of the value of property by a valued policy is material to a risk and avoids the policy if fraudulently and intentionally made and is not a mere error of judgment.²⁶⁰ To establish such a fraudulent over-valuation it must either be shown that the insured knew it was worth less or the actual value must be so much less than that stated as to warrant a presumption that it was intentional.²⁶¹ The mere fact that the property was worth less is insufficient.²⁶¹ However, where the policy was not a valued policy a misrepresentation of the value is not material to the risk and is relevant only to the question of fraud and false swearing in general.²⁵⁹ Under the statute that misrepresentations must be material to avoid a policy, misrepresentations of the value of a stove in a proof of loss cannot affect the liability of the insurer where the total value of the property destroyed, exclusive of such stove, is largely in excess of the amount of the policy.²⁵⁸ (For misrepresentations avoiding a policy see Ann. 262.)

(E) Title or Interest of Insured—Statutory Regulation—Certain Provisions in Policies Void.—All provisions in policies of fire, ma-

²⁵⁷. A fire policy provided that, unless a complete inventory of the stock covered had been taken within 12 months prior to its issue, one should be taken within 30 days, or it would be void. The only inventory taken included such items as: "Hardware, \$25.00. Marble City Drug Co., \$22.50; bill from Houston Drug Co., \$53.66," etc. Held, not a compliance with the policy; it being impossible to determine either the quantity, the number of items included in the summarized entry, the value per item, the reasonableness of the valuation, or whether the articles were within the purview of the policy.—*Fire Ass'n of Philadelphia v. Calhoun*, 67 S. W. 153, 28 Tex. Civ. App. 409.

²⁵⁸—(D) Amount or Value. (See 28 Cent. Dig. Insurance, §§ 597-600.)

²⁵⁹. Under Rev. St. 1911, Art. 4947 the fact that an insured in her proof of loss misrepresented the value of a stove could not affect the liability of the company, where the total value of the property destroyed, exclusive of the stove, was largely in excess of

the amount of the policy.—*Camden Fire Ins. Co. of Camden, N. J., v. Puett*, 164 S. W. 418. 28 Cent. Dig. Insurance, § 597.

²⁵⁹. Where a policy was not a valued policy a misrepresentation by insured of the value of the property was not material to the risk, and was therefore relevant only to the question of fraud, and false swearing in general.—*Deleware Ins. Co. of Philadelphia v. Hill*, 127 S. W. 283. See 28 Cent. Dig. Insurance, §§ 597-600.

²⁶⁰. A misrepresentation of the value of the property insured by a valued policy is material to the risk and avoids the policy if fraudulently and intentionally made, and not a mere error in judgment.—Id.

²⁶¹. In order to establish a fraudulent over-valuation of property insured by a valued policy, it must either be shown that the insured knew that the property was worth less, or the actual value must be so much less than that stated, as to warrant a presumption that it was intentional; the mere fact that the property was worth less than the amount stated being insufficient.—Id.

rine, tornado companies and all companies insuring property against fire to the effect that if said property is encumbered by a lien of any character, or shall after the issuance of such policy become encumbered by a lien of any character, that such encumbrance shall render such policy void, has no force and effect, and any such provision in such a policy is absolutely null and void. (Art. 4892, Rev. St. 1914.)

Case Law—(A) Equitable Title.—An equitable title is held to meet the requirement that the interest of the insured is that of entire, unconditional and sole ownership.²⁷⁰

(B) Outstanding Lien or Mortgage.—In general the existence of a lien on property is not a breach of a condition requiring "unconditional and sole ownership" in the insured.^{275 279 283 275 283} In one case, where the policy recited that it should be void on the interest of the insured becoming other than unincumbered and the policy was assigned to a purchaser whose deed retained a vendor's lien, the insurer having no notice of the lien, the policy became void.²⁶⁴ Where a lien was paid off before suit was begun on a policy it was held that the insured thus became the entire, sole and unconditional owner from the time the deed was made to him within the policy, which became void if the interest of the insured was other than such interest.²⁷⁴ In a case where a policy provided that it should become void if the property were not owned in fee or in case there was any fraud and it was shown that the insured had informed the agent that there were outstanding vendor's lien notes against the property the evidence was held insufficient to show fraud.²⁷¹ The absence of a fee simple title to land on which build-

^{262.} Under Act 1903, ch. 69, certain misrepresentations held not to avoid an insurance policy.—*Co-operative Ins. Ass'n of San Angelo v. Ray*, 138 S. W. 1122. See 28 Cent. Dig. Insurance, §§ 597-600.

^{263.}—**(B) Title or Interest of Insured.** (See 28 Cent. Dig. Insurance, §§ 601-635.)

^{263.} A purchaser of real estate who receives a deed retaining a vendor's lien for the unpaid part of the price acquires the entire, unconditional and sole ownership within policy stipulating that it shall be void on the interest of insured being or becoming other than entire, unconditional and sole ownership.—*Wright v. Hartford Fire Ins. Co.*, 118 S. W. 191. See 28 Cent. Dig. Insurance, §§ 601-635.

^{264.} A fire policy stipulating that it should be void on the interest of insured becoming other than unincumbered was with the consent of insurer, subject to its conditions, assigned to a purchaser, whose deed of the property retained a vendor's lien for the unpaid part of the price. Insurer had

no notice of the lien. Held, that the policy was void.—Id.

^{265.} Insured's statement to agent that he had sold property to H. held not to invalidate policy, he having been told by real estate agents that H. was the purchaser.—*Camden Fire Ins. Ass'n v. Bomar*, 176 S. W. 156.

^{270.} An equitable title meets the requirements that the interest of the insured is the entire, unconditional and sole ownership.—*Hanover Fire Ins. Co. v. Shrader*, 31 S. W. 1100, 11 Tex. Civ. App. 235.

^{271.} A fire policy provided that it should be void if the property were not owned in fee by the insured, or in case of any fraud or false swearing by insured. In an action on the policy it appeared that a deed of the property had been made to the insured, but all the vendor's lien notes, though due, had not been paid, which was known to the member of the insured firm who secured the insurance, and who stated all the facts to the insurance agent. Held, that such evidence was insufficient to show that the person who secured the insurance was guilty of any fraud.—*Underwriters' Fire Ass'n v. Palmer & Co.*, 74 S. W. 603.

ings are situated will preclude recovery where the policy requires it.^{287 277} It is also held that a clause in a policy rendering it void for outstanding incumbrances which are not communicated to the insurer at the time of insurance, applies only to the portion of the property incumbered.²⁸⁹ (For facts authorizing the court to find that there was no lien within the provision of the policy which would avoid it see Ann. 276.)

(C) **Leasehold Interests.**—Where a policy provides that it should be void if the subject of the insurance be a building on ground not owned by the insured in fee simple and it covers a building and separately valued articles of personal property in and about it, such a policy is avoided only as to the building which was situated on leased ground and not as to the other property.²⁸⁶ It was error for the court to charge that, “as to the property being leased, the facts

272. A fire policy provided that it should be void if insured's interest in the property was other than unconditional or sole ownership, or if the building or ground was not owned by him in fee simple. Insured owned only an undivided half of the property, having verbally agreed to purchase the other half; but no part of the price had been paid, and the situation of the parties had not been changed. Held, that the policy was breached.—*Fire Ass'n of Philadelphia v. Calhoun*, 67 S. W. 153, 28 Tex. Civ. App. 409.

273. Provision of a fire policy to be void if fee simple title of insured to the land be not evidenced by deed held a valid condition precedent to insurance.—*Merchants' & Bankers' Fire Underwriters v. Williams*, 181 S. W. 859.

274. Insurance was effected on property whereon existed a vendor's lien. At the time of the loss the lien existed, but was discharged by payment before suit on the policy was brought. Held, that insured, when he paid off the lien, became “the entire, sole, and unconditional owner” from the time the deed was made to him, within the provision of the policy rendering it void, if the interest of the insured be any other than such interest.—*Liverpool & London & Globe Ins. Co. v. Ricker* (Tex. Civ. App.) 81 S. W. 248, 10 Tex. Civ. App. 264.

275. In an action on a fire policy by a mortgagee to whom the loss was payable, an instruction that, if plaintiff had sold the property to assured, and taken his notes containing the vendor's lien on the property to secure the payment of the price, and had given assured a bond for title and delivered possession, assured was the sole and unconditional owner of the property as required by the policy, was proper.—*Hamburg-Bremen Fire Ins. Co. v. Ruddell*, 82 S. W. 826.

276. Defendant corporation contracted to purchase certain real estate

and cement works thereon, with certain personal property, for the lump sum of \$4,500. \$2,500 was paid at the time of purchase. The deed was to be delivered on payment in full of the consideration. At the time defendant applied for insurance about \$1,000 of the consideration remained unpaid, but defendant claimed that, as the title to some of the land was defective, the amount paid was the reasonable value of the remaining property. Held, that, in the absence of proof as to the value of the personal property, etc., it could not be presumed that the difference between the amount paid and the price represented the value of the personal property, and that there was therefore no lien on the property insured, as represented by defendant, within a provision that the policy should be void if the insured's interest in the property was not truly stated.—*Fire Ass'n of Philadelphia v. American Cement Plaster Co.*, 84 S. W. 1116.

277. An insurance policy covering a house and personal property situated therein, separately valued, is void as to both personalty and realty for misrepresentation as to the title of the land on which the house is situated, under a clause stating that the policy should be void if insured misrepresented any material fact concerning “this insurance.”—*Home Ins. Co. of New Orleans v. Smith* (Tex. Civ. App.) 32 S. W. 240.

278. The existence of a lien on property is not a breach of a condition in a fire policy requiring “unconditional and sole ownership” in the assured.—*Alamo Fire Ins. Co. v. Brooks* (Tex. Civ. App.) 32 S. W. 714.

279. That the property insured is mortgaged does not avoid the policy, under a condition avoiding the same unless insured is the sole, absolute, and unconditional owner.—*Burlington Ins. Co. v. Coffman* (Tex. Civ. App.) 35 S. W. 406.

do not show in law such a lease as would affect the insurance policy," where the evidence tended to show the insured building was on leased ground, which would avoid the policy.²⁸⁴

(D) **Marital Interests.**—A husband's interest is not "other than entire, unconditional and sole" where he builds a dwelling on land which is the separate property of the wife and they occupy it as a homestead.²⁸⁰ In a case where the surviving husband stated that his title was complete to the homestead on which he resided with his minor children, it was held that he made no such material misrepresentation as would avoid the policy even though he had not qualified as survivor in the community and the fee to one-half of the community vested in the minor children at their mother's death.²⁸⁵ A wife was held to be the sole owner of property purchased by her earnings, after she had been abandoned by her husband, within the meaning of a policy covering the property.²⁸²

280. Where a husband builds a dwelling on land which is separate property of his wife, and they occupy it as a homestead, his interest is not "other than entire, unconditional, and sole ownership of the property," within the meaning of fire policy on the building issued to him.—*Warren v. Springfield Fire & Marine Ins. Co.* (Tex. Civ. App.) 35 S. W. 810.

281. A vendee in possession of land on which she had erected improvements under a verbal contract with the owner to convey the same to her in fee simple upon payment of the price thereof was the unconditional owner of the property, with the condition of a policy of insurance covering the same, subject only to an incumbrance for the unpaid price.—*Queen Ins. Co. of America v. May* (Tex. Civ. App.) 35 S. W. 829.

282. Upon the abandonment of the wife by the husband, the homestead of the parties was sold, and the proceeds equally divided. For three years thereafter, the husband failed to contribute towards the support of the wife or of the children of the marriage whom he left with her, and never during that time made any claim whatever to any part of the personal earnings of the wife, out of which she supported herself and her children. Held that, assuming there was no release or gift by the husband to the wife of her entire earnings, the abandonment was such as to invest the wife with the right to control and dispose of them as part of the community estate, which estate she had the right to control in view of the husband's abandonment of her; so that the wife was, in effect, the sole owner of property purchased with such earnings, within the condition of a policy of insurance covering the property.—*Queen Ins. Co. of America v. May* (Tex. Civ. App.) 35 S. W. 829.

283. The fact that a surviving partner has paid out in the settlement of the firm, or individual indebtedness of the deceased partner, and in the expenses incident to the management and discharging of such indebtedness, a sum equal to the deceased's interest in the firm, does not render the surviving partner the sole owner of the assets within the meaning of a provision in an insurance policy that, if the interest of the assured is other than "the entire, unconditional, and sole ownership," it must be so expressed.—*Crescent Ins. Co. v. Camp*, (Tex.) 9 S. W. 473.

284. When the evidence tends to show that the insured building was on leased ground, and the policy expressly provides that it shall become void if the insured building stand on leased ground, unless consent is indorsed thereon, and there is no such indorsement, it is error to charge that, "as to the property being leased, the facts do not in law show such a lease as would affect the insurance policy."—*East Texas Fire Ins. Co. v. Brown*, (Tex. Sup.) 18 S. W. 718.

285. In his application, plaintiff, in answer to the question, "Is your title to the above property absolute?" answered, "Complete." The policy provided that it shall be void "if the assured is not the sole and unconditioned owner of the property, or if his interest in the property is not truly stated in the policy." The house, and the 200 acres on which it stood, part of a 400-acre community tract, at the time of taking the insurance and prior thereto, at the time of his wife's death, and subsequently at the time of the loss, was his homestead, on which he resided with such of his children as were minors. Held, that though plaintiff had not qualified as survivor in the community, and though the fee to half the community property vested in

A son who had been deeded certain real estate by his father in consideration of a sum due such grantee from the community estate of his mother, the grantor's wife, the real estate being owned by a corporation, most of the stock of which was owned by the grantor, was held the sole, absolute and unconditional owner of the property within the requirements of a policy thereon.²⁹² The fact that part of the furniture was owned by the wife of the insured before their marriage was not a breach of the warranty that the insured was the sole and unconditioned owner, since he had the actual possession and enjoyment, and hence had an insurable interest.²⁹³

(E) Partnership Property.—Where the estate of a deceased partner had an interest in a stock of goods it was held that the surviving partner only held the legal title to all the personalty of the former firm and this was in trust so that he was not the absolute owner contemplated in the policy and could not recover.²⁹⁵ And the fact that such surviving partner had paid out in the deceased partner's behalf a sum equal to the latter's interest in the firm did

the children on the death of their mother, still, as there had been no partition among the heirs, and as he had the right to use and occupy the whole of the homestead unconditionally as long as he lived, he had made no such material misrepresentation as would prevent his recovery.—*East Texas Fire Ins. Co. v. Crawford*, (Tex. Sup.) 16 S. W. 1068.

^{296.} A fire insurance policy covering a building, and also separately valued articles of machinery and personal property in and about it, is avoided only as to the building which was situated on leased ground, and not as to the other property, by a clause that the "entire policy shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple."—*Hibernia Ins. Co. v. Bills* (Tex. Sup.) 29 S. W. 1063.

^{297.} Under the provision of an insurance policy that it shall be void if the subject of insurance be buildings upon ground not owned by the insured in fee simple, a want of such title precludes recovery.—*Home Ins. Co. v. Smith* (Tex. Civ. App.) 29 S. W. 264.

^{298.} A condition, in a policy on a building, that it should be void if the interest of the insured was other than sole ownership, or if the building was on ground not owned by the assured in fee simple, is not broken by the existence of a lien on such building and ground.—*Alamo Fire Ins. Co. v. Lancaster* (Tex. Civ. App.) 28 S. W. 126.

^{299.} A clause in a policy, rendering it void if incumbrances existed on the property, the knowledge of which was not communicated to the company at the time of insurance, applied only to that portion of the property in-

cumbered.—*Alamo Fire Ins. Co. v. Schmitt* (Tex. Civ. App.) 30 S. W. 833.

^{300.} Where a policy holder stated absolutely that he owned the automobile destroyed, the insurer is not bound to make further inquiries to ascertain whether the statement was true.—*Hamilton v. Firemen's Fund Ins. Co.*, 177 S. W. 173.

^{301.} A fire policy's provision that it be void if insured's interest be not unconditional and sole ownership, or if insured does not own in fee simple the land, refers only to the date of its issuance.—*Fidelity-Phoenix Fire Ins. Co. v. O'Bannon*, 178 S. W. 731.

^{302.} M., who owned all the capital stock of a corporation except a few shares belonging to his ward, conveyed, in his individual capacity, certain real estate of the corporation to his son by a general warranty deed purporting to grant a fee simple, in consideration of a sum due the grantee from the community estate of his mother, M.'s wife. For several years previous to the conveyance, the corporation had ceased to do business or keep up its organization. Held, that the grantee was the "sole, absolute, and unconditional owner" of the property in fee, within the requirements of an insurance policy thereon.—*Phoenix Assur. Co. of London v. Deavenport*, 41 S. W. 399, 16 Tex. Civ. App. 283.

^{303.} The fact that part of furniture insured was owned by the wife of the insured before their marriage was not a breach of a warranty that the insured was sole and unconditional owner, since he had the actual possession and enjoyment, and hence had an insurable interest.—*Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.) 41 S. W. 513.

not render him the sole owner of the assets of the firm, as contemplated.²⁸³

(F) Vendor's Rights.—Where the insured told the agent that he had sold certain property to a party the policy was not invalidated, he having been told by real estate agents that such party was the purchaser.²⁸⁵

(G) Vendee in Contract for Sale.—A vendee in possession of land on which she had erected improvements under a verbal contract with the owner to convey to her in fee simple upon payment of the price thereof, is the unconditional owner of the property within the meaning of the policy, subject only to the incumbrance for the unpaid price.²⁸¹ A policy requiring absolute ownership was held breached where an insured who owned an undivided half of a certain piece of property had agreed to purchase the other half but no part of the price had been paid and the situation of the parties had not been changed.²⁷²

(H) Miscellaneous.—The fact that furniture of another was contained in the same building with that insured will not render the policy void, if such other property was not intended to be included as part of that insured.²⁸⁴

(1) Fee Simple Title by Deed as a Condition Precedent.—A provision rendering a policy void if the fee simple title to land be not evidenced by deed is held to be a valid condition precedent to insurance.²⁷⁵

(2) Not Duty of Insurer to Make Further Inquiries.—Where the policy holder stated absolutely that he owned the property destroyed, the insurer is not bound to make further inquiries as to whether the statement was true.²⁹⁰

(3) As to When Condition of Ownership Refers.—A provision in a policy rendering it void if the insured's interest be not unconditional and sole ownership or if he does not own the land in fee simple, refers only to the date of its issuance.²⁹¹

(I) Incumbrances—(1) In General.—A warranty in a fire policy against incumbrances existing at the time on the property insured is valid and its violation through failure to disclose the same or a false representation by the insured renders the policy

²⁸⁴. Where an owner of property insures the same and warrants his ownership thereof, the policy of insurance describing the property as household and kitchen furniture contained in a certain building, the fact that furniture of another was contained in such building will not render the policy void, if such other property was not intended to be included as part of that insured—*Liverpool & L. & G. Ins. Co. v. Nations*, 59 S. W. 817.

²⁸⁵. Where policy stipulated that if the ownership was other than absolute it must be expressed in the

written portion and it was shown that the estate of a deceased partner had an interest in a stock of goods which existed at the time of the fire, it was held that the surviving partner only held the legal title to all the personalty of the former firm and this was in trust, not for his own use but for the heirs of the deceased and whether the interest was a legal and equitable one in the insured goods of the former firm was immaterial—he was not the absolute owner contemplated by the policy and could not recover.—*Crescent Ins. Co. v. Camp et al.*, 64 Tex. 521.

void.^{302 306 307 312} Art. 3096aa (Laws 1903, ch. 69) providing that matters misrepresented must be material to the risk to avoid a policy and Art. 3096bb (Laws 1903, ch. 69), providing that no defense based upon misrepresentation shall be valid unless the insurer gave notice to the insured within ninety days after discovering such misrepresentation that it did not intend to be bound by the policy, are remedial within the rule requiring a liberal construction of remedial statutes to accomplish the legislative purposes, being designed to prevent forfeitures.^{309 310 311}

(2) **Mixed Personalty and Realty.**—A policy on personalty conditioned that it should be void if the subject of insurance be incumbered by a chattel mortgage was not avoided by a chattel mortgage on one of the articles covered by the policy,^{299 297} especially where the value of the unencumbered portion of the subject of insurance exceeds the amount of insurance on all the goods.²⁹⁸ Where a policy covering a house and personal property, declared that it should be void if the subject of insurance or any part thereof, be encumbered, it was held that the fact that the house was on land incumbered by a vendor's lien constituted a breach of the policy, even though the contract which created the lien was made before the house was built.²⁹⁵

(3) **Rights of Mortgagee.**—A mortgage clause in a policy, payable to a mortgagee as his interest may appear and providing that it shall not be invalidated as against the mortgagee by any act or neglect of the mortgagor, does not prevent the forfeiture of the policy, under a provision that the policy shall be void in case the property is incumbered or on account of other misrepresentations of the mortgagor in the application.^{304 305}

(4) **Miscellaneous.**—Where an insurer had no notice of a chattel

283—(F) Incumbrances. (See 28 Cent. Dig. Insurance, §§ 636-651.)

296. An insurance policy on household goods, which provided that it should be void if the subject of insurance, being personal property, should be or become incumbered by a mortgage, is not rendered void by a mortgage on a part of the property at the time the policy was executed, where the value of the unincumbered portion exceeds the amount of insurance on all the goods, as "subject of insurance" means all property covered by the policy.—*Mecca Fire Ins. Co. of Waco v. Wilderspin*, 118 S. W. 1131. See Cent. Dig. Insurance, §§ 636-651.

297. A fire policy provided that the entire policy should be void if the subject matter was personal property which was incumbered by a chattel mortgage. The policy specified the particular property covered, and the amount of insurance on each portion thereof. A cotton press particularly

6—Ins.

described in the policy was covered by a chattel mortgage. Held not to avoid the policy as to the other property insured.—*Delaware Ins. Co. v. Harris*, 64 S. W. 867, 26 Tex. Civ. App. 537.

298. A fire policy covering a house and personal property declared that it should be void if the subject of insurance, or any part thereof, be incumbered. At the time the policy was issued the house was on land incumbered by a vendor's lien. Held, a breach of the policy, though the contract which created the lien was made before the house was built.—*Curlee v. Texas Home Fire Ins. Co.*, 73 S. W. 831, 986.

299. A policy on personalty conditioned that it should be void if "the subject of insurance" be incumbered by a chattel mortgage was not avoided by a chattel mortgage on one of the articles covered by the policy.—*North British & Mercantile Ins. Co. v. Freeman* (Tex. Civ. App.) 33 S. W. 1091.

mortgage on property and the policy provided for forfeiture if so incumbered, the policy was breached even if the mortgage was paid off the day after the insurance was affected.³¹³ In a case where a note securing a chattel mortgage was never delivered the incumbrance did not invalidate the policy which became void if the subject of the insurance should be incumbered.³¹³

(5) **Omission to Inform Insurer of Existence of Lien.**—Under a policy providing that it should be void if there was any omission to make known every fact material to the risk, where the insured made no representation as to his ownership of the property and no inquiry was made about its condition and the agent knew that the insured had recently bought the property, insured's omission to make known the existence of a vendor's lien would not prevent recovery.³⁰⁸

(6) **Notice and Inquiry of Insurer as to Existence of Lien.**—The filing and indexing of a chattel lien does not constitute notice to an insurer of an incumbrance on insured property.³⁰⁰ When no written application is taken an insurer is not bound to inquire as to the incumbrances on property before issuing a policy containing the usual stipulations in that regard and the failure to make such inquiries is not a waiver of such stipulations.³⁰¹

^{300.} *Sayles' Civ. St. Art. 3190b, § 7*, providing for filing and indexing chattel liens, instead of recording, as previously required, and that, when so filed and indexed, an instrument shall have the same effect as theretofore given it when fully registered, and "all persons shall be thereby charged with notice thereof," is not intended to enlarge the scope of the notice, which, under the provisions for full registration (*Rev. St. Art. 3324*), extends only to creditors of the mortgagor and subsequent purchasers or incumbrancers in good faith. Such filing will not constitute notice to an insurance company of an incumbrance on insured property. 31 S. W. 1086 (*Civ. App. 1895*) reversed.—*Aetna Ins. Co. v. Holcomb*, 34 S. W. 915, 89 Tex. 404.

^{301.} An insurer is not required, when no written application is taken, to inquire as to incumbrances on property before issuing a policy thereon containing the condition that it shall be void in case of incumbrance, unless by agreement otherwise, indorsed on the policy, and its failure to make such inquiries is not a waiver of the condition. 31 S. W. 1086 (*Civ. App. 1895*) reversed.—*Aetna Ins. Co. v. Holcomb*, 34 S. W. 915, 89 Tex. 404.

^{302.} A false representation by the insured in his application for insurance that there is no lien on the property against the loss of which he wishes to be insured avoids a policy issued upon the application.—*Queen*

Ins. Co. of America v. May (*Tex. Civ. App.*) 35 S. W. 829.

^{303.} Under a stipulation that the entire policy shall become void if the subject of insurance be personalty and be incumbered, a forfeiture cannot be claimed for a false statement as to the amount of incumbrance on the personalty, the subject of insurance being partly real and partly personal.—*Hartford Fire Ins. Co. v. Walker*, 60 S. W. 820, reversed 61 S. W. 711.

^{304.} A mortgage-clause provision, in a policy payable to a mortgagee as his interest may appear, that it shall not be invalidated, as against the mortgagee, by any act or neglect of the mortgagor, by whom it was taken out, does not prevent the forfeiture of the policy, under provisions that the policy "shall be void" in case the property is incumbered, and that it "shall not become valid" if the mortgagor be guilty of any concealment, for concealment by the mortgagor of the existence of other liens.—*Hanover Fire Ins. Co. v. National Exchange Bank* (*Tex. Civ. App.*) 34 S. W. 333.

^{305.} A mortgage-clause provision in a policy payable to a mortgagee as interest may appear,—that the policy as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor,—does not prevent the policy from being invalidated as to the mortgagee on account of misrepresentation by the mortgagor in the application for the insurance; he having, in such matter, acted as the

(J) **Special Circumstances Affecting Risk.**—A failure to communicate to the insurer that a servant had threatened to burn the property insured does not avoid a policy as a concealment of a material fact concerning the subject of insurance.³¹⁵

(K) **Other Insurance.**—Under a policy providing that the policy should be void if the insured then had or should thereafter procure any other insurance on the property covered it was held that the rights of the parties became fixed at the time of the loss and any-

agent of the mortgagee.—*American Cent. Ins. Co. v. Cowan* (Tex. Civ. App.) 34 S. W. 460.

306. The assignee of a policy providing that it shall be void if the interest of the assured is other than the sole and unconditional ownership of the premises cannot recover for a loss thereunder if a person other than the assured had an interest in the property at the time the policy was issued.—*Simonds v. Firemen's Fund Ins. Co.* (Tex. Civ. App.) 35 S. W. 300.

307. Failure to disclose other insurance or a mortgage incumbrance, of which the insurer had no knowledge, as required by a policy, will prevent recovery for a loss.—*Guinn v. Phoenix Ins. Co. of Brooklyn* (Tex. Civ. App.) 31 S. W. 566.

308. Under a policy providing that the same shall be void if there was any omission to make known every fact material to the risk, where insured made no representation to the company's agent as to his ownership of the property, and no inquiry was made about its condition, and the agent knew from previous insurance on the same property that insured had recently bought the property, the omission of insured to make known the existence of a vendor's lien does not prevent his recovery for a loss.—*Liverpool & London & Globe Ins. Co. v. Ricker* (Tex. Civ. App.) 31 S. W. 248, 10 Tex. Civ. App. 264.

309. Laws 1903, ch. 69, amending Rev. St. 1895, Tit. 58, by adding chapter 5, Arts. 3096aa, 3096bb, are remedial within the rule requiring a liberal construction of remedial statutes to accomplish the legislative purposes.—*Mecca Fire Ins. Co. of Waco v. Stricker*, 136 S. W. 599. See 28 Cent. Dig. Insurance, §§ 636-651.

310. Laws 1903, ch. 69, amending Rev. St. 1895, Tit. 58, by adding chapter 5, Arts. 3096aa, 3096bb, should be liberally construed, being designed to prevent forfeitures.—Id.

311. Stipulations in an insurance policy held representations within Laws 1903, ch. 69, amending Rev. St. 1895, Tit. 58, by adding chapter 5, Arts. 3096aa, 3096bb, so that their falsity could not be set up in defense of an action on the policy without showing that they were material.—Id.

312. A warranty in a fire policy against incumbrances existing at the time on the property insured is valid, and its violation renders the policy void.—*Hartford Fire Ins. Co. v. Wright* (Tex. Civ. App.) 125 S. W. 363. See 28 Cent. Dig. Insurance, §§ 636-651.

313. Where plaintiff insured wheat subject to a chattel mortgage, of which the insurer was not shown to have had notice, under a policy providing that it should be void if so incumbered, plaintiff was not entitled to recover thereon, though such mortgage was discharged the day following the execution of the policy, since its existence constituted a forfeiture, which could only be waived by the insurer. Judgment (Civ. App. 1899) 54 S. W. 300, affirmed.—*Insurance Co. of North America v. Wicker*, 55 S. W. 740, 93 Tex. 390.

313a. Where a note secured by chattel mortgage on wheat was never delivered, such incumbrance did not invalidate a policy insuring the wheat, conditioned to be void if the subject of the insurance should be incumbered by a chattel mortgage. Judgment (Civ. App. 1899) 54 S. W. 300, affirmed.—*Insurance Co. of North America v. Wicker*, 55 S. W. 740, 93 Tex. 390.

314. Such statement would not avoid the policy as to the personality, though separately set out and separately valued, since the forfeiture is based on the fact of all and not a part only, of the insured property being incumbered.—*Hartford Fire Ins. Co. v. Walker*, 60 S. W. 820, reversed 61 S. W. 711.

296—(G) **Special Circumstances Affecting Risk.** (See 28 Cent. Dig. Insurance, §§ 652-656.)

315. The failure to communicate to the insurance company upon insuring a sanitarium that the cook, because of a mere personal grievance against the manager, threatened to burn the sanitarium would not avoid the policy as a concealment of a material fact concerning the subject of insurance.—*Washington Fire Ins. Co. v. Cobb*, 163 S. W. 608. 28 Cent. Dig. Insurance, §§ 652-655.

thing done by the insured after that time in violation of such provision did not impair the liability of the company.³¹⁶

FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT OR CONDITION SUBSEQUENT

Statutory Provisions.—Art. 4874a, Rev. St. 1914, providing that no breach or violation of any of the warranties or conditions of a fire insurance policy or application therefor shall render the policy void or constitute a defense thereon unless such breach or violation contributed to bring about the destruction of the property, has been held constitutional^{317 317a} as has also Art. 4874b, that this provision shall not affect the provision regarding real property.³¹⁷

Covenants or Provisions of Policy.—Clauses of forfeiture will be construed most strongly against the insurance company.³¹⁹

288—(K) Other Insurance. (See 28 Cent. Dig. Insurance, §§ 660-669.)

316. An insurance policy provided that, unless otherwise provided by agreement indorsed thereon, the policy should be void if insured then had, or should thereafter make or procure, any other contract of insurance on the property covered in whole or in part by the policy. Held, that the rights of the parties under that provision become fixed at the time of the loss, and anything done by the insured after that time in violation of that provision will not impair the liability of the company.—*Allemania Fire Ins. Co. v. Fordtran*, 128 S. W. 692. See 28 Cent. Dig. Insurance, §§ 660-669.

FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT. (SEE 19 CYC. 706.)

303—Statutory Provisions. (A) Grounds in General.

317. Acts 33d Leg. ch. 105 (Vernon's Sayles' Ann. Civ. St. 1914, Arts. 4874a, 4874b), concerning warranties in fire insurance policy the breach of which do not contribute to a loss, held constitutional.—*McPherson v. Camden Fire Ins. Co.*, 185 S. W. 1055.

317a. Act 33d Leg. ch. 105 (Vernon's Sayles' Ann. Civ. St. 1914, Arts. 4874a, 4874b), as to "technical" breaches of fire insurance policy, held constitutional.—*Aetna Ins. Co. v. Waco Co.*, 189 S. W. 315.

317b. Acts 33d Leg. ch. 105 (Vernon's Sayles' Ann. Civ. St. 1914, Arts. 4874a, 4874b) as to technical breach of a fire insurance policy upon personalty, does not violate the Consti-

tution of Texas and of the United States by depriving an insurance company of the right of contract.—*Aetna Ins. Co. v. Waco Co.*, 189 S. W. 315.

317c. Acts 33d Leg. ch. 105 (Vernon's Sayles' Ann. Civ. St. 1914, Arts. 4874a, 4874b), being an act to prevent insurance companies from avoiding liability for loss to personal property under technical provisions of the policy, does not violate the constitutional provision (Const. Art. 3, § 35) that no bill shall contain more than one subject expressed in its title, when construed to render inoperative as a "technical" provision, a provision forfeiting the policy for taking out additional insurance.—*Aetna Ins. Co. v. Waco Co.*, 189 S. W. 315.

Covenants or Provisions of Policy.

318. The policy providing that "the entire policy shall be void," a forfeiture cannot be claimed for a part of the policy.—*Hartford Fire Ins. Co. v. Walker*, 60 S. W. 820, reversed 61 S. W. 711.

319. Clauses of forfeiture in a policy of insurance will be construed most strongly against the insurance company.—*Scottish-Union National Ins. Co. v. Andrews & Matthews*, 39 S. W. 419.

306—Conditions Subsequent.

320. Temporary breach of a stipulation in a policy, to which there is not attached a specific forfeiture, and which breach does not exist at the time of the fire and loss, and which did not contribute thereto, does not prevent recovery on the policy.—*Phoenix Assur. Co. of London v. Munger Improved Cotton-Mach. Mfg. Co.*, 49 S. W. 271.

Temporary Breach of a Policy.—A temporary breach of a stipulation in a policy, to which there is not attached a specific forfeiture and which breach did not exist at the time of the fire and loss and which did not contribute thereto, will not prevent a recovery.³²⁰

Breach of Technical or Immaterial Provisions.—The breach of a mere technical or immaterial provision in a policy which does not contribute to the loss will not defeat or forfeit a right under such policy.³²⁰

Proceedings to Give Effect to Forfeiture.—A provision avoiding a fire policy if the insured should procure any other insurance on the property covered does not ipso facto make the policy void by the issuance of a second policy in another company, since the company has a right to waive the provisions and continue the policy.³²¹

Rights of Creditors After Breach by Insured.—When the insured has violated the conditions of a policy his creditors have no better right to enforce payment against the insurer than he has.³²²

Parties Affected by Forfeiture of Policy.—An assignee of a policy cannot claim that the building was not properly classified and that the provisions in the policy in regard to additional insurance were not valid.³²³ Where the insurer approves an assignment of a policy when the property is sold there is a new contract of insurance between the assignee and the insurer, whereby the assignee could not be charged with any breaches by the grantor of the original contract.³²⁴ In the case of an assignment of a policy at the time the property is sold the grantees are the insured within the terms of a rider protecting the grantors reserved right and the

308—Conditions Subsequent—Fulfillment or Breach.

320. The breach of mere technical or immaterial provisions in an insurance policy which does not contribute to the loss will not defeat or forfeit a right under the policy.—McPherson v. Camden Fire Ins. Co., 185 S. W. 1055.

310—Notice and Proceedings to Give Effect to Forfeiture. (See 28 Cent. Dig. Insurance, §§ 703, 761, 780, 826, 840, 904.)

321. A provision avoiding a fire policy held not to make it ipso facto void by the issuance of a second policy on the property by another company.—Southern Nat. Ins. Co. of Austin v. Barr, 148 S. W. 845.

Rights of Creditors After Breach by Insured.

322. When an insured has violated conditions of a policy, his creditors have no better right to enforce pay-

ment against the company than himself.—Phoenix Ins. Co. v. Willis, (Tex.) 6 S. W. 825.

311—Parties Affected by Forfeiture of Policy. (See 28 Cent. Dig. Insurance, §§ 704-708, 762, 781, 827.)

323. An assignee of a fire insurance policy held precluded from claiming that the building was not properly classified and that the provisions in the policy in regard to additional insurance was invalid.—Reliance Ins. Co. of Philadelphia v. Dalton, 178 S. W. 966.

324. Where plaintiffs bought property of R covered by an insurance policy issued by defendant, the approval by defendant of R's assignment to them of the policy constituted a new contract of insurance between them and defendant, whereby they could not be charged with any breaches by R. of the original contract.—National Fire Ins. Co. v. J. W. Caraway & Co., 130 S. W. 458. See 28 Cent. Dig. Insurance, §§ 704, 762, 781, 827, 841, 874.

grantor could only recover in the case of loss such an amount as was recoverable by the grantees.³²⁵ As one selling mortgaged property to one assuming the mortgage has the rights of a surety he is entitled to the benefits of a clause in a policy providing that it shall not be invalidated as to the interest of the trustee under the mortgage by any act or neglect on the part of the mortgagor, or owner of the property and hence the vendor may after loss pay to the trustee the amount of the mortgage debt and become the beneficiary's assignee, notwithstanding a forfeiture of the policy by parties who had become primarily liable.³²⁶ This right of the surety cannot be defeated by the prior purchase of the mortgage by the insurer, the premium paid by the original mortgagor, who, as surety, claims the benefit of the insurance, being considered a full equivalent for the risk assumed.³²⁷

Matters Relating to Property or Interest Insured—(A) Change in Use of Building.—A mere change in occupation will not avoid a policy where there is a provision in the policy avoiding it if the risk be increased by a change of occupation.³²⁸

(B) Change in Occupancy of Building.—A provision that the mortgagee should notify the insurer of a change in occupancy was not violated by failing to notify it of the owner's neglect to occupy

325. Where on the sale of insured property the insurance was assigned to the grantees, they were the "assured" within the terms of a rider protecting the grantor's reserved interest, and hence the latter could only recover in case of loss an amount as was recoverable by the grantees.—*Dumphy v. Commercial Union Assur. Co., Limited*, of London, 142 S. W. 116. See 28 Cent. Dig. Insurance, §§ 704-708, 762, 781, 827, 841, 874, 890, 903.

326. Since one selling mortgaged property to one assuming the mortgage has the rights of a surety, he is entitled to the benefits of a clause in a fire policy providing that it shall not be invalidated, as to the interest of the trustee under the mortgage, by any act or neglect on the part of the mortgagor, or owner of the property, and hence such vendor may, after a loss under the policy, pay to the trustee the amount of the mortgage debt, and become the beneficiary's assignee, notwithstanding a forfeiture of the policy by parties who had become primarily liable.—*Merchants' Ins. Co. v. Story* (Tex. Civ. App.) 35 S. W. 68.

327. This right of the surety cannot be defeated by the prior purchase of the mortgage by the insurer; the premium paid by the original mortgagor, who, as surety, claims the benefit of the insurance, being considered a full equivalent for the risk assumed.—*Merchants' Ins. Co. v. Story* (Tex. Civ. App.) 35 S. W. 68.

319—(B) Matters Relating to Property or Interest Insured.—(1) Change in Use of Building. (See 28 Cent. Dig. Insurance, §§ 751-756, 758.)

328. A clause in a policy providing for the insurance of premises for a certain period "while occupied" for saddlery purposes, does not make a mere change of occupation avoid the policy, where it contains another provision avoiding it if the risk be increased by a change of occupation. 25 S. W. 999, affirmed.—*East Texas Fire Ins. Co. v. Kempner* (Tex. Civ. App.) 34 S. W. 393; 12 Tex. Civ. App. 533.

329—(2) Change in Occupancy of Building. (See 28 Cent. Dig. Insurance, §§ 760.)

329. Where plaintiff had agreed in his application to obtain defendant's consent in case of vacancy or change of occupancy, it was not error to define occupancy as "such occupancy as the parties might be presumed to have intended,—that is, a practical occupancy, consistent with the purposes for which the property was insured,"—and to charge that mere temporary absence was not a breach of the obligation to occupy, provided such absence was a contingency fairly within the contemplation of the parties.—*Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.) 41 S. W. 513.

the house when completed.³³⁰ It was not error for the court to define occupancy as such occupancy as the parties might be presumed to have intended, that is, a practical occupancy, consistent with the purposes for which the property was insured.³²⁹ Neither was it error to charge that mere temporary absence was not a breach of the obligation to occupy, provided such absence was a contingency fairly within the contemplation of the parties.³²⁹

(C) Change in Value of Goods Insured.—A provision of an automobile fire policy that the machine should not be used to carry passengers for compensation only prohibited its use for carrying passengers continuously as a business.³³¹

(D) Building Becoming Vacant.—The word "vacant" means empty in its ordinary sense.³³³ The term "occupied" implies an actual use by some person according to the purpose for which the property was intended, and does not imply that some one shall remain in a building all the time without interruption, but merely that there shall not be a cessation of occupancy for any considerable length of time.³⁴⁰ In considering the question as to whether the insured property became vacant and unoccupied the jury will look to the purposes to which parties might reasonably have contemplated it would be put.³³⁵ A temporary absence without a removal of the furniture or an intent to abandon the premises, followed by occupation before the fire is not within a condition against allowing property to become vacant and unoccupied.³³⁴ A policy

330. A provision, in a so called union mortgage clause, that the mortgagee should notify the insurer of a change in occupancy held not violated by failing to notify the insurer of the owner's neglect to occupy the house when completed.—*Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.*, 167 S. W. 816.

335—(3) **Change in Value of Goods Insured.** (See 28 Cent. Dig. Insurance, § 750.)

331. A provision of an automobile fire policy that the machine should not be used to carry passengers for compensation held only to prohibit the use of the machine continuously for carrying passengers as a business.—*Commercial Union Assur. Co. of London v. Hill*, 167 S. W. 1095.

333—(4) **Building Becoming Vacant.** (See 28 Cent. Dig. Insurance, §§ 764-779.)

332. In an action on a fire policy containing a clause that it should be void if the house became vacant without a permit from an agent indorsed on the policy, it appeared that a vacancy permit for 30 days was made out by the agent, but not delivered to the in-

sured, and there was no evidence of a permit that the house should remain vacant longer than such 30 days. Held, that plaintiff could not recover, where it was shown that the fire occurred after such 30 days.—*Maness v. Sun Ins. Co.* (Tex. Civ. App.) 32 S. W. 326.

333. A vacancy of a building during the time necessary for the outgoing tenant to remove his goods, and the incoming tenant to place his goods in the building, is not within the meaning of a provision of a policy thereon avoiding it if the building becomes vacant. 25 S. W. 999 (Civ. App. 1894), affirmed.—*East Texas Fire Ins. Co. v. Kempner*, 34 S. W. 393, 12 Tex. Civ. App. 533. Reversed by Supreme Court 27 S. W. 122.

334. A temporary absence from the insured building by the insured and his family, without a removal of the furniture, or an intent to abandon the premises, followed by occupation before the fire, is not within a condition against allowing the property to become vacant and unoccupied.—*Phoenix Ins. Co. v. Burton* (Tex. Civ. App.), 39 S. W. 319.

335. A defendant insurer cannot complain of the charge that, in considering the question as to whether the insured property became vacant

providing that it shall "at once become null and void" and the unearned premiums be returned, if the premises become vacant without consent of the insurer, is avoided by a vacancy of three days, incident to a change of tenants.³³⁰ Where a policy contained a clause that it should be void if the house became vacant without a permit indorsed thereon and a vacancy permit for a certain number of days was made out by the agent but not delivered, the plaintiff could not recover where the fire occurred after such specified time.³³² In a case where to preserve the insurance a person moved his effects into a room of a house and was not absent from the house more than four days at a time, the house was occupied within a policy providing that the insurance should only continue while the premises were occupied by a tenant as a private dwelling house and that it would be avoided if such house should remain vacant or unoccupied for ten days.³³³ A house did not become vacant or unoccupied where the owner left a large part of his furniture there and placed a room in the possession of a servant who slept there

and unoccupied, the jury will look to the purposes to which parties might reasonably have contemplated it would be put.—*Phoenix Ins. Co. v. Swann* (Tex. Civ. App.), 41 S. W. 519.

336. A fire insurance policy providing that it shall "at once become null and void," and the unearned premiums be returned, if the premises become vacant without consent of the company, is avoided by a vacancy of three days, incident to a change of tenants.—*East Texas Fire Ins. Co. v. Kempner* (Tex. Sup.) 27 S. W. 122.

337. A vacancy of a building during the time necessary for the outgoing tenant to remove his goods, and the incoming tenant to place his goods in the building, is not within the meaning of a provision of a policy thereon avoiding it if the building became vacant.—*East Texas Fire Ins. Co. v. Kempner* (Tex. Civ. App.) 25 S. W. 999. Reversed 27 S. W. 122.

338. Where, after the tenant of an insured house moved out, another person moved in at the request of the owner, so as to preserve the insurance, had all his effects in the house, with control of the premises, and was corporally present and in actual possession of the premises every night during most of the time between departure of the tenant and the destruction of the house by fire, which was about a month, and was not absent from the place during that time for more than four days, the house was occupied, within a provision of the policy that the insurance should only continue while the premises were occupied by a tenant as a private dwelling house, and that the entire policy, unless otherwise provided, should be void if the building, whether intended

for occupancy by the owner or tenant, should remain vacant or unoccupied for 10 days, and the fact that only one of the rooms in the house had been used by the occupant, and that the other rooms were not furnished, did not render the house vacant within the policy; the word "vacant" meaning "empty" in its ordinary sense.—*Agricultural Ins. Co. of Watertown, N. Y., v. Owens*, 132 S. W. 828. See 28 Cent. Dig. Insurance, §§ 764-769.

339. A provision in a policy insuring a building occupied as a sanitarium "while occupied as the Park Terrace Sanitarium," in absence of provisions qualifying such intent, constituted a warranty that the building would be occupied as a sanitarium during the life of the policy.—*Washington Fire Ins. Co. v. Cobb*, 163 S. W. 608. 28 Cent. Dig. Insurance, §§ 764-779.

340. The term "occupied" as used in a fire policy implies an actual use by some person according to the purpose for which it was designed, and does not imply that some one shall remain in the building all the time without interruption, but merely that there shall not be a cessation of occupancy for any considerable length of time.—*Id.*

341. A sanitarium which consisted of some 22 rooms and several cottages was not "occupied" during the months preceding the fire, where during that time there was no attending physician, matron or servants, and no facilities for heating the building, which then only contained three people, who were not authorized to receive patients or work for them, and who left about 26 hours before the fire, after which the building was in charge of a watchman.—*Id.*

until the fire.³⁴³ Where a policy upon several buildings, constituting practically one risk, provided that it should be void as to every part if a certain building were vacant for more than ten days, such a provision goes to the whole contract and if such building is vacant longer than the ten days specified the whole insurance lapses even though the amount of insurance on each building is specified.³⁴² Error in a charge which required the property to be both unoccupied and vacant for ten days before the policy is breached is harmless where the evidence showed no breach of the vacancy condition.³⁴⁴ (For facts showing non-occupancy of a sanitarium within the meaning of a policy see Ann. 339 and 341.)

(E) **Keeping or Use of Prohibited Articles.**—Breach of a condition prohibiting the use of gasoline upon the premises avoids the policy, though the use of the gasoline did not cause the loss.³⁵⁰ However, a temporary using and keeping of gasoline will not avoid a policy.³⁵¹ Neither will a policy be avoided if the gasoline is kept in a shed outside the insured building.³⁴⁶ Where gasoline was delivered at the insured building and sent out to another building to be used it was not “kept, used or allowed” on the premises insured within the policy.³⁴⁸ Proof of a custom of using gasoline for domestic purposes is admissible to explain or avoid a prohibition as to the use of gasoline in operating a laundry.³⁴⁷ A policy providing that it shall be void if the risk be increased is not invalidated by a tenant’s use of a gasoline stove without the knowledge

³⁴². Where one insurance policy upon several buildings, which practically constitutes one risk, provided that it shall be void as to every part if a building therein described is vacant for more than ten days, that provision goes to the entire contract, and if building is vacant longer than 10 days, the whole insurance lapses even though the amount of insurance on each building is specified.—*Mecca Fire Ins. Co. v. Coghlan*, 134 S. W. 266.

³⁴³. Where defendant on removing from the insured premises left a large part of his furniture in the house, and placed a room in the possession of a servant, who slept there until the fire occurred, the house did not become vacant and unoccupied, within the meaning of a contract of insurance.—*German-American Ins. Co. v. Evans*, 62 S. W. 417, 94 Tex. 490, denying writ of error (Civ. App.) 61 S. W. 536, 25 Tex. Civ. App. 300.

³⁴⁴. Where the evidence showed no breach of a condition that a fire policy should be void if the property should be vacant “or” unoccupied for ten days, the error in a charge which required the property to be both unoccupied and vacant for a period of ten days is harmless.—*Home Ins. Co. v. Peterman*, 165 S. W. 103.

³⁴⁶—(5) **Keeping or Use of Prohibited Articles.** (See Cent. Dig. Insurance, §§ 782-791.)

³⁴⁵. A policy of fire insurance prohibiting the keeping or using of explosives on the insured premises is not voided by the temporary use of an inflammable fluid as an experiment for lighting.—*Fireman’s Fund Ins. Co. v. Shearman*, 50 S. W. 598, 20 Tex. Civ. App. 343.

³⁴⁶. A prohibitory clause in a fire insurance policy against the keeping of gasoline on the insured premises does not prevent insured from keeping gasoline in a shed on his lot outside the insured building.—*Fireman’s Fund Ins. Co. v. Shearman*, 50 S. W. 598, 20 Tex. Civ. App. 343.

³⁴⁷. Operating a laundry is not a trade or manufacture within a clause in a fire policy prohibiting the use of gasoline, any custom of trade or manufacture notwithstanding, so as to preclude proof of a custom of using gasoline by the residents of the community at the time the policy was issued, to explain or avoid the prohibition.—*Northern Assur. Co. of London, England, v. Crawford*, 59 S. W. 916.

³⁴⁸. A fire policy stipulated that it should be void if gasoline was kept, used or allowed on the premises.

of the insured.³⁴⁹ The keeping of gasoline for domestic purposes does not work a forfeiture of a policy although the policy prohibits it.^{352 353} (For facts warranting a finding that no illuminating gas was generated in a building see Ann. 345 and 354.)

(F) Incumbrances.—A policy on merchandise and fixtures was not invalidated as to the furniture and fixtures by the execution of a chattel mortgage on the merchandise.³⁵⁷ To defeat a policy providing that it shall be void if, with the knowledge of the insured, foreclosure proceedings are commenced by virtue of any mortgage on the chattels insured, it must appear that such proceedings were commenced with the knowledge of the insured.^{355 356}

which were used for a restaurant. Gasoline was kept on the premises for use in carrying on the business. Sometimes gasoline was delivered at the restaurant for use in it and in the business of insured in another building; but the quantity used in such other business was not kept in the restaurant, but was sent to such other building. Held, that the gasoline so sent out was not "kept, used, or allowed" on the premises insured.—*American Cent. Ins. Co. v. Chancey*, 127 S. W. 577. See 28 Cent. Dig. Insurance, §§ 782-791.

349. A policy which provided that it shall be void if the risk be increased by any means within the knowledge of the assured is not invalidated by a tenant's use of a gasoline stove in the building without the knowledge of the assured.—*East Texas Fire Ins. Co. v. Kempner* (Tex. Civ. App.) 34 S. W., 393, 12 Tex. Civ. App. 533.

350. Breach of a condition in a policy prohibiting the use of gasoline upon the premises avoids the policy, though the use of the gasoline did not cause the loss.—*Pennsylvania Fire Ins. Co. v. Faires* (Tex. Civ. App.) 35 S. W. 55.

351. Where a fire insurance policy contained the warranty that gasoline should not be kept, used, or allowed on the premises, but a gallon was brought on the premises during an afternoon for use thereon, and fire resulted therefrom on the night of the same day, the warranty was not broken, and the insurance company was liable, as the terms employed did not include a temporary keeping and using.—*Springfield Fire & Marine Ins. Co. v. Wade*, 68 S. W. 977, 95 Tex. 598.

352. A custom of the insurer not to permit the use of gasoline on premises insured by it is unavailing as against the permission of such use implied by an insurance of household and kitchen furniture and family stores which are shown to ordinarily include gasoline and gasoline stoves.—*American Cent. Ins. Co. v. Green* (Tex. Civ. App.) 41 S. W. 74, 16 Tex. Civ. App. 531.

353. A prohibition in a fire insurance policy of the use of gasoline is repugnant to insurance therein of household and kitchen furniture and family stores where it appears that gasoline and gasoline stoves are, in the vicinity, an ordinary part of such furniture and stores; and hence the keeping of gasoline for domestic purposes does not work a forfeiture.—*American Cent. Ins. Co. v. Green*, 41 S. W. 74, 16 Tex. Civ. App. 531.

354. An insurance policy provided that it should be void if illuminating gas or vapor should be generated in the building, or adjacent thereto, to use therein, or if gasoline should be kept or used on the premises. Insured manufactured "French Electric Fluid" from gasoline and other ingredients, which was kept in a shed separate from the insured building, and used it in a lamp for lighting said building; a portion of it being kept on a shelf in the back part of the building. Insured had used all of the fluid several days before the fire occurred, and was not using any at the time of the fire. Held, that the facts warranted a finding that no illuminating gas was generated in the building for use therein, and, in the absence of expert testimony that French Electric Fluid and gasoline are the same, the facts also justified a finding that no gasoline was kept or used on the premises.—*Phoenix Ins. Co. v. Shearman*, 43 S. W. 930, 17 Tex. Civ. App. 456.

330—(6) Incumbrances. (See 28 Cent. Dig. Insurance, §§ 829-839.)

355. Where a policy provides that it shall be void if, with the knowledge of insured, foreclosure proceedings be commenced by virtue of any mortgage on the chattels insured, it must appear, to defeat the policy, that the foreclosure proceedings were commenced with the knowledge of the insured.—*North British & Mercantile Ins. Co. v. Freeman* (Tex. Civ. App.) 33 S. W. 1091.

356. Where insured had no knowledge at the time of the loss, of the filing of the petition in a suit to fore-

(G) Change of Title or Interest—(1) In General.—A mere contract to convey property covered by a policy, the consideration not being paid and there being no change in the possession does not constitute a change in the interest or title so as to avoid the insurance.³⁶⁷ But a conditional sale was held a change in the interest, title and possession that would avoid the policy.^{367 368} A married woman is the unconditional and sole owner of her separate property within the meaning of a policy, although her husband has a right of homestead therein.³⁶⁹ A transfer of title made with the consent of the agent does not avoid a policy, although no consent was endorsed on it, where the policy declares the transfer must be endorsed on it but does not stipulate that such condition cannot be waived.³⁷² It has been held that a provision voiding a policy for any change in the insured's interest or title does not apply where he sells the land but retains title in the house, to be removed when the balance of the price is paid.³⁷⁸ And in the same case it was decided that the provision as to unconditional ownership referred to the date of the policy and not to any subsequent sale of the ground.^{379 380} A policy will be avoided where an owner, without the insurer's consent transfers his property to another, where it provides that it shall become void if any change shall take place in the possession or interest in the property not consented to in writing indorsed thereon.³⁸⁰

close a mortgage on the insured premises, by which the suit was begun, under Rev. St. 1895, Art. 1177, there was no forfeiture of the policy under a clause providing that it should be void "if with the knowledge of the insured foreclosure proceedings be commenced," etc., though insured had been previously served with citation in such suit.—*London & L. Fire Ins. Co. v. Davis*, 84 S. W. 260.

357. A fire policy on merchandise and fixtures held not invalidated as to the furniture and fixtures by the execution of a chattel mortgage on the merchandise.—*Spring Garden Ins. Co. of Philadelphia v. Brown*, 143 S. W. 292.

358—(7) Change of Title or Interest.
(See 28 Cent. Dig. Insurance, §§ 794-822, 825.)

358. G. made an assignment to plaintiff of all his property including that insured in defendant company under a policy providing for its forfeiture in case the property covered thereby should be assigned without defendant's consent; and on the same day defendant's agent, who had also issued to G. policies in other companies, verbally promised plaintiff that he would have G. transfer to the former all policies held by G. in companies which such agent then represented.

Three policies were thereupon transferred to plaintiff, the agent endorsing his consent thereon; and at the same time G. was told by the agent that his agency for defendant had terminated and that the policy in such company must be cancelled. The agent thereupon drew a draft on the company for the unearned portion of the premium and G. signed a receipt therefor on the policy, believing he was transferring it like the others; defendant thereafter remitting to such agent the amount of the draft, which amount the latter credited to G. on his books. Plaintiff had no knowledge that the agency had been terminated and believed that all the policies had been transferred to him. Held that defendant was not liable on the policy.—*Campbell v. German Ins. Co. of Freeport* (Tex. Civ. App.) 31 S. W. 310.

359. Execution of a mortgage on the real estate on which a building is situated is not a change of interest, within the condition in a policy thereon forfeiting it "if any change other than the death of the insured take place in the interest, title or possession of the subject of the insurance. *Lampasas Hotel & Park Co. v. Phoenix Ins. Co.* (Tex. Civ. App.) 38 S. W. 361.

360. Where the owner of property conveys it to another for a stipulated price, the payment of which is secured by vendor's lien notes, a vendor's

(2) **As Between Partners.**—In general, a mortgage taken by a retiring partner who sells his interest to the remaining partner to secure a part of the purchase money is not within a condition of a policy prohibiting a change of interest without the consent of the insurer, under the rule that the policy remains operative as long as the insured retains any interest in the property, legal or equitable, to the extent of the interest so retained.³⁶¹ A person who continued a firm business in the firm name and took out insurance in that name did not misrepresent any material fact or any provision of the policy that his interest was not as stated.^{363 364} In a case where a policy could not be assigned except by the consent of the company in writing and a partner sold out to his co-partners his interest in the stock of goods, it was held that the sale of one partner to the others of his interest did not by reason of the provision in the policy release the insurer.^{369 392} It was further held that the retirement of one of the partners was not such a change as to prevent a suit on the policy by the firm, as the non-assignability part of the policy contemplated only a transfer to parties other than those to the original contract.^{390 393} The insurance was intended to cover the stock of the insured and there was no substantial change caused by the sale of one partner to another material to the risk.³⁶¹ Where the insured took in two partners, put one in possession and received part of the price the policy was avoided as a change in interest and it was immaterial that he retained a lien on the goods and after the fire paid the money back to his partners.³⁷⁷

lien, and a deed of trust, and the property is occupied by a tenant of the new owner, who pays his rent to the original owner, to apply on the purchase price due him, an insurance company that had insured the property while it belonged to the original owner, and had not consented to its transfer, will not be responsible for the loss of the property occurring after the transfer, where its policy contained a provision that it should be void if any change should take place in the possession or interest of the property not consented to in writing indorsed on the policy.—*Northern Assur. Co. of London, England, v. City Sav. Bank*, 45 S. W. 737, 18 Tex. Civ. App. 721.

361. A mortgage, taken by a retiring partner, who sells his interest to the remaining co-partner, to secure a part of the purchase money, is not within the condition of a policy prohibiting a change of interest without the consent of the insurer under the rule that the policy remains operative so long as the insured retains any interest in the property, legal or equitable, to the extent of the interest so retained.—*Delaware Ins. Co. of Philadelphia v. Hill*, 127 S. W. 283.

362. A provision of a fire policy requiring notice to be given of any mortgage on the property insured is obligatory, and renders the policy void when not complied with. (*Civ. App. 1899*) *Insurance Co. of North America v. Wicker*, 54 S. W. 300, judgment affirmed (1900) 55 S. W. 740, 93 Tex. 390.

363. Where insured failed to give notice of the existence of a mortgage on the property insured as required by the terms of the policy, the fact that such mortgage was paid before loss was incurred does not alter the legal effect of the breach of the requirement. —(*Civ. App. 1899*) *Insurance Co. of North America v. Wicker*, 54 S. W. 300, judgment affirmed (1900) 55 S. W. 740, 93 Tex. 390.

364. A person named B. doing business under the firm name of B. Bros., insured his goods in his firm name. Held, that his representation that the goods belonged to B. Bros. was not a violation of the provision of the policy that it should be void if the insured had concealed or misrepresented any material fact, or if the interest of the insured was not truly stated. —*Bonnett v. Merchants Ins. Co.*, 42 S. W. 316.

(3) **Mortgages and Rights of Mortgagees.**—In an early case it was held that the execution of a mortgage on insured property is a breach of a condition that the policy shall be void if any change takes place in the interest of the insured, whether by sale, transfer or conveyance,³⁶⁵ but this is not the case where the mortgage is executed on the land on which the insured property is situated.³⁶⁶ Failure to give notice of a mortgage, if required in the policy, renders such policy void,³⁶⁷ and the fact that the mortgage was paid before the loss did not alter the legal effect of the breach.³⁶⁸ A sale of property by the legal owner will not affect the mortgagee's rights under a mortgage clause, making the policy payable as the interest of such mortgagee may appear.³⁷⁰ Where a policy insuring a mortgagee's interests was excepted from a foreclosure proceedings condition it was not invalidated as to him by a foreclosure of a judgment lien against the property by a third party.³⁷¹ (For facts showing mistake in naming mortgagee and owner and holding that real mortgagee was not bound to give notice of the termination of the builder's interest, see Ann. 381.)

(4) **What Constitutes a Change in Title.**—Property sold in partition and afterwards sold again were facts showing a change in title and constituting a complete defense.³⁶⁶ Where property subject to a lien was transferred to the lien holders and by them transferred back to the insured the status of the title was not changed.³⁶⁵

^{365.} When a policy was issued there was a lien on the property insured, and in adjusting a difference that arose in regard thereto it was agreed between insured and the lienholders that the debt would be reduced to a certain sum and a change in the form of the evidence of security should be made, in that insured was to execute a deed to the property to the lienholders, and they should retransfer the property to insured, he to execute a deed of trust to them to secure the amount agreed on. These instruments were signed on a certain date by all the parties except one of the lienholders, who was absent, but who, about two weeks later, upon his return, signed the transfer back to insured, thus consummating the agreement theretofore made between the parties. The papers, during such two weeks, were held by the lienholders. Held, that such transaction did not change the status of the title to the property, and was not a breach of that clause of the policy relating to change of title.—*Pennsylvania Fire Ins. Co. v. Waggener*, 97 S. W. 541.

^{366.} Where a policy provided that it should be void if any change should take place in the interest, title, or possession of the subject of insurance, other than by the death of the insured, and the property was legally sold in partition, and thereafter sold again, these facts showed a change in the

title, within the terms of the policy, and constituted a complete defense to an action thereon.—*Hartford Fire Ins. Co. v. Ransom*, 61 S. W. 144.

^{367.} A mere contract to convey property covered by a fire policy—the consideration therefor not being paid, and there being no change in the possession or right of possession—does not constitute a change in the interest or title, within a stipulation in the policy by which it is to become void if any change in the interest or title occurs.—*Home Mut. Ins. Co. v. Tomkies*, 71 S. W. 812.

^{368.} A person who continued a firm business in the firm name, and took out insurance in that name, did not thereby violate a provision of the policy that it should be void if the insured concealed or misrepresented any material fact, or if his interest was not fully stated.—*Delaware Ins. Co. v. Bonnet*, 48 S. W. 1104, 20 Tex. Civ. App. 107; *Merchants' Ins. Co. v. Same*, 48 S. W. 1110.

^{369.} A married woman is the unconditional and sole owner of her separate property, within the meaning of a policy providing that it should be forfeited if the interest of the assured was other than that of an unconditional and sole ownership, though her husband has a right of homestead therein.—*Sun Insurance Office v. Benecke*, 53 S. W. 98.

A lease of property with a provision that at any time the lessee paid the lessor a certain sum of money the lessor "hereby" sells the absolute title, violates a policy.³⁷³ A transfer of property for the purpose of negotiating a loan, not however accomplished, is not a breach of the condition as to change of title or ownership.³⁷³ An insurer was not relieved of liability by a conveyance as security a number of years before the loss, because the policy, if it had been issued as promised, would have been subsequent to such conveyance.³⁷⁴ A policy was not invalidated by a deed made to a party

370. Where fire policies are made payable to a mortgagee as its interest may appear, under an agreement by the owner to procure insurance to protect the mortgage debt, a sale of the property by the owner, without the consent of the mortgagee, will not affect its rights.—*Pan Handle Nat. Bank v. Security Co.*, 44 S. W. 15, 18 Tex. Civ. App. 96.

371. Where a policy insuring a mortgagee's interest was excepted from a condition that it should be void if foreclosure proceedings should be brought against the property with the knowledge of the mortgagee, such policy was not invalidated as to him by a foreclosure of a judgment lien against the property by a third party.—*Sun Ins. Office v. Beneke*, 53 S. W. 98.

372. Where a fire insurance policy declares that a transfer of title avoids the policy unless consent to such transfer is indorsed thereon, but does not stipulate that such condition cannot be waived, a transfer of title made with the knowledge and consent of an agent of the insurance company who has authority to permit the transfer does not avoid the policy, although no consent is indorsed on it.—*Phoenix Ins. Co. v. Witt* (Tex. Civ. App.) 25 S. W. 796.

373. A provision in a policy of fire insurance making it void "if any change takes place in the title, interest, or possession of the property," etc., is violated by the making of a lease which provides that, if the lessee pays the lessor a certain sum any time during the term thereof, the lessor "doth hereby sell, transfer, and convey" to the lessee the absolute title to the property.—*Fire Ass'n of Philadelphia v. Flournoy*, (Tex. Sup.) 19 S. W. 793; *Northern Assur. Co. of London v. Same*, Id. 795.

374. Insurance company liable although no policy was issued, because it had agreed to attend to the matter, held not relieved of liability by a conveyance as security two years before the loss because the policy, if issued, would have been subsequent to such conveyance.—*Commonwealth Fire Ins. Co. v. Obenchain*, 151 S. W. 611. See 28 Cent. Dig. Insurance, §§794-825.

375. A transfer of the legal title to property to another, for the mere purpose (not, however, accomplished) of having him negotiate a loan upon it for the grantor, does not show a breach of a condition in an insurance policy against sale, transfer, or change in title, or that the interest of the insured is not the entire, unconditional, and sole ownership for the benefits of the assured.—*New Orleans Ins. Co. v. Gordon*, (Tex.) 3 S. W. 718.

376. The execution of a mortgage on insured property is a breach of a condition that the policy shall be void if any change takes place in the "interest" of the assured, "whether by sale, transfer, or conveyance."—*East Tex. Fire Ins. Co. v. Clarke*, (Tex.) 15 S. W. 166.

377. As regards the provision of a fire policy voiding it in the event of any change in interest, title, or possession of the subject-matter of insurance, insured having taken in two partners, put one in possession, and received part of the price, it is immaterial that he retained a lien on the goods for balance of price, and after the fire paid back the money to his partners.—*Mechanics' & Traders' Ins. Co. v. Davis*, 167 S. W. 175.

378. A fire policy's provision, voiding it for any change in insured's interest or title, does not apply where he sells the land, retains title to the house, to be removed, balance of price to be then paid.—*Fidelity-Phoenix Fire Ins. Co. v. O'Bannon*, 178 S. W. 731.

379. In a policy insuring a dwelling house, provisions that it should be void if the interest of the insured was other than an unconditional ownership, or if the dwelling was on ground not owned by the insured, referred to the date of the policy, and it was not avoided by a subsequent sale of the ground.—*Insurance Co. of North America v. O'Bannon*, 170 S. W. 1055.

380. Under a policy on a dwelling providing that upon any change in the interest in the dwelling it should be void, a subsequent sale of the ground with reservation of title to the dwelling with right of removal within a fixed time held not to avoid the policy within the time for removal.—*Id.*

through mistake, such change of title having been consented to by the agent, though the party had not bought the land and the deed had been made by real estate agents.³⁸² (For facts showing an absolute sale of an automobile, see Ann. 382.) (For facts held not to render a policy void for change in ownership of a stock of merchandise, see Ann. 384.)

(5) **Fraudulent Assignment.**—After a fraudulent assignment, consented to by the insurer on the false representations of the insured, it was held that the latter was not liable after loss on the ground of misrepresentation of interest in the property, though its agent was a party to the fraud.³⁸³

(6) **Construction of a Cotton Contract.**—Where a policy on cotton specified that it must be the property of the insured, held by them in trust or on commission, or sold but not delivered and it must also be at the place specified, and the cotton was bought by another party with funds advanced by the original insured and shipped, the bill of lading being taken in the name of the latter, the court held that the cotton was not covered by the policy under its own terms, as the risk could not be extended beyond the plain letter of the contract.³⁸⁵ The court further held that even if the title had remained in the original insured and vendor it would not have been covered because it had been moved from the only place where the policy could attach.³⁸⁵

^{381.} Under a policy on a building under construction, mistakenly naming the builder as the insured and the owner as the mortgagee and payee, and containing a mortgage clause requiring the mortgagee to notify the insurer of any change of ownership, held, that the ownership was that mentioned in a rate slip correctly designating the owner or occupant, so that the real mortgagee was not bound to give notice of the termination of the interest of the builder.—*Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.*, 167 S. W. 816.

^{382.} In view of Rev. St. Art. 5654, held, that there was an absolute sale of an automobile, avoiding a policy which declared that a change in title should invalidate it.—*Hamilton v. Fireman's Fund Ins. Co.*, 177 S. W. 173.

^{383.} The company consented to an assignment of a policy, on representation that the assignor had sold his interest in the property to the assignee, the local agent of the company. The transfer proved to be fraudulent as to creditors. Held, that the company, under a provision in the policy for its invalidity in case of misrepresentation of interest in the property, was not liable for loss occurring after the transfer, though its agent was a party to the fraud.—*Phoenix Ins. Co. v. Willis*, (Tex.) 6 S. W. 825.

^{384.} (Texas Civ. App.) Policy of fire

insurance on stock of merchandise, etc., held not void on account of a change in ownership after its issuance.—*Merchants' & Bankers' Fire Underwriters v. Brooks*, 188 S. W. 248.

^{385.} Under a policy the cotton insured must be the property of insured, held by them in trust or on commission, or sold but not delivered. It must also be at the place specified in the entry which was to be made in the book accompanying policy. The cotton was bought by another party with funds advanced by plaintiff and shipped, the bill of lading however being taken in the name of plaintiff. The court held that the cotton was not covered by the policy, under the plain letter of the policy itself, which would govern absolutely; that the court could not extend the risk beyond what was in the policy contract plainly set forth; that even had the legal title remained in the plaintiff it would not have been covered because it had been moved from the only place where the policy could attach; that custom sometimes governs to interpret what is doubtful but not to contradict plain stipulations.—*First Nat'l. Bank v. Lancashire Ins. Co.*, 62 Tex. 461.

^{386.} Policy held not invalidated by deed to H. to which change of title insurance agent consented, though H. had not bought the land, the deed hav-

(7) **Miscellaneous.**—Where an insured was told by an agent that a certain policy had to be canceled and the insured signed a receipt for the unearned premium, believing he was transferring it like he had transferred certain other policies by reason of an assignment of all his property, the assignee could not recover al-

ing been made by direction of real estate agents.—*Camden Fire Ins. Ass'n v. Bomar*, 176 S. W. 156.

387. Under a policy of fire insurance, a conditional sale held a change in the interest, title and possession of the insured property avoiding the policy and defeating the insured's recovery thereon.—*Fire Ass'n of Philadelphia v. Perry*, 185 S. W. 374.

388. Conditional sale of billiard and pool tables for certain amount represented by notes secured by chattel mortgage, to become the buyer's property if he quit drinking and lived with his wife, under which buyer paid part of notes and was performing the contract, held not unenforceable for want of mutuality.—*Fire Ass'n of Philadelphia v. Perry*, 185 S. W. 374.

389. A policy could not be assigned except by the consent of the company in writing. A partner sold out to his co-partners his interest in stock of goods. The goods were destroyed by fire and in a suit against the company it was held that the sale of one partner to his copartners of his interest did not on account of the provision in the policy release the company.—*Texas Banking & Ins. Co. v. Cohen & Sampson*, 47 Tex. 406.

390. Considering the intent of the policy contract the retirement of one of the partners is not such a change in the persons to the contract and in the interest in the property lost as to prevent a suit on the policy by the firm. The non-assignability provision contemplated only the sale or transfer to parties other than those to the original contract, with whom the company had not consented to contract.—*Id.*

391. The insurance was intended to cover the stock of the assured in the building in which the business was conducted and there was no substantial change caused by the sale of one partner to others material to the risk.—*Id.*

392. Changes of this character often occur in firms and it was the duty of the company to make proper provisions covering such changes.—*Id.*

393. The wording in the policy may be regarded as embracing both a stipulation against the assignment of the policy and against a transfer of the property insured—either is immaterial as the transfer of the interest of one partner to another is neither such an assignment of the policy or transfer

of the property as is contemplated in the policy.—*Texas Banking & Ins. Co. v. Cohen and Sampson*, 47 Tex. 406.

333—(8) Special Causes Increasing Risk.

394. The breach of a condition in an application for a fire policy requiring insured to keep barrels of water in the insured mill will not prevent a recovery for a loss occurring at a time when no one was at or near the mill, and it does not appear that failure to keep water in the barrels contributed to the loss.—*Delaware Ins. Co. v. Harris*, 64 S. W. 867, 26 Tex. Civ. App. 537.

395. Where, prior to a fire, insured received an anonymous communication that some one was moving goods frequently at night from an adjoining building with a view of subsequently burning the building being vacated, the hazard, if any, did not arise from the writing and receipt of the letter, but from the actual existence of the occurrence referred to therein; and hence, in order for insurer to maintain a forfeiture of the policy because of insured's failure to communicate the increased hazard, it was bound to prove, not only the writing and the receipt of the letter by insured, but that the condition referred to actually existed to insured's knowledge, and that he failed to report the same.—*Hartford Fire Ins. Co. v. Dorroh*, 133 S. W. 465. See 28 Cent. Dig. Insurance, §§ 842-846.

396. "Increased hazard" provided against in fire policies refers to changes in conditions in or upon the insured premises, and does not include dangerous conditions on adjacent premises.—*Id.*

397. Whether there has been an increase in the hazard with reference to insured premises must be determined by a comparison with the conditions existing at the time the policy was written.—*Id.*

398. Where a fire policy provided that it should be void if the hazard was increased by any act within the control or knowledge of the insured, such clause did not include insured's failure to communicate information relating to an increase of hazard, through means of which he had knowledge, though not within his control, consisting of an attempt on the part of others to burn an adjoining building.—*Id.*

though he had been promised by the agent that all the assignor's policies would be transferred to him.³⁹⁸

(H) Special Causes Increasing Risk.—The term "hazard" as used in a fire policy means the incurring of the possibility of loss or harm for the possibility of benefit, the insurer undertaking to indemnify the insured against the possibility of a loss by fire for an agreed consideration paid in advance, the hazard consisting of the possibility of a loss by fire indicated by the sum of all dangers resulting from the recognized exposure, including losses from incendiary fires communicated from other premises.³⁹⁹ The term "moral hazard," as used in the law of fire insurance, means the possibility of loss by fires of incendiary origin.⁴⁰⁰ "Increased hazard" provided against in fire policies refers to changes in conditions in or upon the insured premises, and does not include dangerous conditions on adjacent premises.³⁹⁶ Whether there has been an increased hazard is determined by a comparison with the conditions existing at the time the policy was written.³⁹⁷ Where a policy provides for forfeiture if the hazard is increased by any means within the knowledge or control of the insured, the increased hazard referred to includes only such as result from physical changes in the insured property,⁴⁰¹ and such clause does not include the failure of the insured to inform the insurer of an attempt on the part of others to burn an adjacent building.^{398 402 395} In such a case, where the insured received an anonymous letter to the effect that goods were being removed from an adjoining building with the view of subsequent burning, to maintain a forfeiture the insurer must prove the writing and receipt of the letter by the insured, that the condition referred to actually existed within the insured's knowledge and that he failed to report the same.³⁹⁵ Under the statute (Art. 4874a and 4874b, Rev. St. 1914) the keeping of gasoline in contravention of the policy on a stock of goods, did not avoid such policy where the breach did not contribute to bring about the

³⁹⁹. The term "hazard," as used in a fire policy, means the incurring of the possibility of loss or harm for the possibility of a benefit; the insurer undertaking to indemnify the insured against the possibility of a loss by fire for an agreed consideration paid in advance; the hazard consisting of the possibility of a loss by fire indicated by the sum of all dangers resulting from the recognized exposure, including losses from incendiary fires communicated from other premises.—Id.

⁴⁰⁰. The term "moral hazard," as used in the law of fire insurance, means the possibility of loss by fires of incendiary origin.—Id.

⁴⁰¹. Where a fire policy provided
7—Ins.

for a forfeiture if the hazard was increased by any means within the control or knowledge of the insured, the increased hazard referred to included only such as resulted from physical changes in the insured property.—Id.

⁴⁰². A single effort by an unknown person to set fire to a building in which insured property was situated is not within a stipulation in the policy that it shall be void if the hazard be increased by any means within the control or knowledge of insured, and the failure of insured to inform insurer of the effort or to take steps to prevent its repetition does not defeat a recovery for a loss by an incendiary fire.—Williamsburg City Fire Ins. Co. v. Weeks Drug Co., 133 S. W. 1097.

loss.⁴⁰³ The breach of a condition requiring insured to keep barrels of water in the insured property will not prevent a recovery for a loss occurring at a time when no one was near the mill and it does not appear that the failure to keep the water there contributed to the loss.³⁹⁴ Ignorance of the fact that a policy contains a "clear space clause" will not excuse the insured's violation of it and he will be presumed to have had knowledge of it.⁴⁰⁴ A provision in a policy that if the building "or any part thereof" fall, except as the result of fire, the insurance shall cease, requires that the fall be of some material or substantial part of the building,⁴⁰⁷ but it is not necessary that the distinctive character of the building be destroyed.⁴⁰⁵ Thus, where a cupola on a two-story structure fell during a storm the policy was avoided.⁴⁰⁶

(I) Precautions Against Loss.—An agreement by the insured to have a watchman on the premises at nights and on Sundays and at all times when work is suspended is complied with by employing a reliable watchman and charging him with the duty of watching the premises, though the watchman be asleep at the time of a fire.⁴⁰⁸ An insured is entitled to a reasonable time after the delivery of a policy in which to put in a suitable watch clock or detector in order to comply with his agreement in the application.⁴⁰⁹ Negli-

403. (Tex. Civ. App.) Under Acts 33d Leg. ch. 105 (Vernon's Sayles' Ann. Civ. St. 1914, Arts 4874a, 4874b) providing that no breach by the insured of any fire insurance policy on personalty shall avoid it unless contributing to cause the loss, the keeping of gasoline in contravention of the policy on a stock of goods did not avoid it, where the breach did not contribute to bring about the loss.—Commonwealth Ins. Co. of New York v. Finegold, 183 S. W. 833.

404. Where a clause requiring 100 feet of clear space to be kept between the insured stock of lumber and any dry kiln was attached to the policy and mentioned in the body thereof, and the policy was made a part of the petition, in an action thereon ignorance of the fact that the policy contained the "clear-space clause" will not excuse assured's violation of it, but he will be conclusively presumed to have had knowledge of it.—Hartford Fire Ins. Co. v. Post, 62 S. W. 140, 25 Tex. Civ. App. 428.

405. If a material and substantial part of the building fell, the policy would be avoided, though the distinctive character of the building was not destroyed.—Home Mut. Ins. Co. v. Tomkies, 71 S. W. 812.

406. A fire policy provided that if the building, "or any part thereof," fell, except as the result of fire, the insurance should cease. The main building was a two-story structure, 50x50 feet, with a flat roof, from which

a cupola, called a "third story" in the policy, 12x16 feet, and 10 feet high, projected. The cupola was constructed for the purpose of operating therein part of the machinery belonging to the building, and all of it, except a few uprights, fell in a severe storm. Held, that the policy was avoided.—(1903) Home Mut. Ins. Co. v. Tomkies, 71 S. W. 814, affirming (Civ. App. 1902) Id. 812.

407. Provision in a fire policy that if the building, "or any part thereof," fall, except as the result of fire, insurance shall cease, requires that the fall be of some material or substantial part of the building.—Home Mut. Ins. Co. v. Tomkies, 71 S. W. 812.

334—(9) Precautions Against Loss.
(See 28 Cent. Dig. Insurance, §§ 847-852, 854, 855.)

408. An agreement by insured to "have a watchman on the premises at night and on Sundays, and at all times when work is suspended," is complied with by employing a reliable watchman, and charging him with the duty of watching the premises, though the watchman be asleep at the time of a fire.—Phoenix Assur. Co. of London, England v. Coffman (Tex. Civ. App.) 32 S. W. 810. 10 Tex. Civ. App. 631.

409. In his application for insurance on a mill, insured agreed to put in a suitable watch clock or detector. The insurer, knowing that such clock had not been put in, made out and delivered the policy. Held, that the in-

gence of an insured in not safeguarding an insured automobile after the first fire which was one of a series of several, the car being finally totally destroyed, will not defeat recovery.⁴¹² A policy providing that it shall become void if the hazard be increased by any means within the control or knowledge of the insured is not avoided by the fact that an unknown person attempted to burn the subject of insurance and the insured had at most a mere surmise that the attempt might be repeated and did not inform the insurer or do anything to prevent its repetition.⁴¹¹

(a) **As Regards Marine Insurance.**—A watchman warranty in a marine policy was sufficiently complied with where a competent number of the crew were always detailed as watchmen.⁴¹³ The fact that different members of the crew were required to stand different watches and that they also performed other duties was not in violation of the warranty.⁴¹³

(J) **Keeping Books, Papers and Safe**—(1) **In General.**—An insured's failure to substantially comply with the provisions of a policy by failing to keep his books and inventories⁴¹⁴ in a fireproof safe,⁴¹⁷ will defeat his recovery on a policy, the provisions being material.⁴¹⁷ The iron-safe clause is a promissory warranty, and not a mere representation.⁴¹⁵ While such clause is a warranty, the breach of which will avoid the policy, yet, where it is open to two constructions, that one will be given it which favors the insured.⁴¹⁶ The burden is on the insurer in the matter of whether the books

sured was entitled to a reasonable time thereafter to put in the clock.—*Phoenix Assur. Co. of London, England v. Coffman* (Tex. Civ. App.) 32 S. W. 810. 10 Tex. Civ. App. 331.

410. A policy conditioned that the insured keep a watchman on duty at night is not avoided by the fact that the watchman, in the employment of whom insured used reasonable diligence, was, at the time of the fire, asleep on the premises.—*Burlington Ins. Co. v. Coffman* (Tex. Civ. App.) 35 S. W. 406.

411. A fire policy, under its provision that it, "unless otherwise provided by agreement hereon or added hereto," shall be void, if, etc., following which is a specification of the various states of fact, the existence of any one of which is to avoid the policy, among them, "if the hazard be increased by any means within the control or knowledge of the insured," is not avoided by the fact that, an unknown person having, after the issuance of the policy, attempted to burn the property, insured, having at most a mere surmise that the attempt might be repeated, did not inform the insurer thereof, or do anything to prevent its repetition; the risk intended to avoid the policy being one the means of creating which is to be within the

control or knowledge of insured, and among the risks against which it is the purpose of insurance to guard insured being incendiarism and mere negligence.—*Williamsburg City Fire Ins. Co. v. Weeks Drug Co.*, 132 S. W. 121. See 28 Cent. Dig. Insurance, §§ 847, 854.

412. Where an insured automobile was totally destroyed by successive fires, negligence of the insured in not safeguarding the automobile after the first fire held not to defeat recovery.—*St. Paul Fire & Marine Ins. Co. v. Huff*, 172 S. W. 755.

413. A warranty in a policy of marine insurance that a competent watchman should always be on board was sufficiently complied with where a competent member of the crew was always detailed as a watchman; the fact that different members of the crew were required to stand different watches, and that they also performed other duties, not being in violation of the warranty.—*Mannheim Ins. Co. v. Charles Clarke & Co.*, 157 S. W. 291. See 28 Cent. Dig. Insurance, §§ 847-855.

414. Such warranty is complied with by the providing of a competent watchman, and the fact that he was asleep at the time of the accident will not avoid the policy.—*Id.*

are sufficient to satisfy the conditions of the policy, to show that the books as kept by the insured would not enable the insurer with reasonable certainty to arrive at the actual loss sustained.⁴⁴⁴ The insured is responsible for the negligence of its employes in the performance of the conditions in the policy as to keeping books and papers.^{445 451} A policy specifying different amounts of insurance on building, furniture and fixtures and stock of merchandise is severable and a failure to take an inventory or keep books as required therein does not avoid the insurance on the building, furniture and fixtures.^{470 471} Where a policy gives thirty days in which to make an inventory there can be no breach until the expiration of such time.⁴⁷⁵ A policy requiring the insured to produce account books and vouchers in case of loss is not avoided by failure or refusal to do so unless the policy so provides but the failure or refusal may be proven and is a proper subject of comment before the jury as to the extent of the loss.⁴⁶⁹ A provision requiring the taking of an inventory and declaring that non-compliance will avoid the policy, is valid and enforceable.⁴⁸³

(2) **The Iron-Safe Clause a Warranty.**—The "iron-safe clause" in a policy, by which the insured agrees to keep a set of books secure from fire, is a warranty binding on the insured, a breach of which avoids the policy,⁴¹⁸ even though just endorsed or pasted on the policy,⁴¹⁹ when the body of the policy makes it a part

335—(10) **Keeping Books, Papers and Last Stock Inventory in Fire Proof Safe.** (See 28 Cent. Dig. Insurance, §§ 852, 853.)

415. Assured covenanted to keep complete books and the last stock inventory locked in a fire proof safe, or in some secure place not exposed to a fire which would destroy the store, and, in case of loss, to produce the books and inventory; otherwise the policy to be void. Plaintiff kept them as required, but, when the store was on fire, his bookkeeper, fearing that the safe would not stand, opened it, and took out the contents, to remove them to a safe place; and, as he ran out, some of them fell, and were burned. Held that, unless he were negligent, the covenant was not broken. —*East Texas Fire Ins. Co. v. Harris* (Tex. Civ. App.) 25 S. W. 720.

416. Under a condition in a fire insurance policy that the insured will keep his books in a "fire proof safe," the insured complies with the letter and the spirit of the condition when he puts the books in a safe of the kind generally known as fireproof, and does not by this clause warrant the safe to preserve the books.—*Knoxville Fire Ins. Co. v. Hird*, (Tex. Civ. App.) 23 S. W. 393, 4 Tex. Civ. App. 82.

417. The fire insurance policy declared on stated that it was issued subject to the iron-safe clause, attach-

ed to and made a part of it. The clause was on a printed slip attached to the face of the policy with mullage, and in it the assured agreed to keep a set of books secure from fire, and, in case of loss, to produce the same, and the clause provided that on his failure to do so the policy should be void. Held, that it was error to refuse to instruct that the clause was a warranty by the assured. —*American Fire Ins. Co. v. First Nat. Bank* (Tex. Civ. App.) 30 S. W. 384.

418. The "iron-safe clause" in a policy by which insured agreed to keep a set of books secure from fire, is a warranty binding on insured, a breach of which avoids the policy. *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 28 S. W. 1027, followed.—*Standard Fire Ins. Co. of Kansas City v. Willlock* (Tex. Civ. App.) 29 S. W. 218.

419. There was pasted on a fire insurance policy a slip, partly printed and partly written, which stated the amount of the policy, and the property insured, and contained a clause, "subject to iron-safe clause * * * attached." On a separate, printed slip, pasted on the policy, was the "iron-safe clause," by which the assured agreed to keep a set of books secure from fire, and, in case of loss, to produce the books for the inspection of insurer, and providing that on his failure to produce them the policy

thereof.^{421 423 424} It is error for a court to refuse to instruct that the iron-safe clause is a warranty by the insured.⁴¹⁷

(3) **Substantial Compliance Necessary.**—It is held that a substantial compliance with the iron-safe clause will entitle the insured to recover.^{491 490 430} However, one early case holds that it constitutes a warranty which must be strictly and not substantially complied with.⁴²⁸

(4) **Meaning of "Fire-Proof Safe, "Last Inventory," Etc.**—An insured complies with the letter and spirit of the "fire-proof safe clause" in a policy when he puts his books in a safe of the kind generally known as fire-proof and he does not by this clause warrant the safe to preserve the books.^{416 456} The "last inventory" is construed as meaning the last inventory of the goods insured, and it need not include office fixtures or other articles not covered by the policy.⁴²⁷ A "complete itemized inventory of stock on hand"

should be void. The policy stated that it was accepted subject to such conditions as "may be indorsed thereon or added thereto." Held, that the iron-safe clause was a warranty on the part of assured, and that a compliance therewith was necessary to a recovery.—*Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.* (Tex. Civ. App.) 28 S. W. 1027.

^{420.} Where it was the custom of the insured to enter the credit sales each day upon a blotter, the entries being afterwards transferred to the regular books of account, the failure to produce a record of the credit sales of the day before the fire, because of the destruction of the blotter, which was not placed in the safe at night, is not a violation of the condition in a fire insurance policy providing that the insured shall keep a set of books, showing the cash and credit sales, in a fire-proof safe, and that failure to produce such books shall avoid the policy. *Palatine Ins. Co. v. Brown* (Civ. App. 1896) 34 S. W. 462, reversed.—*Brown v. Palatine Ins. Co.*, 35 S. W. 1060, 89 Tex. 590.

^{421.} A policy of insurance had a slip attached thereto containing the only description of the property insured, and the "iron-safe clause" provided that such clause was a warranty, and a part of the contract. Held to constitute a warranty, a breach of which would avoid the policy.—*Home Ins. Co. of New Orleans v. Cary* (Tex. Civ. App.) 31 S. W. 321, 10 Tex. Civ. App. 300.

^{422.} Defendant, in an action for insurance on a stock of goods, to sustain the defense of a breach by plaintiff of a stipulation requiring him to keep the last inventory of his business in a fire-proof safe "at night and at all times when the store is not actually open for business," must prove that the fire occurred at a time mentioned in

the stipulation.—*Allemania Fire Ins. Co. v. Fred* (Tex. Civ. App.) 32 S. W. 243, 11 Tex. Civ. App. 311.

^{423.} Pasted on a fire policy was a rider on which was printed a warranty by the insured to keep his books and the last inventory in an iron safe at night and all times when the store was not kept open for business, and in it was the description of the property insured, and the amount of insurance, which appeared no place else in the policy, and the rider was signed by the agents of the company as part of the policy. Held, that the iron-safe clause was a warranty, noncompliance with the terms of which was fatal to a recovery.—*American Fire Ins. Co. v. Center* (Tex. Civ. App.) 33 S. W. 554.

^{424.} There was pasted on a fire insurance policy a slip, which stated the amount of the policy, and the property insured, and contained a clause, "Subject to iron-safe clause * * * attached." On a separate printed slip, pasted on the policy, was the iron-safe clause, under a provision that, on failure to produce the books, the policy should be void. The policy stated that it was accepted subject to such conditions as "may be indorsed thereon or added thereto." Held, that the iron-safe clause was a warranty on the part of assured.—*American Fire Ins. Co. v. Center* (Tex. Civ. App.) 33 S. W. 554.

^{425.} Where a fire policy is accepted subject to the iron-safe clause, set out in a slip attached to it, containing the only description of the insured property, and providing that a failure to comply therewith shall avoid the policy, the provision constitutes a warranty by the insured.—*Palatine Ins. Co. v. Brown* (Tex. Civ. App.) 34 S. W. 462. Reversed 35 S. W. 1060.

^{426.} A covenant in a fire policy by which the insured agrees to keep a set of books showing all business trans-

is such an inventory as will show on its face the character of the goods, and an inventory which for the most part is a mere summary of the condition of the goods is not a compliance.⁴⁵⁷ A detailed and itemized enumeration of the articles composing the stock, with the value of each, is intended,⁴⁵⁸ and the invoice must contain such a statement as to meet the requirements of the covenant.⁴⁷⁶ An invoice is not complete and itemized when it does not contain substantially all of the articles embraced in the stock at the time.⁴⁷⁷ ^{478 479 480} The "complete itemized inventory" does not require that the cost or value of the articles listed both in detail and in total be shown.⁴⁸⁸

(5) Certain Statutory Provisions Do Not Affect.—Art. 4947 of the Revised Statutes of 1914, to the effect that a misrepresentation must be material to avoid a contract or contributed to the contingency on which the policy became payable does not apply to a covenant in a policy to keep an inventory in an iron safe and produce it after a fire.^{483 489 482} Neither do articles 4874a and 4874b of the Revised Statutes of 1914, providing that no breach of any provision in a policy upon personality shall avoid it unless it contributed to cause the loss, have any application to permit the insured who has broken the "iron-safe clause" provisions, to recover.^{486 496} The former article refers to warranties to be performed before the fire, while the "iron-safe" warranties are to be performed after.⁴⁸⁹

(6) Books Not in Safe at Time of Fire.—The insurer, to sustain the defense of a breach of the stipulation requiring the insured to keep the last inventory in a fire-proof safe "at night and at all times when the store is not actually open for business," must prove that the fire occurred at the time mentioned in the stipulation.⁴²²

actions and the last inventory of the business locked in a fireproof safe at night and when the store is not open for business, and that the policy shall be void if, in case of loss, they are not produced, constitutes a warranty, which must be strictly, and not substantially, complied with.—*Northwestern Nat. Ins. Co. v. Mize* (Tex. Civ. App.) 34 S. W. 670.

^{427.} Where a policy of insurance provides that the insured shall keep in an iron safe, etc., the "last inventory of the business," the words "last inventory" must be construed as meaning the last inventory of the goods insured, and need not include office fixtures or other articles not covered by the policy.—*Manchester Fire Ins. Co. v. Simmons* (Tex. Civ. App.) 35 S. W. 722, 12 Tex. Civ. App. 607.

^{428.} The fact that the items of loss sued for included some which did not appear on the inventory does not prove the inventory to have been incomplete, some time having elapsed since it was taken, and additions having been made

to the stock in the interval.—*Manchester Fire Ins. Co. v. Simmons* (Tex. Civ. App.) 35 S. W. 722, 12 Tex. Civ. App. 607.

^{429.} Where an insured enters daily credit sales in a blotter, from which he transfers them to his regular books of account, his inability to furnish a record of the credit sales the day before the fire, because the blotter containing it had been destroyed in the fire through his failure to put it in a safe at night, will not avoid a fire policy requiring him to keep a set of books, showing both cash and credit sales, in a fireproof safe, and providing that failure to produce such books shall avoid the policy.—*Pennsylvania Fire Ins. Co. v. Brown* (Tex. Civ. App.) 36 S. W. 590; *Sun Mut. Ins. Co. v. Same, Id.* 591.

^{430.} A substantial compliance, only, with the warranty in an insurance policy requiring the insured to keep certain account books in a safe, is required.—*Royal Ins. Co. v. Brown* (Tex. Civ. App.) 36 S. W. 591.

Where the "iron-safe clause" was complied with in every respect theretofore and the insured supposed the books were in the safe at the time of the fire but they were not found either there or elsewhere, there was a breach of the warranty.⁴³¹ In a case where the insured negligently failed to put one of the essential books in his safe and it was burned the policy was breached.⁴³²

(7) **Loss of Some of the Books.**—The policy providing that the set of books kept by insurer shall be produced after the fire, the insured is not excused from complying because they were destroyed,

431. A fire policy on a stock of goods contained the "iron-safe clause." In an action on the policy it appeared that the insured had the proper books, and kept them in a fire-proof safe; that about six months before a loss by fire they made the required inventory; that they were in the habit of keeping their inventory in such safe, with other papers, etc.; that when the fire occurred they supposed it was in the safe, but on opening the safe it was not found, and there were no ashes, or evidence of its having been destroyed in the safe; and that it was never found. Held, that there was a breach of the warranty by the insured.—*Allred v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 37 S. W. 95.

432. In a suit on a fire policy which required the insured to keep a set of books showing a complete record of the business transacted, evidence that merchants in general failed in some particulars to keep books, and in lieu thereof kept records upon cash register slips, was inadmissible; the preservation of cash register slips not being a compliance with the requirement that a set of books should be kept.—*Monger & Henry v. Queen Ins. Co. of America*, 99 S. W. 887.

433. The requirement of a fire policy that insured keep a set of books clearly presenting a record of all sales and purchases is not complied with by the preservation of slips from a cash register.—*Henry v. Green Ins. Co. of America*, 103 S. W. 836.

434. A stock of goods covered by a fire policy was replenished from time to time by shipments from another store belonging to the insured, who kept a duplicate of the invoices of the goods so shipped, with a description of the same and their value. Held, that on destruction of the stock by fire the furnishing of the invoices to the insurer was not a compliance with a clause of the policy requiring an inventory to be taken.—*Fire Ass'n of Philadelphia v. Masterson*, 61 S. W. 962, 25 Tex. Civ. App. 518.

435. Where a fire policy on a stock of goods required that an inventory should be taken, and, on a destruction of the stock by fire, insured claimed

that invoices of goods placed in the store constituted a substantial compliance with the condition, a contention that it was not customary or practicable for the manager of the store, when purchasing farm produce, to receive an invoice thereof, was no excuse for not complying with the terms of the condition.—*Fire Ass'n of Philadelphia v. Masterson*, 61 S. W. 962, 25 Tex. Civ. App. 518.

436. A fire policy required insured to keep books showing a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, which should be securely locked in a fireproof safe at night. Insured kept books as required, but on the day before the night of a fire took the cash book home to make some entry, and, when he came back, left it in the pocket of his coat, lying on the counter. He then went out on an errand, and did not return that afternoon; and the book accordingly was not put in the safe, and was destroyed in the fire. Held, that the policy was breached; the loss of the cash book being due to insured's negligence.—*Fire Ass'n of Philadelphia v. Calhoun*, 67 S. W. 153, 28 Tex. Civ. App. 409.

437. The iron-safe clause in a policy of insurance required the assured to take an inventory at least once in each calendar year, and provided that, unless one had been taken within 12 months prior to the date of the policy, one should be taken within 30 days thereafter. Section 2 required the assured to keep a set of books showing sales from the date of the inventory, "and also from the date of the last preceding inventory if such has been taken." Section 3 provided that assured should keep such books and inventory, "and also the last preceding inventory," if such has been taken, locked in a safe, and that, unless such books and inventories were produced, the policy should be void. Held, that this required that the inventory taken preceding the date of the policy should be kept and produced. Judgment, *Continental Fire Ins. Co. v. Cummings* (Civ. App. 1903) 78 S. W. 378, reversed.—*Continental Ins. Co. v. Cummings*, 81 S. W. 705, 98 Tex. 115.

where his own negligence contributed to cause their loss.^{439 441} The covenant is not broken where in an effort to save the books from the fire the bookkeeper opened the safe and as he ran out some of them fell and were burned, unless the insured were negligent.⁴¹⁵ Where a complete set of books is saved with the exception of the journal the requirement is complied with.⁴⁹⁵ Neither will the destruction of the record of the sales of the day before the fire which was not placed in the safe avoid the policy.^{420 429} Where the next to the last inventory is burned but the subsequent inventory and account books which are saved show its contents there is a substantial compliance with the condition.⁴³⁸ But where the owner negligently left his inventory outside the safe the night of the fire and fifteen per cent of it was thereby rendered unintelligible there can be no recovery.⁴⁹⁴

(8) **Substantial Compliance With Iron-safe Clause.**—It was sufficient that the set of books were otherwise complete but did not show an account of the goods taken out of stock for home consumption.⁴⁴² Where the next to the last inventory was burned but the set of books and subsequent inventory, which were saved, showed its contents there was a substantial compliance.^{438 446} When the

438. Where a policy requires the insured to take an inventory of stock once a year, and keep the inventory, and also the last preceding inventory, together with his books of account, in a fire-proof safe, etc., and the last preceding inventory is left outside the safe and destroyed at the time of loss, but on account books and subsequent inventory show its contents, there is a substantial compliance with the policy.—(Civ. App. 1903) *Continental Fire Ins. Co. v. Cummings*, 78 S. W. 378, Judgment reversed. *Continental Ins. Co. v. Same* (1904) 81 S. W. 705, 98 Tex. 115.

439. Where one who had a fireproof safe took no care to place therein a set of books kept by him in compliance with a provision of his fire insurance policy, and they were burned, he was guilty of negligence.—*Rives v. Fire Ass'n of Philadelphia*, 77 S. W. 424.

440. A provision in a fire insurance policy requiring the assured to keep a set of books, and produce them in case of loss, is not complied with by producing books kept by others for themselves, though showing the facts required to be shown by plaintiff's books.—*Rives v. Fire Ass'n of Philadelphia*, 77 S. W. 424.

441. Where a provision in a fire insurance policy requires the assured to keep a set of books concerning the insured property, and stipulates that in case of loss he shall produce them, or the policy shall be void, he is not excused from producing them by their destruction in the fire, where his own negligence contributed to cause their

loss.—*Rives v. Fire Ass'n of Philadelphia*, 77 S. W. 424.

442. An iron-safe clause in a fire policy, requiring assured to keep a set of books, which shall present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, does not require that he shall keep an account of the goods taken out of his stock for domestic consumption.—*Aetna Ins. Co. v. Fitze*, 78 S. W. 370, 34 Tex. Civ. App. 214.

443. While the iron-safe clause in an insurance policy is a warranty, the breach of which will avoid the policy, yet, where it is open to two constructions, that one will be given it which favors the insured.—*Aetna Ins. Co. v. Fitze*, 78 S. W. 370, 34 Tex. Civ. App. 214.

444. In an action on an insurance policy the evidence showed that insured had taken goods from his stock for domestic consumption, of which no record had been kept, though he estimated their value at a certain sum monthly. His books did not show the freights paid, and the freight bills were burned at the time of loss. No accounts were kept of the cash used by the insured. Held, that an instruction that, in order to avoid payment of the policies for violation of an agreement to keep books of account showing purchases, sales and shipments, etc., it was not sufficient for the defendant company to show an occasional clerical error of omission, but it must show the books as kept would not enable defendant with reasonable certainty to

insured at the time the policy was transferred made an inventory and the inventory and a complete set of books were saved the requirements were met.⁴⁴⁸ The fact that several items which were sold on credit did not appear on the ledger but appeared elsewhere did not affect the completeness of the record.⁴⁵⁰ An inventory showing the number of pieces of lumber, dimensions of each piece of different kinds and total number of each kind separately, without showing the class or value, met the requirements of a policy calling for a complete lumber inventory.⁴⁹² The original invoices, the bank record of the cash sales, the cash being deposited daily in the bank and a small book showing the credit sales met the conditions of the clause requiring a complete set of books.⁴⁴⁹ In a case where

arrive at the actual loss sustained; and, if the jury found that from the books as kept the company could with reasonable certainty ascertain the actual loss, verdict should be for plaintiff—was properly given.—*Aetna Ins. Co. v. Fitze*, 78 S. W. 370, 34 Tex. Civ. App. 214.

445. The insured is responsible for the negligence of his employees in the performance of a condition in the policy requiring the preservation of an inventory of the insured property. Judgment, *Kemendo v. Western Assur. Co. of Toronto, Canada* (Civ. App. 1900) 57 S. W. 293, reversed—*Western Assur. Co. v. Kemendo*, 60 S. W. 661.

446. Where insured had taken an inventory in 1901 and 1902, during the continuance of a policy, and the 1901 inventory, and invoices of purchases made between January 1, 1902, and the date of the fire, had been journalized, so that from the books and papers preserved a substantially complete record of the business transacted, including all sales, purchases, and shipments, was shown, and the amount and character of the inventory of January, 1901, could be and was determined with reasonable accuracy, the iron-safe clause of the policy was substantially complied with, though the 1901 inventory, and invoices between January 1, 1902, and the fire, were left out of the safe and burned.—*Virginia Fire & Marine Ins. Co. v. Cummings*, 78 S. W. 716.

447. Policies of fire insurance required insured to make an inventory of stock at least once each year, and, unless one had been taken within 12 months before the date of the policy, it should be made within 1 month thereafter, and that "the assured shall keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe," etc. The first policy was issued May 15th, and the second on September 12th. One inventory had been taken in January, and another in July. Held, in an action on the policies, that the words

"the last preceding inventory, if such has been taken," being ambiguous, were to be construed against the company, as meaning the last inventory taken before the issuance of the policy, and therefore, as to the policy of September 12th, plaintiff was required to produce only the inventory taken in July.—*Phoenix Assur. Co. v. Stenson*, 79 S. W. 866, 34 Tex. Civ. App. 471.

448. Where insured in a fire policy, on the date that the policy was transferred, made an inventory of the stock of goods insured, and the inventory and books, showing all sales, both cash and credit, from the date of the transfer, were preserved, there was a substantial compliance with the "iron safe" clause.—*Scottish-Union & National Ins. Co. v. Moore*, 81 S. W. 573, 36 Tex. Civ. App. 312.

449. Where insured had been in business less than a year when his property was burned, and all the original invoices showing the amount of goods purchased were preserved, and his cash sales were deposited each day in a bank, thereby preserving a complete record thereof, and he had a small book showing his credit sales, there was no breach of an iron-safe clause contained in the policy requiring him to keep a complete set of books showing the record of his business, etc.—*First Nat. Bank v. Cleland*, 82 S. W. 337, 36 Tex. Civ. App. 478.

450. In an action on a policy, which provided that the assured should keep a set of books, clearly presenting a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, the evidence showed that plaintiffs kept a day book in which they entered all their daily sales, and that in the event that it was a cash sale they would enter so much cash and in the event the goods were sold on credit they would enter the name of the purchaser, the amount, and the item. It was further shown that the cash sales shown by these day books were copied into the cash book, and that the credit sales were copied into a ledger, which

two policies had been issued on different dates each calling for the last preceding inventory to be included in the iron-safe clause, the words being ambiguous and being construed against the company, it was held that the plaintiff must only produce the last inventory before the last policy issued.⁴⁴⁷

(9) **Insufficient Compliance With Iron-Safe Clause.**—In general, the burden is on the insurer to show non-compliance.⁴⁶¹ Ordinarily, non-compliance will forfeit the policy.⁴⁵⁴ Cash register slips will not take the place of a set of books.^{452 453 455} Neither will invoices be sufficient as an inventory,^{454 455 490} although it is impracticable

were exhibited at the trial, but in more than one-half of the sales the items were not copied. Held, that the fact that several items which were sold on credit were not shown in the ledger in no way affected the completeness of the record as to the value of the goods sold, and that the condition of the policy was sufficiently complied with.—*Scottish-Union & National Ins. Co. v. Andrews & Matthews*, 89 S. W. 419.

451. The question whether there had been a substantial compliance with an iron-safe clause, requiring the preservation of an itemized inventory of the stock insured, was properly taken from the jury, where the evidence showed that the loss of the inventory resulted from the neglect of employees of the assured who were authorized to use it. Judgment, *Kemendo v. Western Assur. Co. of Toronto, Canada* (Civ. App. 1900) 57 S. W. 293, reversed.—*Western Assur. Co. v. Kemendo*, 60 S. W. 661.

452. The inventory of goods on hand taken two or three days before the fire cannot take the place of the accounts of cash sales required by the policy to be kept by insured.—*Scottish Union & National Ins. Co. v. Weeks Drug Co.*, 118 S. W. 1086. See 28 Cent. Dig. Insurance, §§ 852-853.)

453. The provision in a policy of insurance that insured will keep accounts showing sales of goods in some place not exposed to fire is material to the risk, though insured made an inventory of his goods on hand two or three days before the fire. Hence *Sayles' Ann. Civ. St. Sup.* 1903, Art. 3096a, providing that misrepresentations will not avoid a policy unless they are material, does not apply.—Id.

454. The failure of insured to keep an account of his cash sales of goods, as required by the policy, is a forfeiture of the insurance as a matter of law.—Id.

455. The requirement of a fire policy that insured keep a set of books, clearly presenting a record of all sales and purchases, is not complied with by the preservation of slips from a cash register. Judgment *Delaware Ins. Co.*

v. Monger & Henry (Civ. App. 1903) 74 S. W. 792, affirmed.—*Monger & Henry v. Delaware Ins. Co.* 79 S. W. 7, 97 Tex. 362.

456. Where the insured in a fire policy containing an iron-safe clause keeps the books, etc., in an iron safe believed by him to be fire proof, and of the kind understood to be fireproof, the clause is complied with, though the books, etc., while in the safe, are destroyed by fire.—*Underwriters Fire Ass'n. v. Palmer & Co.*, 74 S. W. 603.

457. A stipulation in a fire policy requiring the insured to "take a complete itemized inventory of stock on hand" requires the insured to make such an inventory as will show on its face the character of the goods, and an inventory which for the most part is a mere summary of the condition of the goods is not a compliance with the requirement of the policy.—*Delaware Ins. Co. v. Monger & Henry*, 74 S. W. 792.

458. Insured being, by the plain terms of his fire policy, required, on condition of the policy otherwise becoming void, to keep a fireproof safe, and to produce for the insurer, after a fire, an inventory of the property taken, by one from whom he bought the property, within 12 months before he made the purchase and received a transfer of the policy, his failure to produce it, in the absence of a showing by him that it was lost or destroyed without fault or negligence on his part, and not by mere failure to keep it in a safe, prevents recovery, though there is ample proof that the loss exceeded the insurance. *National Fire Ins. Co. v. J. W. Caraway & Co.*, 130 S. W. 458.

459. Rev. St. 1895, Art. 3096aa, as added by Laws 1903, c. 69, declaring that a provision in a contract of insurance, that misrepresentations therein or in the application therefor shall render it void, shall not be a defense to an action on the contract, unless the misrepresentation was material or contributed to the contingency on which the policy became payable, has no application to a covenant in a policy to keep an inventory in an iron safe and produce it after fire.—Id.

to receive invoices in purchasing farm produce.⁴³⁵ Although the set of books will show the stock on hand a failure to take an inventory will bar recovery.^{438 472} Books kept by others though showing the facts required to be shown by the insured, are not sufficient to sustain a recovery.⁴⁴⁰ A recent inventory cannot take the place of the accounts of cash sales required.^{452 454} A failure to take an inventory within the time required will avoid the policy

440. A substantial compliance with an iron-safe clause, requiring the preservation of an itemized inventory of the stock insured, is necessary to entitle the assured to the benefits of his policy, though such inventory, by reason of the rapid changes in the stock, will not represent the quantity and kind of stock on hand at the time of loss. *Judgment, Kemendo v. Western Assur. Co. of Toronto, Canada*, (Civ. App. 1900) 57 S. W. 293, reversed.—*Western Assur. Co. v. Kemendo*, 60 S. W. 661.

441. The burden is on defendant, in an action for insurance on stock of goods, to show non-compliance by plaintiff with the clause requiring set of books showing a record of the business to be kept in a safe.—*German Ins. Co. v. Pearlstone*, 45 S. W. 832, 18 Tex. Civ. App. 706.

442. In an action on fire policies providing that assured should keep a set of books during lives of the policies, showing a complete record of the business transacted, including all purchases and sales, both for cash and credit, and should keep them in a safe, to be produced in case of loss, the court properly refused to direct a verdict for defendant on the ground that there was not a substantial compliance with such provision; all the books for the year in which the fire occurred in August, including January and July inventories, having been produced the policies having been issued the preceding year, one in September and the other October 4th, the ledger and journal for the entire period being produced, also the petty cash covering all the time after October 21st; the ledger showing all the purchases, and all the sales by months, and to whom made, though not the items thereof, and it not being clearly shown what the cash book contained.—*German Ins. Co. v. Pearlstone*, 45 S. W. 832, 18 Tex. Civ. App. 706.

443. A policy required insured to keep a set of books presenting a clear record of the business transacted, including sales, and failure to do so was to avoid it. Insured made credit sales to different persons before the fire, which were not shown by the books. Other sales were entered in the journal, cash, and day book, but not in the ledger, and insurer was charged with them in the proof of

loss. Held, that the condition had been violated.—*Beville v. Merchants' Ins. Co.*, 46 S. W. 914.

444. A policy of insurance, requiring the insured to keep an inventory of their merchandise stock, and produce it in case of loss, intends a detailed and itemized enumeration of the articles composing the stock, with the value of each.—*Roberts, Willis & Taylor Co. v. Sun Mutual Ins. Co.*, 48 S. W. 559, 19 Tex. Civ. App. 338.

445. The iron-safe clause in an insurance policy is a promissory warranty, and not a mere representation.—*Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 48 S. W. 559, 19 Tex. Civ. App. 338.

446. Failure to comply with a clause requiring an inventory of stock to be kept in a fireproof safe will not avoid the policy, where such inventory, by reason of the rapid changes in the stock, will furnish but meager evidence of the loss.—*Kemendo v. Western Assur. Co. of Toronto, Canada*, 57 S. W. 293. Reversed 60 S. W. 661.

447. There being no cotton insured by a policy on a cotton gin, and no claim made for the loss of any, a promissory warranty relating to keeping a "correct account of the cotton put into and taken out of the gin house" becomes immaterial.—*Hartford Fire Ins. Co. v. Walker*, 60 S. W. 820. Reversed 61 S. W. 711.

448. Under an insurance policy requiring insured to take a yearly inventory, or, if none was had within 12 months prior to the issuance, requiring one to be taken within 30 days thereafter, insured's failure to take such inventory within 30 days, none having been taken within 12 months previous, will bar recovery, though he kept a set of books from which might be ascertained the stock on hand at any time.—*National Union Fire Ins. Co. v. Walker*, 156 S. W. 1095.

449. An insurance policy, containing a clause requiring the assured to produce account books and vouchers in case of loss by fire, is not avoided by failure or refusal to produce them, unless the policy provides in express terms for such forfeiture; but the failure or refusal may be proven, and is a proper subject of comment before the jury as to the extent of the loss.—*Ldon Fire Ins. Co. v. Starr*, (Tex.) 12 S. W. 45.

and it cannot be revived without the insurers consent to the inventory being taken subsequently.⁴⁶⁴ Incidentally, the fact that there are some items of loss sued for which do not appear on the inventory does not prove that the inventory was incomplete,⁴²⁸ where some time has elapsed and additions have been made to the stock in the interval. Where the insured keeps part of his goods in cold storage his books must show the quantity.⁴⁷⁴ (For further fact cases showing non-compliance with the provisions of the iron-safe clause see Ann. 437, 462, 463, 473, 481.)

470. Provisions of policy as to keeping inventory and set of books held not to be construed as applying to all the property, unless its express provisions compelled such construction.—*State Mut. Fire Ins. Co. v. Kellner*, 169 S. W. 636.

471. Fire insurance policy, specifying different amounts of insurance on building, furniture and fixtures, and stock of merchandise, held severable and failure to take inventory or keep books, as required therein, did not avoid the insurance on the building, furniture and fixtures.—*Id.*

472. Insured's failure to take inventory as required held to bar recovery, though he kept a set of books from which might be ascertained the stock on hand at any time. *National Union Fire Ins. Co. v. Walker*, 156 S. W. 1095. See 28 Cent. Dig. Insurance, §§ 852, 853.

473. Facts held insufficient to show a sufficient classification of cotton in storage covered by certain policies, precluding plaintiff's recovery thereon.—*Royal Exchange Assur. of London, Eng., v. Rosborough*, 142 S. W. 70.

474. Where insured was in the produce business handling large quantities of eggs, which in part were kept in cold storage, he must keep his books so as to show what eggs were removed from his store and placed in cold storage.—*Teutonia Ins. Co. v. Tobias*, 145 S. W. 251.

475. There could be no breach of a clause of an insurance policy requiring that the inventory be made within 30 days, until the expiration of such 30 days.—*Royal Ins. Co. v. W. P. Wright & Co.*, 148 S. W. 824.

476. Where a fire insurance policy provided that the assured would take a complete itemized inventory of the stock on hand at least once each calendar year, the invoice must contain such a statement to meet the requirements of the covenant.—(*Sup.* 1911) *Dorroh-Kelly Mercantile Co. v. Orient Ins. Co.*, 135 S. W. 1165, affirming judgment *Orient Ins. Co. v. Dorroh-Kelly Mercantile Co.* (*Civ. App.* 1910) 126 S. W. 618. See 28 Cent. Dig. Insurance, §§ 852, 853.

477. An invoice under a fire insurance policy is not complete and itemiz-

ed when it does not contain substantially all of the articles embraced in the stock at the time.—*Id.*

478. Where there was omitted purposely from an invoice articles of the value of \$3,000 or \$4,000, such omission is not insignificant where it was not shown that there was any means by which the articles so omitted could be established as having been in the stock at the time the policy was issued, and the claim of substantial compliance with the contract cannot be sustained.—*Id.*

479. While the omission of articles of \$3,000 or \$4,000 in value from an inventory might have been an oversight on the part of the assured, and it would not have been any advantage to the insurance company to have had all of the items upon the inventory, the court cannot vary the terms of the contract made by the parties requiring a complete inventory.—*Id.*

480. Where there was no inventory complying with the requirements of a policy taken within a year prior to its issuance, and there was no inventory in compliance with its terms, taken within 30 days from the time the policy was issued, the policy was forfeited.—*Id.*

481. A fire policy provided that assured should take a complete itemized inventory of the stock on hand at least once in each calendar year, and, unless such inventory had been taken within 12 calendar months prior to the policy, one should be taken within 30 days after its issuance, or the policy would be invalid. It also required the keeping of a complete set of books, containing a complete record of the business transacted, including all purchases, sales and shipments, both for cash and credit, from the date of the inventory. Plaintiff began business September 23, 1907, and his stock covered by the policy was burned June 2, 1908. No inventory was taken until January 1, 1908, and from September 23, 1907, till June 2, 1908, insured failed to keep a set of books showing purchases, or the cash and credit sales made by him. Held, that plaintiff could not recover on the policy.—*German Ins. Co. v. Beville*, 126 S. W. 31.

(K) **Additional Insurance.**—In general, a violation by the insured of a provision prohibiting other insurance forfeits the policy,^{519 506} and such a provision is reasonable and proper,^{515 522} and a concurrent insurance clause which does not provide for forfeiture for its violation will not nullify such a provision.^{522a} A clause forbidding other concurrent insurance unless permitted is a promis-

482. A policy of fire insurance required insured to keep books clearly presenting a complete record of business transacted, including shipments from the date of inventory, provided for in a previous section of the policy, and during the continuance of the policy, and that on failure to produce such books the policy should become void, and such failure should be a bar to recovery on the policy. Insured shipped goods from his stock amounting to \$578, and no entry of such shipments was made in his books, but there was evidence that insured kept a list of the goods shipped. Act of March 27, 1903 (Acts 28th Leg. c. 69) Sayles' Ann. Civ. St. Supp. 1897-1904, Art. 3096aa, provides that any provision in any contract of insurance which provides that the answers or statements made in the application for such contract of insurance, if untrue, shall render the policy void, shall be of no effect, unless it be shown that the matter or thing misrepresented was material to the risk, or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed shall be a question of fact for the court or jury trying such case. Held that the statute did not apply to the provision as to keeping books, and that a verdict should have been directed for defendant.—Home Ins. Co. v. Rogers, 128 S. W. 625.

483. Provision of policy on stock of merchandise requiring taking of inventory, and declaring that non-compliance would avoid policy, held valid and enforceable.—Hartford Fire Ins. Co. v. Adams, 158 S. W. 231.

484. Policy held avoided by failure to take inventory within 30 days as required therein, and not capable of being revived without the insurer's consent by taking the inventory subsequently.—Id.

485. Where a policy of insurance on a stock of merchandise required the taking of an inventory and provided that it should be void unless this was done, the insurer could not be compelled to accept the invoices of the goods purchased by the insured in lieu of an inventory.—Id.

486. Acts 33d Leg. c. 105 (Vernon's Sayles' Ann. Civ. St. 1914, Arts. 4874a, 4874b), providing that no breach by insured of any provision of any fire insurance policy upon personalty shall

avoid it unless it contributed to cause the loss, has no application to permit insured, who has broken the stipulation of his policy, insuring his stock of goods, that he should keep books, etc., in an iron fireproof safe, to recover on the policy, although the failure to keep the books did not contribute to bring about the destruction of the property.—Commonwealth Ins. Co. of New York v. Finegold, 183 S. W. 833.

487. Insured's failure to substantially comply with the provision of a fire insurance policy by failing to keep his books in a fireproof safe will defeat his recovery on the policy; the provision being material.—Id.

488. Provision of policy requiring insured to take a "complete, itemized inventory of stock on hand," held not to require that the cost or value of the articles listed both in detail and in total be shown.—Hartford Fire Ins. Co. v. Walker, 153 S. W. 398.

489. Acts 33d Leg. c. 105, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, Art. 4874a), refers to warranties to be performed before the fire, and does not apply to a warranty requiring the production of books and accounts after the fire, breach of which could not contribute to, or occur until after, the loss.—McPherson v. Camden Fire Ins. Co., 185 S. W. 1055.

490. An invoice of goods bought during three months, some time before issuance of a fire policy, does not satisfy a provision of the policy that it shall become void, if a complete, itemized inventory be not taken within a certain time, unless one has been taken within a certain time prior to the policy.—Mechanics' & Traders' Ins. Co. v. Davis, 167 S. W. 175.

491. Where the keeping of invoices and books of entry by insured was in substantial compliance with the iron-safe clause, he was entitled to recover.—American Cent. Ins. Co. v. Hardin, 151 S. W. 1152. See 28 Cent. Dig. Insurance, § 852.

492. Provision of fire insurance policy that insured should take a complete inventory of stock held met by inventory showing number of pieces of lumber and dimensions of each piece of different kinds and total number of each kind separately, without showing the class or value.—Camden Fire Ins. Co. v. Yarbrough, 182 S. W. 66.

493. Where a fire insurance policy required the insured to take and pre-

sory warranty and strict compliance is essential to a recovery.⁵⁰⁷
^{522b} Where the policy prohibits additional insurance, whether valid or not, it includes an invalid additional policy and is enforceable.⁵¹¹
 In order that other insurance shall constitute additional insurance within the meaning of a policy, the property covered by both policies must be the same, and the burden of proving these facts is

serve in a fireproof safe an inventory of the insured stock, the failure to preserve such inventory or an equivalent thereof forfeits the insurance.—*Royal Ins. Co. v. Okasaki*, 177 S. W. 200.

494. Where the owner of an insured stock of goods negligently left his inventory outside the safe the night of the fire, and 15 per cent. of it was thereby rendered unintelligible, there can be no recovery.—*Id.*

495. The requirement of a fire insurance policy that the insured shall keep a set of books showing his business is complied with where the books preserved contain a complete record of the business though the journal was burned.—*Id.*

496. The breach of a provision of a fire insurance policy, requiring the insured to take an annual inventory and to keep a complete record of his business, bars a recovery; the provisions of *Vernon's Salyes' Ann. Civ. St. 1914, Art. 4874a*, providing that recovery shall not be defeated by breach of provisions which did not contribute to the loss or destruction of the insured property, not being applicable.—*Westchester Fire Ins. Co. v. McMinn*, 188 S. W. 25.

336—(11) **Additional Insurance.** (See 28 Cent. Dig. Insurance, §§ 856-873.)

497. A policy providing that it should be void if the insured had or should thereafter procure "any other insurance, whether valid or not," was avoided by afterwards procuring another policy, which, by reason of a similar clause therein, was void, and never attached.—*Wilson v. Aetna Ins. Co.*, 33 S. W., 1085, 12 Tex. Civ. App. 512.

498. A provision that consent to additional insurance must be endorsed on the policy does not prevent recovery, where the local agent who has authority to give consent, does so, but forgets to endorse it on the policy.—*German Ins. Co. v. Cain*, 37 S. W. 657.

499. Evidence that plaintiff moved into his house with part of his furniture, which he insured, and that he subsequently moved, and insured the rest without intending to reinsure any of the previously insured part was insufficient to show that there was no double insurance on any of the furniture, where the policies covered apparently identical furniture, and plain-

tiff failed to inform the second insurer of the first policy, and what part of the furniture he intended the second should cover.—*Westchester Fire Ins. Co. v. Storm*, 25 S. W. 318, 6 Tex. Civ. App. 390.

500. Where an insurance company expressly forbade other insurance, the fact that a clause, "Total insurance permitted \$.....," was not filled in, did not tend to show that the amount of insurance was not limited.—*Labell v. Georgia Home Ins. Co.*, 28 S. W. 133.

501. An insurance company cannot be held to have consented to additional insurance because its agent, long before the policy was issued, promised that consent would be given.—*East Texas Fire Ins. Co. v. Blum*, 13 S. W. 572.

502. A policy of insurance for \$1,000 was issued upon property already insured for \$3,000, and provided that if other insurance were obtained without consent of the company the contract should be void. Additional insurance for \$1,000 was obtained. Upon the policy in question, detached from other parts of it, were the words: "Total concurrent insurance, \$4,000." Held, the words included the amount of the policy on which they were written, and therefore implied no consent to the additional \$1,000.—*East Texas Fire Ins. Co. v. Blum*, 13 S. W. 572.

503. The condition on a fire policy that additional insurance shall not be obtained without the consent of the company indorsed on the policy is neither complied with nor waived by the assured telling the company's agent that he intends to take out additional insurance when able, and the agent expressing a desire to write the policy; and the subsequent procurement of additional insurance, without the agent's knowledge, invalidates the first policy.—*New Orleans Ins. Ass'n v. Griffin*, 18 S. W. 505, 66 Tex. 232.

504. A policy provided that other insurance, not made known to the company, and consented to thereon, would avoid the policy. In an action on the policy, plaintiff offered to show that the agent was informed of the other insurance, made no objection, but promised to indorse it on the policy; that plaintiff relied on such promise; and that, just before the loss, the agent arranged to renew the policy, and made a memorandum for renewal containing such reinsurance, but never indorsed it on the policy. Held, that

on the insurer.⁵⁰⁹ The procurement of another policy without the consent of the insurer, where additional insurance is prohibited without such consent, invalidates the first policy, having a similar clause,^{497 508 512} even though by good excuse or by mistake. A cancellation of the new policy after loss will not prevent a forfeiture of the original policy.⁵¹³ Where concurrent insurance is permitted

the company was bound by its acquiescence in such acts of its agents, though the policy contained a clause that no agent had authority to bind the company in violation of any of the printed terms of the contract, and no condition or restriction contained in the policy, which by its terms may be waived, shall be deemed to have been waived, except by distinct agreement contained in the body of the policy; this clause having no reference to the subject of reinsurance.—*Morrison v. Insurance Co. of North America, (Tex.)* 6 S. W. 605.

506. Though, to a policy issued to and paid for by plaintiff, there is attached a memorandum reciting that the loss, if any, is payable to the mortgagee, as his interest may appear, there is such an insurance of plaintiff's interest as to cause a breach of a condition in another policy issued to him, against additional insurance.—*Guinn v. Phoenix Ins. Co. of Brooklyn (Tex. Civ. App.)* 31 S. W. 586.

508. A verdict is properly directed for defendant in an action on a fire policy providing that it shall be void if additional insurance is procured without a permit indorsed on the policy; insurance to the amount of \$10,500 being on the property at the time of loss, the permit allowing only \$7,000, a permit for \$10,000 being refused by the agent, who stated at the time that he would not endorse for any additional insurance except as it was taken out; and the company not having been notified that insurance in excess of \$7,000 had been taken.—*Works, Pritchett & May v. Springfield Fire & Marine Ins. Co.,* 79 S. W. 42.

507. A clause in a fire insurance policy forbidding other concurrent insurance unless permitted is a promissory warranty, so that strict compliance therewith is essential to a recovery.—*Gross v. Colonial Assur. Co.* 121 S. W. 517. See 28 Cent. Dig. Insurance, §§ 856-873.

508. Rev. St. 1895, Art. 3096aa, added by Acts 28th Leg. 1903, p. 94, ch. 69, § 1, provides that any provision of an insurance contract, which provides that any answers or statements made therein or in the application, if untrue or false, shall render the policy void, shall be of no effect unless the matter misrepresented is material to the risk. A fire insurance policy provided that it should be void if assured then had, or thereafter procured other insurance. Held, construing the

statute under the assumption that it was enacted with knowledge of the judicial doctrine of promissory warranties and representations, and requiring strict compliance with the former, that it did not abolish such doctrine, and the policy was avoided by carrying policies in other companies, \$750 in excess of the \$37,000 concurrent insurance permitted, and the small amount of the excess, compared with the total insurance permitted, did not excuse the violation of the provision.—Id.

509. In order that other insurance shall constitute "additional insurance" within the meaning of a policy, the property covered by both policies must be the same, and the burden of proving these facts is on the insurance company.—*Norwich Union Fire Ins. Society v. Cheaney Bros.* 128 S. W. 1163.

510. Where insurer claimed that, after insured acquired information that an arson was about to be committed on adjoining property, he took out another policy covering the property destroyed, such fact, if true, did not constitute such fraud as would be a defense to the policy sued on, unless in procuring such additional insurance defendant exceeded the amount of current insurance permitted by the policy in suit.—*Hartford Fire Ins. Co. v. Dorroh,* 133 S. W. 465.

511. A stipulation in a fire policy that it shall be void on insured procuring, without notice, additional insurance, whether valid or not, includes an invalid additional policy, and is enforceable.—*National Union Fire Ins. Co. v. Dorroh,* 133 S. W. 475.

512. An original fire policy stipulated that it should be void on insured procuring additional insurance, valid or invalid, in excess of concurrent insurance allowed. Insured, under the mistaken belief that other insurance, within the amount of the concurrent insurance allowed, had expired, procured a new policy, but because the other insurance was in force, the new policy exceeded the amount of concurrent insurance allowed. Held, that the original policy was invalidated by the procurement of the new policy.—Id.

513. Where an original fire policy was invalidated by insured procuring a new policy in excess of the amount of concurrent insurance allowed, the cancellation of the new policy after a fire did not prevent a forfeiture of the original policy.—Id.

but total insurance is limited to three-fourths of the actual cash value, concurrent insurance and over-valuation do not avoid a policy in the absence of an intention to defraud.⁵¹⁴ The fact that the excess insurance is small as compared to the total insurance permitted will not excuse a violation of the additional insurance provision in a policy although the statute says that misrepresentations must be material to avoid a contract.⁵⁰⁸ Where the insured carried excess insurance on the theory that it was a co-insurance policy they could not recover on a concurrent policy limiting the total amount to be carried, which was the policy contracted for, in view of the classification of such property by the State Insurance Board.⁵¹⁶ It is held that the fact that the blank space for the amount of total insurance permitted is not filled in does not tend to show that the amount of insurance was not limited.⁵⁰⁰ A policy payable to a mortgagee as his interest may appear, recites such an interest in the mortgagor as to cause a breach in another policy issued to him as to additional insurance.⁵⁰⁸ An owner's policy is not void because a lien holder procures additional insurance without the former's authority.⁵²¹ Incidentally, it is held that a conveyance of property insured, reserving a vendor's lien, and assignment of the policy creates a new contract of insurance in which the vendees are the insured.⁵²⁰ Therefore, the act of the husband of the purchaser from the insured in obtaining other insurance does not forfeit the first insured's rights under the policy.⁵¹⁷ The words "total concurrent insurance" include the amount of the policy on which they are written.⁵⁰² The procurement of a policy because of fear of arson on the adjoining property does not constitute such fraud as will be a defense unless the total concurrent insurance permitted is exceeded.⁵¹⁰ (For facts showing double insurance on furniture, see Ann. 499.) (For facts not showing ad-

514. A policy provided that, "in the event of loss by fire on the property covered under this policy, this company shall not be liable for an amount greater than three-fourths of the actual loss on each item of property covered, * * * and, in the event of additional insurance hereon, this company shall be liable for its proportion only of three-fourths of such loss on each item, not exceeding the amount insured on each such item. Other concurrent insurance permitted, but total insurance shall at no time exceed three-fourths of the actual cash value of each item of the property hereby covered." Held, that concurrent insurance and overvaluation did not avoid the policy, in the absence of an intention to defraud.—*Pennsylvania Fire Ins. Co. v. Waggener*, 97 S. W. 541.

515. A stipulation in a policy avoiding it if other insurance is taken out

without insurer's consent is reasonable and proper.—*Orient Ins. Co. v. Prather*, 62 S. W. 89, 25 Tex. Civ. App. 446.

516. Under Act Sept. 6, 1910 (Acts 31st Leg., 4th called Sess. ch. 8, par. 18) concurrent policy of fire insurance with a stipulation prohibiting an insurance in excess of \$15,000, which was the policy contracted for, could not support assured's recovery, though they had carried excess insurance, on the theory that it was a coinsurance policy, in view of the classification of the property by the state insurance board.—*Reliance Ins. Co. of Philadelphia v. Dalton*, 180 S. W. 668.

517. Under a policy of fire insurance, held, that act of husband of purchaser from insured in obtaining other insurance on the property did not forfeit the first insured's rights in the policy.—*Dumphy v. Commercial Union Assur. Co. Limited*, of London, 174 S. W. 814.

ditional insurance because of failure to demand policies of agent, see Ann. 518.)

(a) **Consent of Agent to Additional Insurance.**—A provision that consent to additional insurance must be endorsed on the policy, does not prevent recovery, where the local agent who has authority to give consent, does so, but forgets to endorse it on the policy.⁴⁹⁸ In such a case the insurer is bound by the acts of the agent even though the policy stipulates to the contrary.⁵⁰⁴ However, the insurer cannot be held to have consented where the agent, long before the policy was issued promised that consent would be given.⁵⁰¹ Neither is the provision as to additional insurance complied with or waived by the insured informing the agent that he intended to take out additional insurance when able.⁵⁰³

(L) **Assignment of Policy**—(1) **Rights of Assignee.**—The assignee of a policy is affected with the knowledge of her agent regarding a previous forfeiture and therefore cannot claim a waiver of such forfeiture by the insurer's consent to the assignment.⁵²³

(2) **Assignment as Collateral Security.**—Where, after assignment to the mortgagee as additional collateral security, the insured conveyed the property insured without notice to the insurer or mort-

518. In an action on a policy providing that it should be void in case of other insurance, it appeared that, two years before the issuance of the policy, insured had applied to an agent for other insurance. The policies were issued for three years, and the premiums paid by the insurance agent; insured testifying, though that he only applied for the insurance for one year, and did not know that the policies were issued for three years. The policies were not delivered to insured, but were retained by the agent. Held, that insured, by failure to demand the policies from the agent will not be held, as a matter of law, to have acquiesced in their issuance, so as to render them valid and thereby avoid the policy in suit for failure to disclose such additional insurance.—Phoenix Ins. Co. v. Hague (Tex. Civ. App.) 34 S. W. 654.

519. Violation by insured of a provision in a fire policy prohibiting other insurance forfeits the policy.—Dumphy v. Commercial Union Assur. Co., Limited, of London, 142 S. W. 116.

520. A conveyance of property insured, reserving to the vendor a lien for the unpaid portion of the price and assignment of a fire policy thereon, held to create a new contract of insurance in which the vendees were the "insured."—Id.

521. Where a lienholder procured additional insurance without authority of the owner, who had procured a policy stipulating that it should be void if insured procured other insurance, the owner's policy was not void.

3—Ins.

—Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House, 147 S. W. 629.

522. A condition that a fire insurance policy shall be void if any of the insured property is then insured is reasonable.—Westchester Fire Ins. Co. v. Storm (Tex. Civ. App.) 25 S. W. 318.

523a. A provision that a policy should be void, in the absence of agreement, if insured procured other insurance, was not nullified by a concurrent insurance clause which did not provide for forfeiture for its violation.—Aetna Ins. Co. v. Waco Co., 189 S. W. 315.

523b. Clause in an insurance policy forbidding concurrent insurance in excess of amount allowed is a promissory warranty, the breach of which, in the absence of waiver or estoppel, will avoid the policy.—Mechanics' & Traders' Ins. Co. v. Dalton, 189 S. W. 771.

(D) ASSIGNMENT OF POLICY. (SEE 28 CENT. DIG. INSURANCE, §§ 883-889.)

Rights of Assignee.

523. The assignee of an insurance policy is affected with knowledge her agent, effecting the assignment, may have of a previous forfeiture of the policy, and, having such knowledge, cannot claim a waiver of the forfeiture by the insurer's consent to the assignment.—Fire Ass'n of Philadelphia v. Flournoy (Tex. Sup.) 19 S. W. 793; Northern Assur. Co. of London v. same, Id. 795.

tract and that if the notes were not paid when due it should be void, the premium being considered earned.⁶²⁵ Where an open policy provided that risks covered by it should be advised as soon as known to the home office by the insured but it was shown that in numerous instances the notice was sent by the agent and the losses had been paid without objection, such a course of dealing waived the requirement of the policy and estopped the insurer from setting up the insured's failure to advise as a defense.⁶²⁴ (For facts

621. Where the insured asked the local agent for an extension when the premium note became due, but notified him of his intention to pay if it should be refused, and the agent promptly communicated this request to the general officers of the company, their silence for three months thereafter is strong, if not conclusive, evidence of their consent to the extension.—*East Texas Fire Ins. Co. v. Perkey*, 24 S. W. 1080, 5 Tex. Civ. App. 698. Reversed 35 S. W. 1050.

622. In an action on an insurance policy, where the issue is whether the company waived a condition of forfeiture for non-payment of the premium notes, and plaintiff proves that he asked the local agent for an extension, and that the latter stated that he would communicate with the general office and promptly inform plaintiff of the reply, further evidence by plaintiff, that he relied on the local agent to inform him if the payment should be insisted on, is not objectionable as being intended to elicit plaintiff's motive in not paying.—*East Texas Fire Ins. Co. v. Perkey*, 24 S. W. 1080, 5 Tex. Civ. App. 698. Reversed 35 S. W. 1050.

623. Where a fire policy provided that it should be void where the hazard as to the subject of insurance was increased by any means within the knowledge or control of insured, and the hazard came from the presence or the keeping of gasoline on the premises, elsewhere provided against in the policy, and insurer impliedly waived the latter condition, it could not insist that the increased hazard was not also waived.—*American Cent. Ins. Co. v. Chancey*, 127 S. W. 577. See 28 Cent. Dig. Insurance, §§ 1026, 1027, 1030.

624. Where an open policy of marine insurance contained a stipulation that risks covered by it should be advised, as soon as known to the insured, to the company at its home office, by telegram or letter, but in numerous cases under the policy the notice was not sent by plaintiff, but by the company's agent when application was made to cover a shipment, and that the company had always accepted such risks and the premiums therefor, and had paid losses thereon, without objecting that plaintiff had not advised them of the risk, such course of deal-

ing constituted a waiver of the requirement of the stipulation, and estopped the company from setting up plaintiff's failure to advise as a defense to a claim for a loss.—*Insurance Co. of North America v. Bell*, 60 S. W. 262.

625. Where a fire policy provided that time was of the essence of the contract, and that, if the premium notes were not promptly paid when due, the policy should be void, and the premium note declared that the policy should be void on failure to pay the note at maturity, without notice to insured, but that if it was not paid at maturity the full membership fee and premium should be considered earned during the currency of the policy, and the note should be payable without reviving the policy or any of its provisions, an extension of time for payment of the note, not granted until after it had matured, and collection of the note after loss, did not estop the insurer from insisting on a forfeiture of the policy for the failure to pay the note at maturity.—*Texas Fire Ins. Co. v. Knights of Tabor Lodge of Camp County*, 74 S. W. 809.

626. A policy of insurance on lumber contained a clause that a clear space of 200 feet should be maintained between the lumber and any wood-working establishment. Subsequently a planing mill was erected within 128 feet of the lumber, and the insurance company was notified that the insured wished to cancel the lumber policy and insure the mill, which was done. The company's agent saw the lumber when the change of insurance was effected, but paid no attention to the amount of the clear space. The manager of the mill stated that he told the agent he was contemplating re-insuring the lumber, whereupon the agent stepped the distance, and said, as the lumber was then situated, the rate would be 2½ per cent., but with a 200-foot space he could give 1 per cent. rate. Afterwards a policy was issued on the lumber for 2½ per cent., containing a 200-foot clear-space clause, and was received and retained by the assured without reading. Held, that no waiver of the clear-space clause could be implied from such evidence.—*Keller v. Liverpool & L. & G. Ins. Co.*, 65 S. W. 695. 27 Tex. Civ. App. 102.

(M) Non-Payment of Premiums—(1) Default as Ground of forfeiture in General.—Where the insurer agrees to look solely to the broker procuring the insurance for the premiums the non-payment of such premiums will not forfeit the policy.⁵³⁰

(2) Extension of Time of Payment.—It was held to be error to charge that if the insurer failed to give notice that a requested extension of a premium note was refused and by silence led the insured to believe the extension was granted, by reason of which the insured failed to pay the note when due although he could have done so, such failure to pay would not forfeit a policy providing for forfeiture in case of non-payment.⁵³¹

(3) Excuses for Non-Payment.—The failure of the insured to pay a premium when due when notified did not relieve the mortgagee from such liability where it had agreed to attend to its payment, had done so for a long time and had not notified the insured that it would not continue to do so.⁵³² Where a premium note providing for forfeiture if not paid at maturity, was payable at a certain place but at the time of such maturity was not there, such fact will not prevent forfeiture in the absence of proof that the insured was willing and ready to pay it at the place where it was payable.⁵³³

(N) NONPAYMENT OF PREMIUMS.

349—Default as Ground of Forfeiture in General. (See 28 Cent. Dig. Insurance, §§ 891, 895-902, 913.)

530. Where the insurer agreed to look solely to the broker procuring the insurance for the premiums, the nonpayment of a premium did not affect the right of the insured to recover on a fire policy; the insurer's remedy being an action against the broker.—*Hanover Fire Ins. Co. v. Turner*, 147 S. W. 625. See 28 Cent. Dig. Insurance, §§ 891, 895, 913.

356—Extension of Time for Payment.

531. Plaintiff took out policy of insurance in defendant company, giving his notes for the premium. The policy provided that his failure to pay the notes when due would cause the policy to lapse from the date of the maturity of the notes. When the second note came due, plaintiff asked the local agent for an extension, and his request was referred to the general manager of the company. No reply was received from the general manager, and the note was not paid, although plaintiff could have paid it if required. Held, that it was error to charge that if defendant failed to give

notice that extension was refused, and, by silence, led plaintiff to believe the extension was granted, by reason of which plaintiff failed to pay the note when due, such failure to pay would not forfeit the policy.—*East Texas Fire Ins. Co. v. Perkey* (Tex. Sup.) 35 S. W. 1050.

362—Excuses for Nonpayment.

532. Failure of insured to pay insurance premium when notified by local agent that it was due held not to relieve the company, the mortgagee, from liability where it had agreed to attend to the insurance, had done so for a time, and had not notified the insured that it would not continue to do so.—*Commonwealth Fire Ins. Co. v. Obenchain*, 151 S. W. 611. 28 Cent. Dig. Insurance, §§ 925-930.

533. Where a premium note was payable at a particular place, and provided that failure to pay the same at maturity should forfeit the policy, the fact that the note was not at the place of payment at maturity did not prevent a forfeiture of the policy for failure of insured to pay the same, in the absence of proof that insured was ready and willing to pay the note at the place where it was payable.—*Texas Fire Ins. Co. v. Knights of Tabor Lodge of Camp County*, 74 S. W. 809.

that a clear-space clause therein is being violated waives such provision only to the extent of allowing the insured a reasonable time in which to remove the lumber.⁶³³

Failure to Assert Forfeiture or Cancel Policy.—When an insurer ascertains that its agent at the time of writing the policy was also the agent of the insured it is its duty to cancel the policy promptly if it desires to avoid it.⁶⁴⁰

Demand, Acceptance, or Retention of Premiums.—When a policy stipulates for a forfeiture for non-payment of premiums a demand for and payment of such premium constitutes a waiver of such forfeiture.⁶⁴⁴ It is otherwise however, when the policy in addition provides that upon default in any installment the insurance shall cease and the installment shall be considered as earned.⁶⁴⁴ A mere demand for the payment of a past due premium, without its payment, is not sufficient to reinstate a policy which is forfeited.⁶⁴⁶

632. Where an insurer issues a policy and accepts premiums thereon with knowledge of facts that constitute a violation of a provision in the policy and would make the same void when issued, such insurer has waived the provision violated.—*Hartford Fire Ins. Co. v. Post*, 62 S. W. 140, 25 Tex. Civ. App. 428.

633. Where a policy provides that a clear space of 100 feet shall be kept between insured lumber and a dry kiln, the issuance of a policy with knowledge that the lumber was within less than 100 feet of the dry kiln waives such provision only to the extent of allowing assured a reasonable time in which to remove the lumber.—*Hartford Fire Ins. Co. v. Post*, 62 S. W. 140, 25 Tex. Civ. App. 428.

634. A condition against incumbrances is waived by the company's delivering the policy with knowledge of the incumbrance.—*German Ins. Co. v. Everett*, 46 S. W. 95, 18 Tex. Civ. App. 514.

635. Issuance of insurance policy on application containing the question: "Incumbrance or Indebtedness. I. Is there any on the above-described property? * * * If so, (1) on what; (2) to whom; (3) in what amount; (4) when due?" answered merely, "Owe H. \$800; * * * one-half due this year, one-half due next year,"—is a waiver of omission in the application to contain a specific answer as to the question of "incumbrances," the inquiry answered appearing to relate to general indebtedness.—*Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.*, 49 S. W. 271.

636. An insurance company, which has delivered a policy of insurance with full knowledge that the insured property is mortgaged, is estopped to set up the mortgage in avoidance of the policy.—*Phoenix Ins. Co. v. Ward* (Tex. Civ. App.) 26 S.W. 763.

637. In an action on an insurance policy, the company cannot claim a forfeiture under a condition that the policy should be void if the insured premises were mortgaged, or otherwise incumbered, where the agent effected the insurance with knowledge of a vendor's lien on the premises.—*Hartford Fire Ins. Co. v. Josey*, 25 S. W. 685, 6 Tex. Civ. App. 290.

638. An insurance company is estopped to claim that a policy is avoided by breach of a condition therein that no other insurance shall be obtained on the property without the company's consent, if the agent who issued the policy is notified by the insured of his intention to take out further insurance, and fails to object thereto.—*Hartford Fire Ins. Co. v. McLemore*, 26 S. W. 928.

639. The fact that an insurance agent, without authority to waive the condition of the policy requiring a true statement of the assured's interest in the insured property, was notified at the execution of the contract that the assured's interest was other than expressed in the policy, does not preclude the company from setting up a forfeiture of the policy for breach of said condition.—*Westchester Fire Ins. Co. v. Wagner* (Tex. Civ. App.) 30 S. W. 959.

390—Failure to Assert Forfeiture or to Cancel or Rescind Policy. (See 28 Cent. Dig. Insurance, §§ 1037, 1038.)

640. Where the insurer in a fire policy ascertained that its agent at the time of writing the policy was also the agent of the insured, if it desired to avoid the policy, it was its duty to manifest such intention promptly.—*German Ins. Co. v. Gibbs, Wilson & Company*, 92 S. W. 1063, rehearing denied 96 S. W. 760. See 28 Cent. Dig. Insurance, § 1038.

Where the insurer receives the premium with knowledge of the true state of the title of the property it is estopped from urging the defense that the interest of the insured was other than entire, unconditional and sole.⁶⁴⁷ The fact that the agent of insurer made demand for the premium and threatened suit would not constitute a waiver of the forfeiture especially where it appeared that the agent did not have authority to make contracts of insurance.⁶⁴⁸ After acceptance of a premium by the insurer with knowledge that the policy issued to one partner is in fact partnership property, it is estopped to deny the validity of the policy on the ground of misrepresentation as to ownership.⁶⁴¹ Where an agent was instructed to cancel a vacancy permit upon expiration and a loss occurred afterwards the insurer did not, by accepting the premiums after loss, without knowledge of the fact that the building was vacant at the time of loss, waive the condition against vacancy.⁶⁴⁶ (For facts waiving forfeiture by insurer's failure to cancel a policy and return the unearned premium, in view of certain knowledge, see Ann. 642.)

Consent to Assignment of Policy.—Where the insurer consented

392.—Demand, Acceptance, or Retention of Premiums or Assessments. (See 28 Cent. Dig. Insurance, §§1041-1056, 1058-1070.)

641. Where an insurance company, whose agent is aware that property covered by the policy issued to one partner is in fact partnership property, receives a premium on the policy, it is estopped to deny its validity on the ground of misrepresentation as to ownership.—*Continental Fire Ins. Co. v. Cummings*, 78 S. W. 373, judgment reversed *Continental Ins. Co. v. Same* (1904) 81 S. W. 705, 98 Tex. 115.

642. The insurer's failure to cancel a policy and return the unearned premium held, in view of certain knowledge, to waive forfeiture of the policy.—*Hamilton v. Fireman's Fund Ins. Co.*, 177 S. W. 173.

643. Where a policy of fire insurance provided that the company should not be liable for any loss or damage under the policy if default should be made in the payment of any premium, and that the policy should be void if the assured should neglect to pay the premium, held, that the fact that an agent of the company made demand for the premium after default by the insured, and threatened to sue for it if it were not paid by a certain day, did not constitute a waiver of the forfeiture, so as to make the company liable for a subsequent loss; especially as it appeared that the agent who acted in the matter had authority to receive applications, and to collect premiums only, and not to make contracts of insurance.—*Cohen v. Continental Fire Ins. Co.*, 3 S. W. 296.

644. Where a policy of insurance provides for a forfeiture upon failure to pay premiums which are to fall due, but does not stipulate that upon such failure the overdue premium shall be considered as earned, a demand and payment of such premium constitutes a waiver of the forfeiture. But such is not the case when the policy provides that, upon default in any installment, the insurance shall cease, and the installment be considered as earned; for then the insurer has the right to the premium, although the insurance is forfeited, and hence demand and payment of the premium is no waiver.—*Cohen v. Continental Fire Ins. Co.*, 3 S. W. 296.

645. Where the agent was instructed to cancel a vacancy permit as soon as it expired, and a loss occurred after the expiration thereof, the company did not, by accepting premiums after loss, without knowledge of the fact that the building was vacant at the time of loss, waive the condition against vacancy.—*McLeary v. Orient Ins. Co.*, 32 S. W. 583.

646. A mere demand for the payment of a past due premium, without its payment, is not sufficient to reinstate a policy which is forfeited.—*Cohen et al. v. Continental Fire Ins. Co.*, 67 Tex. 325.

647. An insurance company in receiving the premium, with knowledge of the true state of the title of the property, the insurer is estopped from denying the right of plaintiff to recover on the ground that the interest of assured was other than entire, unconditional and sole.—*Liverpool & L. & G. Ins. Co. v. Ende*, 65 Tex. 118.

gatee, it was held that the latter, not having assumed the obligation of the insured to the insurer, there was no contract with him, and the conveyance by the insured avoided the policy.⁵²⁴ Neither is this defense invalidated by the statutory provision permitting the assignee of a non-negotiable instrument to sue thereon in his own name upon assuming all legal defenses to which it was subject in the hands of the previous owner.⁵²⁵

(3) **Restrictions on Assignment in General.**—A clause in a policy prohibiting its assignment before loss does not prohibit a mere conditional transfer to a creditor as this would only give the creditor a lien on the proceeds after loss to secure his indebtedness.⁵²⁶ An express warranty in a policy that the insurance shall not inure to the benefit of any carrier is legal and proper and in the event the insured contracts to give a carrier the benefit of such insurance the policy is forfeited.^{527 528}

(4) **Invalid or Inoperative Assignment.**—A policy is not forfeited where it is assigned by mistake, where there is no delivery, no consideration and the assignment is made subject to the consent of the insurer.⁵²⁹

347—Assignment as Collateral Security.

524. Where an assured, with the company's consent, assigned the policy, as additional collateral security, to the mortgagee of the premises insured, and subsequently, in violation of the terms of the policy, conveyed said premises without notice to the company or to the mortgagee, held, that the latter not having assumed the obligation of the assured to the company, there was no contract with him, and the conveyance by the assured avoided the policy in his hands.—*Swenson v. Sun Fire Office*, 5 S. W. 60.

525. Where, in a suit by the assignee of an insurance policy, the defense is set up that the property covered by the policy has been conveyed subsequent to such assignment to a third party by the assignor and original holder of the policy in violation of the express terms of the policy, this defense is not invalidated by Rev. St. Tex. Arts. 266, 267, which permits the assignee of a non-negotiable instrument to sue thereon in his own name, upon condition of allowing every defense thereto to which it was subject in the hands of the previous owner before notice of the assignment to defendant.—*Swenson v. Sun Fire Office* (Tex. Sup.) 5 S. W. 60.

Restriction on Assignment in General.

526. A clause in a policy of insurance prohibiting its assignment before loss does not prohibit a mere conditional transfer to a creditor, which in

effect would only give the creditor a lien on the proceeds of the policy, in the event of loss, to secure his indebtedness.—*Scottish-Union & National Ins. Co. v. Andrews & Matthews*, 89 S. W. 419.

527. An express warranty in a policy that "this insurance shall not inure to the benefit of any carrier" does not contravene public policy, nor is it in restraint of trade, and all rights under the policy are forfeited on the execution of a contract by the insured to give the carrier the benefit of such insurance.—*Insurance Co. v. Easton*, (Tex.) 11 S. W. 180.

528. The fact that the contract was issued without the knowledge or privity of the carrier is immaterial. The carrier had no right to have the insurance company execute any contract whatever, and, knowing that the insured could not transfer rights he did not possess, if it desired to know the extent of the latter, it was its duty to make inquiry.—*Insurance Co. v. Easton*, (Tex.) 11 S. W. 180.

348—Invalid or Inoperative Assignment.

529. Where an insurance policy has been assigned by mistake, and there has been no delivery, and no consideration for the assignment, and it was made subject to the consent of the insurer, and therefore ineffective until the consent was given, the policy is not forfeited, under a clause providing that it should be void if an assignment was made.—*Pennsylvania Fire Ins. Co. v. Waggener*, 97 S. W. 541. See 28 Cent. Dig. Insurance, § 888.

(M) Non-Payment of Premiums—(1) Default as Ground of forfeiture in General.—Where the insurer agrees to look solely to the broker procuring the insurance for the premiums the non-payment of such premiums will not forfeit the policy.⁵³⁰

(2) Extension of Time of Payment.—It was held to be error to charge that if the insurer failed to give notice that a requested extension of a premium note was refused and by silence led the insured to believe the extension was granted, by reason of which the insured failed to pay the note when due although he could have done so, such failure to pay would not forfeit a policy providing for forfeiture in case of non-payment.⁵³¹

(3) Excuses for Non-Payment.—The failure of the insured to pay a premium when due when notified did not relieve the mortgagee from such liability where it had agreed to attend to its payment, had done so for a long time and had not notified the insured that it would not continue to do so.⁵³² Where a premium note providing for forfeiture if not paid at maturity, was payable at a certain place but at the time of such maturity was not there, such fact will not prevent forfeiture in the absence of proof that the insured was willing and ready to pay it at the place where it was payable.⁵³³

(E) NONPAYMENT OF PREMIUMS.

249—Default as Ground of Forfeiture in General. (See 28 Cent. Dig. Insurance, §§ 891, 895-902, 913.)

530. Where the insurer agreed to look solely to the broker procuring the insurance for the premiums, the nonpayment of a premium did not affect the right of the insured to recover on a fire policy; the insurer's remedy being an action against the broker.—*Hanover Fire Ins. Co. v. Turner*, 147 S. W. 625. See 28 Cent. Dig. Insurance, §§ 891, 895, 913.

356—Extension of Time for Payment.

531. Plaintiff took out policy of insurance in defendant company, giving his notes for the premium. The policy provided that his failure to pay the notes when due would cause the policy to lapse from the date of the maturity of the notes. When the second note came due, plaintiff asked the local agent for an extension, and his request was referred to the general manager of the company. No reply was received from the general manager, and the note was not paid, although plaintiff could have paid it if required. Held, that it was error to charge that if defendant failed to give

notice that extension was refused, and, by silence, led plaintiff to believe the extension was granted, by reason of which plaintiff failed to pay the note when due, such failure to pay would not forfeit the policy.—*East Texas Fire Ins. Co. v. Perkey* (Tex. Sup.) 35 S. W. 1050.

362—Excuses for Nonpayment.

532. Failure of insured to pay insurance premium when notified by local agent that it was due held not to relieve the company, the mortgagee, from liability where it had agreed to attend to the insurance, had done so for a time, and had not notified the insured that it would not continue to do so.—*Commonwealth Fire Ins. Co. v. Obenchain*, 151 S. W. 611. 28 Cent. Dig. Insurance, §§ 925-930.

533. Where a premium note was payable at a particular place, and provided that failure to pay the same at maturity should forfeit the policy, the fact that the note was not at the place of payment at maturity did not prevent a forfeiture of the policy for failure of insured to pay the same, in the absence of proof that insured was ready and willing to pay the note at the place where it was payable.—*Texas Fire Ins. Co. v. Knights of Tabor Lodge of Camp County*, 74 S. W. 809.

ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY

What Conditions May Be Waived.—The insurer's agent may waive a stipulation as to the endorsement of transfer on the policy.⁵³⁵ In a case where insured property is moved from the location specified in the policy the insurer may waive the provision in the policy limiting liability to such location or it may be estopped to set it up.⁵³⁵ Additional insurance without endorsement on policy requiring such endorsement will not avoid a policy if the insurer consents thereto.^{536a} A condition requiring endorsement in such case may be avoided by an authorized agent.^{536b}

Liability of Insurer to Estoppel by Acts, Conduct or Statements of Agents.—In general, the fraud of an agent, authorized not only to enter into negotiations for insurance but also to issue and deliver the policy, in misstating any fact essential to the validity of the contract is chargeable to the insurer.⁵³⁸ Where an agent, after agreeing with the insured to insure the property in a certain place but through fraud or mistake describes the property as located in another building, the insurer is bound.⁵³⁷ Where the evidence

363—Rights of insured After Default.
(See 28 Cent. Dig. Insurance, §§ 194, 931-940.)

534. A fire insurance policy, providing that it shall cease to insure if default is made in payment of the premium note, and that the company shall not be liable during such default, does not become utterly extinguished on nonpayment of the premium note, but the obligation of the risk is suspended during such default, unless the company waives it, or estops itself from insisting thereon; and a further provision that the company shall not become liable after default, until the policy is revived by its written consent, on payment of all amounts due thereon, does not affect this construction.—*East Texas Fire Ins. Co. v. Perkey*, (Tex. Civ. App.) 24 S. W. 1080, 5 Tex. Civ. App. 698; reversed 35 S. W. 1050.

ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.
(SEE 19 CYC. 777.)

373—What Conditions May Be Waived.
(See Cent. Dig. Insurance, § 941.)

535. When insured property is removed from the location specified in the policy without the knowledge or consent of the insurer, the insured cannot ordinarily recover, but there may be a waiver of the provision limiting liability to such location, or the

insurer may be estopped to set it up.—*Deleware Ins. Co. v. Wallace*, 160 S. W. 1130. 28 Cent. Dig. Insurance, § 941.

536. The insurer's agent may waive a stipulation as to the endorsement of transfer on the policy.—*British America Assur. Co. et al. v. Francis Co.*, 123 S. W. 1144. See 28 Cent. Dig. Insurance, § 941.

536a. The taking of additional insurance without permission being indorsed on policy, as required thereby, does not avoid the policy, if the insurer consents thereto.—*Mechanics' & Traders' Ins. Co. v. Dalton*, 189 S. W. 771.

536b. Condition of insurance policy requiring that insurer's written consent for insurance in excess of the amount of concurrent insurance stipulated therein must be indorsed on or attached to such policy, may be waived by a duly authorized agent of the insurer.—Id.

373—Liability of Insured to Estoppel by Acts, Conduct, or Statements of Officers or Agents.

537. Where there was a mutual agreement between an insurance agent and the insured to insure the property in a negro cabin, and by error, mistake, or fraud the agent described the property as located in another building, the insurer was bound; whether the agent, at the time the policy was prepared, intended to write the insur-

showed that an agent of the insurer, who was ignorant of a breach of the policy by the insured took possession of the debris after a fire and sold it but did not show that the insurer received the proceeds or otherwise ratified these acts, the agent having authority to procure insurance only, a charge upon waiver, estoppel or ratification by the defendant was not authorized.⁵³⁹

Estoppel of Insured.—Insured's acquiescence in an agent's mistaken statement that contemplated foreclosure proceedings avoided the policy does not estop him from denying that the policy was canceled by mutual consent, where there is no proof that his silence misled the insurer.^{539a}

Powers of Agents Respecting Waiver—(1) In General.—A duly authorized agent may waive a forfeiture of a policy for non-payment of premiums and thereby reinstate the obligation.⁵⁴¹ It was held error to charge that if a soliciting agent knew that a risk had been declined by another company the fact that the insured had stated in his application that it had not been so declined, would not defeat his right to recover since the insurer was not bound by the agent's acts beyond the terms of the statute, which did not include the right to waive a warranty.⁵⁴⁰

ance to cover the property in the cabin, or elsewhere.—*Aetna Ins. Co. v. Brannon*, 91 S. W. 614. See 28 Cent. Dig. Insurance, § 947.

538. Where an insurance agent was authorized, not only to enter into negotiations for a contract of insurance, but also to issue and deliver the policy, his fraud, if any, in misstating any fact essential to the validity of the contract, was chargeable to the insurer.—*Aetna Ins. Co. v. Brannon*, 91 S. W. 614.

539. In an action on a fire insurance policy there was evidence of a breach of the policy by the plaintiff; that one who was agent of the company for procuring insurance only, and who was ignorant of the breach of the policy, took possession of the debris after the fire and sold it, but there was no evidence that the company received the proceeds or otherwise ratified these acts. Held, that the evidence did not authorize a charge upon waiver, estoppel, or ratification by defendant.—*German-American Ins. Co. of New York v. Waters* (Tex. Civ. App.) 30 S. W. 576.

Estoppel of Insured.

539a. Assured's acquiescence in an insurance agent's mistaken statement that contemplated foreclosure proceedings voided the policy does not estop him from denying that the policy was canceled by mutual consent, where there is no proof that his silence misled the insurer.—*Glens Falls Ins. Co. v. Walker*, 187 S. W. 1036.

374—**Powers of Officers or Agents Respecting Waiver. (A) In General.** (See 28 Cent. Dig. Insurance, §§ 948-965.)

540. A soliciting agent of defendant, who had taken an application for insurance on plaintiff's gin house in another company, which was rejected, took plaintiff's application, containing the statement, in the agent's writing, that no application had been rejected by any company. By the terms of the application, and of the policy issued thereon by defendant's general agent, the statements in the application were made warranties. Held, under Rev. St. Art. 3093, which provided that any person who solicited insurance on behalf of any insurance company should be held to be the agent of the company, as far as related to all the liabilities, duties, requirements, and penalties set forth in that act, it was error to charge "that, if such soliciting agent knew that the risk had been declined, then the fact that plaintiff made such statement in the application would not defeat his right to recover," since by the statute the company was not bound by the agent's acts beyond the terms of the statute, which did not include the right to waive a warranty. Judgment (Civ. App.) 60 S. W. 820, reversed.—*Hartford Fire Ins. Co. v. Walker*, 61 S. W. 711, 94 Tex. 473.

541. Although a policy be forfeited by the failure to pay premiums according to its conditions, yet an agent, duly authorized, may waive the forfeiture, and thereby reinstate the ob-

(2) **Effect of Provisions of the Policy.**—In general, a local agent, authorized to solicit insurance, deliver policies and collect premiums may waive conditions and forfeitures in the policy regardless of authority conferred by the insurer, unless the insured knows of such limitations.⁵⁵³ But it is further held that a waiver by an agent of compliance by the insured with a warranty required by the policy is not binding on the insurer, where the policy expressly prohibits agents from waiving the requirements of the warranty or compliance with its provisions.^{552 548} A provision that the insured should submit to examination and that the insurer should not be held to have waived any provisions of the policy or any forfeiture thereof is valid and binding on the insured.⁵⁴⁶ Where a policy stipulating that it should be void if the insured kept, used or allowed gasoline on the premises, was issued with knowledge on the part of the agent that gasoline was being used on such premises, the policy was not rendered void and the issuance carried with it the consent of the insurer that the building might be used as it was being used at the time of such issuance.⁵⁵⁰ Delivery of a policy with knowledge on the part of the agent of an outstanding vendor's lien, waives such incumbrance on the part of the company, where the agent has power to countersign policies, deliver them and collect the premium.⁵⁴⁴ An insurer is bound by the statement of an agent authorized to issue policies that a sale and mortgage of the property insured would not avoid it and would be agreed to though the policy provided that its conditions can be waived only by specific agreement indorsed thereon and that the agent shall be deemed the agent of the insured.⁵⁴² In the same way the insurer may be bound by the agreement by the agent that the iron-safe clause should not apply where the insured had no notice of limitation of his authority, though the policy stipulated against his right to waive provisions and where he did not know at the time of acceptance of policy that it differed from the terms agreed upon.⁵⁴³ An agent with power to solicit insurance, deliver policies and collect premiums may agree to accept certain invoices in lieu of an inventory and bind the insurer although the policy stipulates

litation.—Cohen et al. v. Continental Fire Ins. Co., 67 Tex. 325.

376—(B) Effect of Provisions of Policy.
(See 28 Cent. Dig. Insurance, §§ 952-955.)

542. An insurance company is bound by the statement of an agent authorized to issue policies that a sale and mortgage of the property insured would not avoid it and would be agreed to though the policy provided that its conditions can be waived only by specific agreement indorsed thereon, and that the agent shall be deemed the agent of the assured.—Delaware Ins.

Co. of Philadelphia v. Hill, 127 S. W. 283.

543. Agreement by fire insurer's agent, who was empowered to solicit, issue, and deliver policies, in negotiating for a policy, that an iron-safe clause should not apply, binds insurer, where insured, when the contract was made, had no notice of limitation upon the agent's authority, though the policy stipulated against his right to waive provisions, and where, when insured accepted the policy, he did not know that the policy differed from the terms agreed upon.—Old Colony Ins. Co. v. Starr-Mayfield Co., 135 S. W. 252. See 28 Cent. Dig. Insurance, §§ 952-955.

that no agent can waive any provision in the policy.⁵⁴⁷ The insurer is estopped to assert a forfeiture where a general agent, after notice of the procuring of other insurance, fails to indorse the insurer's consent on the policy, although the policy makes this essential.⁵⁴⁸ (For facts showing waiver by agent of insurer's right to rely on certain warranties see Ann. 549.)

544. Where an agent of an insurance company who received applications for insurance determined the rate, filled out the blanks, countersigned and delivered the policies, collected the premiums, and reported to the company, learned that the property of an applicant for a policy was incumbered by a vendor's lien, and delivered a policy stipulating that the policy should be void if the interest of insured was other than unconditional and sole ownership, the company waived the incumbrance, and was estopped from relying thereon to defeat the policy, though it stipulated that no agent could waive the provisions of the policy.—*Mecca Fire Ins. Co. v. Smith*, 135 S. W. 688.

545. The provisions in a policy that insured should submit to examination by any person appointed by the company, and that the company should not be held to have waived any provision of the policy, or any forfeiture thereof, are valid, and binding on the insured.—*American Cent. Ins. Co. v. Nunn*, 32 S. W. 497, 98 Tex. 191, 68 L. R. A. 83.

546. Where a general agent of a fire insurance company, with power to issue and deliver policies, solicit and write insurance, and otherwise to act for and in behalf of the company in the conduct of its business at a certain place, receives notice from the insured of the taking of other insurance on property covered by a policy issued by such agent, but fails to indorse the company's consent on the policy as required by the policy's terms to maintain its validity, and fails to make any objection to the taking of other insurance, the company is estopped to assert a forfeiture for want of such indorsement, though the policy further provides that no agent has power to waive the provision unless the waiver shall be written on or attached to the policy, and that no privilege affecting the insurance shall exist or be claimed by the insured unless so written or attached.—*Aetna Ins. Co. v. Eastman*, 80 S. W. 255.

547. Though a fire policy contained a clause that no agent should have power to waive any provision of the policy, an agreement on the part of an agent who wrote the policy, having authority to solicit insurance and deliver policies and collect premiums, that certain invoices would be accepted by insurer in lieu of an in-

ventory required by the policy, was a waiver of the requirement binding on the insurer.—*Fire Ass'n of Philadelphia v. Masterson*, 83 S. W. 49.

548. An insurance agent cannot waive the requirements of the "iron-safe clause" when that authority is expressly withheld from him by the terms of the policy.—*Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.* (Tex. Civ. App.) 36 S. W. 955; *Same v. Lancashire Ins. Co.*, Id.

549. The right of an insurer to rely on certain warranties, held waived by his agent.—*Co-operative Ins. Ass'n of San Angelo v. Ray*, 138 S. W. 1122, 28 Cent. Dig. Insurance, §§ 952-955.

550 Where an agent of insurer, procuring a fire policy stipulating that it should be void on insured keeping, using, or allowing gasoline on the premises, knew at the time of the issuance of the policy that gasoline was kept on the premises for the needs of the restaurant conducted thereon, the keeping on the premises of gasoline for such needs did not render the policy void, but its issuance carried with it the consent of insurer that the building might be used as it was being used at the time of the issuance of the policy.—*American Cent. Ins. Co. v. Chancey*, 127 S. W. 577.

551. Under Rev. St. 1895, Art. 3093, making any person who does any act in the consummation of any contract of insurance for any insurance company the agent of the company, so far as relates to all the liabilities, duties, etc., set forth in the chapter relating to insurance, an agent writing out the application of insured, forwarding it to the company, collecting the premiums, and delivering the policy is the agent of the company, and, having knowledge that a previous application of insurance had been rejected, had authority to waive a warranty against such rejection, notwithstanding any stipulations or limitations of the powers of the agent printed in the application and policy.—*Hartford Fire Ins. Co. v. Walker*, 60 S. W. 820, *Reversed*, 61 S. W. 711.

552. A waiver by an insurance agent of compliance by the insured with a warranty required by the policy is not binding on the company, where the policy expressly prohibits agents from waiving the requirements of the warranty or compliance with its provisions.—*Northwestern Nat. Ins. Co. v. Mize* (Tex. Civ. App.) 34 S. W. 670.

Knowledge or Notice of Facts—In General.—To bind the insurer it must have actual notice or notice of such facts as would put it on inquiry.⁵⁵⁰ So that the fact that a mortgage is recorded does not constitute notice thereof to the insurer.⁵⁵⁰ The fact that an agent waived certain breaches of the conditions of a policy after a loss does not estop the insurer to insist on other breaches not then known to it or its agent as defenses.⁵⁵¹ Failure to give notice of a mortgage is not waived by the insurer's knowledge of a mortgage subsequently given on the property to secure money with which to pay a mortgage existing at the time the policy was issued.⁵⁵² A clause avoiding a policy "if with the knowledge of the insured foreclosure proceedings be commenced by virtue of any mortgage" is not waived by knowledge of the insurer of a mortgage which it knew would mature during the life of the policy.⁵⁵² An agent issuing a policy with a stipulation against incumbrances is not required to exercise diligence in examining the registers of insurance of other companies kept by his predecessor to ascertain whether mortgage permits had been granted by any of the numerous companies represented by such agent.⁵⁵⁴ To show a waiver of a stipulation against incumbrances proof of actual knowledge on the part of the agent of mortgage liens at the time the policy was issued is essential.⁵⁵⁵ Proof that a mortgage permit was once issued by the wife of the predecessor of the agent in behalf of another company is insufficient to establish knowledge on the part of the agent of the issuance of such permit.⁵⁵⁶ Although an agent knew that the insured occupied leased premises and that his property was subject to the statutory lien for the payment of such rent there is no waiver of a clause rendering the policy void if the property "be or become incumbered by a chattel mortgage" where the lease contained a clause of which the agent was ignorant, giving the landlord a lien for the full term.⁵⁵⁷ It is the right and duty of the first

553. A local agent of a fire insurance company, authorized to solicit insurance, deliver policies, and collect premiums, may waive conditions and forfeitures in the policy regardless of authority conferred by insurer, unless insured knows of such limitations. —New Jersey Fire Ins. Co. v. Baird, 187 S. W. 356.

377—**Knowledge or Notice of Facts in General.** (See 28 Cent. Dig. Insurance, §§ 942, 966, 967, 975-997.)

554. The agent of a fire insurance company issuing a policy with a stipulation against incumbrances was not required to exercise diligence in examining the registers of insurance in other companies kept by his predecessor in order to ascertain whether mortgage permits had been granted by any of the 12 companies represented by such agent.—Hartford Fire Ins. Co.

v. Wright, 125 S. W. 363. See 28 Cent. Dig. Insurance, §§ 942, 966, 967, 975-997.

555. Proof of actual knowledge on the part of defendant insurance company's agent of the existence when the policy was issued of mortgage liens on plaintiff's property was essential to show a waiver of a stipulation against incumbrances.—Id.

556. Proof that a mortgage permit was once issued to insured by the wife of the predecessor of defendant insurance company's agent in behalf of another company was insufficient to establish knowledge on the part of the agent of the issuance of such permit.—Id.

557. Rev. St. 1895, Art. 3251, gives lessors of buildings a preference lien for one year on the property of the tenant in the building for the payment of rent, and provides that the article

insurers to elect whether they will enforce their policy or cancel it and they should do this in a reasonable time and in an unmistakable way where a second policy was procured on the same property without an endorsement of consent on the first policy although the agent had full knowledge of the same.⁵⁵⁸ Where an insurer issues a policy with knowledge that the statements therein with reference to dividends are untrue it is estopped from avoiding the policy on the ground they were less than the amount stated.^{559a}

Knowledge of or Notice to Officers or Agents—(1) In General.—The rule is that insurers are responsible for the acts of their agents within the general scope of the business with which they are entrusted and no limitation on the authority of the agent will be binding on the parties with whom he deals, unless such limitation be brought to their knowledge.⁵⁶⁰ The statute does not prevent an insurance company from limiting the power of soliciting agents to bind it by notice received while soliciting insurance.⁵⁶¹ While the general rule is that a principal is not chargeable with notice of such facts as come to the knowledge of his agent while engaged in transactions with which the principal has no concern, an insurer is bound by information acquired by its agent while acting without

shall not be construed as in any manner affecting any act exempting property from forced sale. Held, that though insurer's agent knew that insured occupied leased premises, and that his property was subject to the statutory lien, there was no waiver of a clause rendering the policy void if the property "be or become incumbered by a chattel mortgage," where the lease contained a clause of which the agent was ignorant, giving the landlord a lien for the full term, expressly waiving all exemption laws, and providing that the lien should be cumulative of all statutory liens and remedies.—*Id.*

558. A policy provided that if the insured took out additional insurance the first insurance became void unless proper notice were given. Other insurance was procured on the same property without an indorsement of consent on the first policy although the agent had full knowledge of same. It was held that it was the right and duty of the first insurers to elect whether they would enforce the policy or cancel it and they should do this in a reasonable time and in an unmistakable way.—*Crescent Ins. Co. v. Griffin & Shook*, 59 Tex. 509.

559a. Insurer issuing policy of indemnity with knowledge that statement therein as to dividends paid by company in which insured held stock was untrue, held estopped from avoiding policy on the ground that dividends were less than amount stated.—*Liver-*

pool & London & Globe Ins. Co. v. Lester, 176 S. W. 602.

559. Failure to give notice of the existence of a mortgage on property insured, when required by the terms of the policy, is not waived by the insurer's knowledge of a mortgage subsequently given on the property to secure money with which to pay a mortgage existing at the time the policy was issued.—(*Civ. App.* 1899) *Insurance Co. of North America v. Wickler*, 54 S. W. 300, judgment affirmed (1900) 55 S. W. 740, 93 Tex. 390.

560. The fact that a mortgage executed on insured property is recorded does not constitute notice thereof to the insurer. To bind the company, it must have actual notice, or notice of such facts as to put it on inquiry.—*United States Ins. Co. v. Moriarty* 36 S. W. 943.

561. The fact that the agent of an insurance company waived certain breaches of the conditions of a policy after a loss will not estop the company to insist on other breaches, not then known to it or its agent, as a defense to liability thereon.—*United States Ins. Co. v. Moriarty*, 36 S. W. 943.

562. A clause avoiding the policy "if, with the knowledge of the insured, foreclosure proceedings be commenced by virtue of any mortgage," is not waived by knowledge by the company of a mortgage which they knew would mature during the life of the policy.—*Hartford Fire Ins. Co. v. Clayton*, 43 S. W. 910, 17 Tex. Civ. App. 644.

the scope of his agency, where at the time of the issuance of a policy the agent knows that a condition in the policy is inconsistent with the facts.^{563 564} An insurer is estopped from setting up the failure of the policy to state certain facts required to be stated if they existed, where the insurer's agent, when issuing the policy, knew that the facts existed.^{574 585} However, information to an agent not given in connection with a policy afterwards issued and not imparted at a time when he was soliciting insurance was not notice to the insurer.^{579 578}

(2) **As to Additional Insurance.**—Where, by its silence the in-

378—Knowledge of or Notice to Officers or Agents. (See 28 Cent. Dig. Insurance, §§ 968-997.)

563. While the general rule is that a principal is not chargeable with notice of such facts as come to the knowledge of his agent while engaged in transactions with which the principal has no concern, an insurer is bound by information acquired by its agent while acting without the scope of his agency, where at the time of the issuance of a policy the agent knows that a condition in the policy is inconsistent with the facts.—*Fire Ass'n of Philadelphia v. La Grange & Lockhart Compress Co.*, 109 S. W. 1134. See 28 Cent. Dig. Insurance, §§ 968-997.

564. A fire policy stipulated that if the insurer should claim that a fire was caused by the neglect of another person it should, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured, and that the policy should be void if the insured concealed a material fact concerning the insurance. The agent of the insurer knew that the insured had released a railroad company from liability for loss by fire set by it. The agent acquired the knowledge of the release while acting as a director of insured. Held, that the insurer was bound by the facts known by the agent at the time of the issuance of the policy, and was liable thereon.—*Id.*

565. Even if there was a misrepresentation as to title of property in application, the right of the company to insist on a forfeiture therefor was waived, where plaintiff thereafter, applying for permission for a change of occupancy to the partner of the agent, who with knowledge and consent of the agent, was in the habit of receiving applications and premiums and delivering policies, informed such partner of the facts concerning the title, and was told that it was all right.—*East Texas Fire Ins. Co. v. Crawford*, (Tex. Sup.) 16 S. W. 1068.

566. (1) A policy of insurance contained, among other stipulations, the following, viz: "If the assured shall have or shall hereafter make, any other

insurance on the property hereby insured, or any part thereof, without the consent of the company written herein, * * * then, and in every such case, this policy shall be void." The agent of the company was informed by the insured that additional insurance had been obtained. Held, that it was the duty of the company, upon being notified of the additional insurance, to have indorsed the same upon the plaintiff's policy, or notified the insured of the refusal of the risk, and that, having failed to do so, it is estopped from setting up as a defense that such additional insurance was not indorsed on the policy.—*The Planter's Mutual Ins. Co. v. Lyons, Lindenthal & Co.*, 38 Tex. 253.

567. (2) An agent of an insurance company authorized to make and revoke contracts of insurance, is the proper person to give consent to the procuring of new insurance, unless his powers be restricted by the company in this respect, and the insured have notice of the restriction.—*The Planters Mut. Ins. Co. v. Lyons, Lindenthal & Co.*, 38 Tex. 253.

568. (3) Where a party has, by his representations or conduct, induced the other party in a transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he cannot be permitted to avail himself of that advantage.—*The Planters Mut. Ins. Co. v. Lyons et al.*, 38 Tex. 253.

569. (4) Insurance companies doing business through agencies at a distance from their principal places of business, are responsible for the acts of their agents within the general scope of the business with which they are entrusted, and no limitation on the authority of the agent will be binding on the parties with whom he deals, unless such limitation be brought to their knowledge.—*Planters Mut. Ins. Co. v. Lindenthal et al.*, 38 Tex. 253.

570. A condition in a policy requiring notice of any other insurance afterward taken on the same property may not be complied with by notice of an intention to obtain other insurance.—*New Orleans Ins. Ass'n v. Griffin & Shook*, 66 Tex. 232.

suror leads the insured to believe the policy is still in force, although it has knowledge that additional insurance has been taken out, it is estopped to allege the contrary,⁵⁷¹ for to permit the insurer to take advantage of the breach after long acquiescence would be to permit the perpetration of a fraud.^{572 568} It is the duty of the agent to consent to additional insurance when informed of the intention of the insured to take out such insurance,^{567 573} and to make the proper endorsement or to refuse to do so, but what is told such agent must be sufficient to give him proper notice.⁵⁷⁸ The intention must be certain in point of time and not conditioned.^{578 570} Where, after notice of additional insurance the agent fails to endorse the same on the policy or notify insured of his refusal, the insurer is estopped to set up that such additional insurance was not endorsed on the policy.^{566 589 590}

571. Where by their silence insurers lead the insured to believe the policy was still in force although they had knowledge of additional insurance having been taken out in violation of the policy contract, they were estopped from alleging the contrary when an attempt was made to enforce it against them.—*Crescent Ins. Co. v. Griffin & Shook*, 59 Tex. 509.

572. To let the company take advantage of the breach of which it had full knowledge after long acquiescence would be to permit the perpetration of a fraud.—*Crescent Ins. Co. v. Griffin & Shook*, 59 Tex. 509.

573. It is the duty of agent to consent to additional insurance when informed of intention of insured to take out such insurance and to make proper endorsement or to refuse to do so but what is told such agent must be sufficient to give him proper notice. The intention must be certain in point of time and not conditioned.—*New Orleans Ins. Ass'n v. Griffin & Shook*, 66 Tex. 232.

574. The company is estopped from setting up the failure of the policy to state certain facts required to be stated if they existed, where the company's agent, when issuing the policy, knew that the facts existed.—*Crescent Ins. Co. v. Camp*, (Tex.) 9 S. W. 473.

575. Forfeiture of a fire policy by breach of warranty to use the building as a foundry and machine shop is not waived by failure of the agent of the company to have the policy declared forfeited after he knew that the building was not used as a foundry and machine shop, where the agent has authority only to take applications and deliver them, or where the knowledge came to him in his individual capacity after the contract of insurance was made.—*Sun Mut. Ins. Co. v. Texarkana Foundry & Machine Co.*, (Tex.) 15 S. W. 34.

576. Defendant's agent, knowing that other insurance companies had refused to insure plaintiff's mill property, made out an application for insurance thereon, and procured one of the employees in the mill to sign it for plaintiff. The application stated that no other company had ever refused to insure the property. Held, that such statement did not defeat the liability of defendant on the policy.—*Phoenix Assur. Co. of London, England, v. Coffman*, 32 S. W. 810. 10 Tex. Civ. App. 631.

577. Where the agents of an insurance company, having power to issue and cancel policies, allowed a policy to remain in force after notice by insured of the existence of an incumbrance on the property, the company cannot, because of such incumbrance, avoid liability for a subsequent loss.—*Phoenix Assur. Co. of London, England, v. Coffman*, 32 S. W. 810. 10 Tex. Civ. App. 631.

578. Notice to one of a firm of insurance agents, another member of which issued the policy in suit, given several months before the policy was applied for, that there was a lien upon the property of insured which was covered by the policy subsequently obtained, was not sufficient to estop the insurance company from avoiding the policy on the ground that insured falsely represented in his application that the property was free from incumbrances.—*Queen Ins. Co. of America v. May*, 35 S. W. 829.

579. Information to an insurance agent which was not given in connection with the application for a policy afterwards issued by him to his informant, and which did not appear to have been imparted at a time when he was soliciting insurance, was not notice to the company whose policy he issued.—*Queen Ins. Co. of America v. May*, 35 S. W. 829.

(3) **As to Ownership of Property.**—Where a policy is issued and the agent of the insurer knows the true status of the property as to ownership the insurer cannot afterwards interpose the defense that the recitals as to ownership were false but will be held to have waived the stipulation that the policy would be void if the interest of the insured was not truly stated therein.^{586 587 588 591 593}

^{595 599} However, information obtained by the agent several years before when issuing other policies is not imputable to the insurer in the absence of evidence that the agent was at the time the insurer's agent or that the prior insurance was obtained from the insurer.⁵⁸²

590. The knowledge of an insurance broker, who acted as soliciting agent for a company in obtaining the policy in suit, that there was an incumbrance on the property at the date the policy was issued, binds the company.—*German Ins. Co. v. Everett*, 36 S. W. 125.

581. Where the insurance agent was acquainted with the premises insured, and could have made an accurate description from his knowledge of them, the company cannot, after receiving the premium with such knowledge, avoid its obligation by showing a misdescription of the property.—*Hartford Fire Ins. Co. v. Moore*, 36 S. W. 146.

582. Information as to the ownership of insured property, obtained by an agent from insured several years before the issuance of the policy in suit, and at the time of the issuance of other policies, is not imputable to defendant company in the absence of evidence that the agent was at the time defendant's agent, or that the prior insurance was obtained from defendant.—*Continental Ins. Co. v. Cummings*, 95 S. W. 48. See *Cent. Dig. Insurance*, §§ 968-974.

583. Where a member of a firm engaged in the insurance business and agent of the insurer acquired knowledge of an incumbrance on property insured in the course of the business of the firm, such knowledge was chargeable to the insurer, though the partner acquiring the knowledge was not the one who subsequently wrote the policy.—*St. Paul Fire & Marine Ins. Co. v. Stogner*, 98 S. W. 218.

584. *Rev. St. Art. 3093*, providing that any person soliciting insurance on behalf of any company shall be held to be an agent of the company, so far as relates to all the liabilities, duties, requirements, and penalties set forth in the chapter of which it is a part, being originally a part of the revenue act of 1879, does not prevent an insurance company from limiting the power of soliciting agents to bind it by notice received while soliciting insurance.—*Delaware Ins. Co. v. Harris*, 64 S. W. 867, 26 Tex. Civ. App. 537.

585. Where an applicant for fire insurance answered all questions asked by the local agent, who, by direction of the company, wrote out, counter-signed, and delivered the policy, the company, after collection of the premium and a loss under the policy, could not say that it did not have notice of the facts known to the agent at the time he issued the policy, though the application stated that no one except the general agent of the company could make any contracts relative to such risks, and that none of its conditions could be waived unless such waiver was written on the policy.—*Continental Fire Ass'n v. Norris*, 70 S. W. 769.

586. An insurer, whose agent was fully informed of the interest of the party named in the policy as the insured, who in fact had an insurable interest, and that the party named as mortgagee and payee was in fact the owner, could not be heard to say that it delivered what it then knew to be an invalid policy, so as to defeat the recovery by the party designated as the insured.—*Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.*, 167 S. W. 816.

587. That persons other than the party to a preliminary oral contract of insurance owned interests in the property insured did not invalidate the contract where the insurer's agent knew the facts in relation to the ownership and that the contract was for the benefit of all the owners.—*Austin Fire Ins. Co. v. Brown*, 160 S. W. 973. See 28 *Cent. Dig. Insurance*, §§ 968-997.

588. Where the agent of a fire insurance company had knowledge when he issued a policy in the name of an executor that it was owned by the estate of which the executor had the management, and that the executor held in that capacity, and not as a sole owner, the provisions of the policy as to sole and unconditional ownership are thereby waived by the company.—*Shawnee Fire Ins. Co. v. Chapman*, 132 S. W. 854. See 28 *Cent. Dig. Insurance*, §§ 968-997.

(4) **As to Incumbrances.**—In general, the knowledge of the agent that there is an incumbrance on the property at the date the policy is issued binds the company,⁵⁸⁰ and the same is true after issuance of the policy.⁵⁷⁷ Notice of incumbrance to one authorized by the general agents to solicit insurance, take and report applications, deliver policies and collect premiums on commission is notice to the company.⁵⁸⁴ Notice of a member of a firm of an incumbrance is notice to the insurer even though another member of the firm wrote the insurance.⁵⁸³ However, in another case it was held that notice to one member of a firm several months before the issuance of the policy of a lien on the property, another member of the firm writing the policy, would not estop the insurer from insisting on its defense.⁵⁷⁸ In an early case it was held that where the policy provides that if the property be mortgaged it must be so stated in the written part of the policy or it will be void and the agent has no power to waive conditions except in writing, mere notice to the agent of a mortgage before delivery of policy or parol waiver by him does not estop the company to claim the policy is void.⁵⁹²

(5) **As to Miscellaneous Matters.**—Even if there was a misrepresentation as to title of property the right of forfeiture is waived where the insured thereafter, applying for permission for a change of occupancy to the partner of the agent, informed such partner

589. A fire policy stipulating that it shall be void if insured, without notice, shall procure other insurance in excess of the amount of concurrent insurance allowed, is not invalidated by insured procuring other insurance in excess of the concurrent insurance allowed, where the agent of insurer effecting the original insurance had notice of the additional insurance and consented thereto, though he did not indorse on the original policy a consent for additional insurance, though requested so to do.—*National Union Fire Ins. Co. v. Dorroh*, 133 S. W. 475.

590. Where an insurance agent, with authority to receive premiums and issue policies, exercises such authority, with notice from insured that there is concurrent insurance on the premises, the company is estopped, after a loss, to declare the policy forfeited because consent to such concurrent insurance was not indorsed on the policy, as provided for therein.—*Hibernia Ins. Co. v. Malevinsky*, 24 S. W. 804. 6 Tex. Civ. App. 81.

591. Though a policy provide that it shall be void if the interest of insured be otherwise than sole and absolute ownership, or if the ownership be not truly stated, yet where the agent issues the policy and accepts the premium knowing that its recitals as to ownership are false, the company is estopped to deny the right of insured to recover on the ground that they did not have sole and absolute

ownership. Judgment (Civ. App. 1898) 48 S. W. 49, reversed.—*Wagner v. Westchester Fire Ins. Co.*, 50 S. W. 569, 92 Tex. 549.

592. Where a policy provides that, if the property be mortgaged, it must be notified to the company in the written part of the policy, or it will be void, and that no agent has power to waive or modify conditions except by writing, mere notice to the agent of the existence of a mortgage before he delivers the policy, or parol waiver of conditions by him, does not estop the company to claim that the policy is void.—*Phoenix Ins. Co. v. Dunn* 41 S. W. 109.

593. When the insured told the agent of the insurer on several different occasions while the agent was soliciting the insurance the true condition of her title, the insurer will be deemed to have had notice thereof, notwithstanding the written application, made afterwards and upon the issuance of the policy, but not referred to therein, makes a different statement.—*Queen Ins. Co. of America v. May*, 43 S. W. 73.

594. Notice of incumbrance to one authorized by the general agents of an insurance company to solicit insurance, take and report applications to the general agents, deliver the policies, and collect the premiums, on commission, is notice to the company.—*German Ins. Co. v. Everett*, 46 S. W. 95, 18 Tex. Civ. App. 514.

of the facts concerning the title and was told that it was all right.⁵⁶⁵ An insurer can not be said to waive the breach of a policy by reason of its agent's knowledge of a certain intended transfer, when there was another transfer of which the insurer had no notice whatever.⁵⁶⁶ Where an agent is well acquainted with the property the insurer cannot, after receiving the premium with such knowledge avoid its obligation by showing a misdescription of the property,⁵⁶⁷ and the same is true as to a misrepresentation of the occupancy of a building.⁵⁶⁸ However, forfeiture by reason of the occupancy of a building is not waived by failure of an agent to have it declared forfeited after learning of the fact, where such agent has authority only to take applications and deliver them or where the knowledge came to him in his individual capacity after the contract of insurance was made.⁵⁶⁹ And in another case a clear space provision in a lumber policy was not waived by the fact that the agent of the insurer examined the lumber yard before the policy was issued.⁵⁷⁰ Where an agent, knowing that other companies had refused a certain risk, made out an application and procured an employee of the insured to sign it for the insured, the liability of the insurer was not defeated although the application stated that no other company had ever refused to insure the property.⁵⁷¹

Insertion of False Answers in Application by Agent or Under His Direction.—In a case where the insured was not familiar with the insured premises, the agent filled in the application and the insured signed without reading, the agent being in a hurry, it was

565. When applicants for insurance informed the company's agent that they did not own part of the property, but held it on commission under an agreement of agency, and the agent made out the policy in their name, designating them as owners, a stipulation that the policy would be void if the interest of insured was not truly stated therein was waived.—*Westchester Fire Ins. Co. v. Wagner*, 57 S. W. 876.

566. An insurance company could not be said to have waived the breach of a provision in a policy that it should be void on any change of the title to the property insured by reason of its agent's knowledge of a certain intended transfer, when there was another transfer of title of which the company had no notice whatever.—*Hartford Fire Ins. Co. v. Ransom*, 61 S. W. 144.

567. Where a policy contained a provision requiring 100 feet of clear space to be kept between the insured lumber and dry kiln, the fact that the agent of the insurer examined the premises before the policy was issued, and knew at that time that the lumber was within less than 100 feet of the dry kiln, did not waive the clear-space

provision, so as to excuse assured for violating it.—*Hartford Fire Ins. Co. v. Post*, 62 S. W. 140, 25 Tex. Civ. App. 428.

568. A misrepresentation as to the occupancy of a building, at the date of a fire insurance policy, is waived by the company if its agent, not being in collusion with the insured, knows the real fact as to its occupancy.—*Fire Ass'n of Philadelphia v. Bynum*, 44 S. W. 579.

569. A policy was issued by a foreign insurance company on a verbal application; it was not shown that it was transmitted to the home office nor that it was void for want of power in the agent. The policy contained the usual entire, unconditional and sole ownership clause but the agent knew at the time it was issued that the property had been assigned. It was held that the act and knowledge of the agent were the act and knowledge of the principal and to deliver a policy with full knowledge of such facts and then to insist on such facts as a ground of avoidance is to attempt a fraud. The courts will hold this an intent to waive a known ground of avoidance.—*Liverpool and L. and G. Ins. Co. v. Ende*, 65 Tex. 118.

held the insured was not relieved from the binding effect of the answers.⁶⁰⁰

Mistake or Fraud of Agent.—When the insured claims (that through fraud or mistake the house in which the insured property is located is misdescribed the insurer is not estopped to disprove the claim and show that the policy correctly states the contract.⁶⁰³

Form and Requisites of Express Waiver.—(1) **Oral Waiver.**—The rule is that an agent of an insurance company may verbally waive a condition in a policy though the policy provides that the condition can only be waived by writing endorsed thereon, and such waiver may be shown by parol.^{604 605 606 607 608 609 610 611 612 613} Proof of a verbal consent of an agent and of any facts which would make

379—Insertion of False Answers in Application by Agent or Under His Direction. (See 28 Cent. Dig. Insurance, §§ 998-1015.)

600. An application for a fire policy recited that the authority of the agent taking the same was limited to its taking and the collection of the premium, and that the applicant had read and approved the answers contained therein. The insured was not familiar with the insured property, and the agent, who was familiar therewith, filled in the answers, and said that he would verify the same; and insured signed the application without reading it, the agent being in a hurry to catch a train. Held, not sufficient to relieve insured from the binding effect of such answers.—*Delaware Ins. Co. v. Harris*, 64 S. W. 867, 26 Tex. Civ. App. 537.

601. Where applicant answered a certain sum to the question whether anything was owing on the property insured, and proposed to go to the creditor and get the exact amount, but the agent told him to make the statement to the best of his recollection, this estopped the insurer to assert a breach of the warranty as to the correctness of the amount.—*Hartford Fire Ins. Co. v. Walker*, 60 S. W. 820, reversed, 61 S. W. 711.

602. Under Rev. St. 1895, Art. 3093, making any person who does any act in the consummation of any contract of insurance for any insurance company the agent of the company, so far as relates to all the liabilities, etc., set forth in the chapter relating to insurance, the agent of an insurance company, writing the answer, "No," with knowledge of its falsity, to a question, in application for insurance, whether the risk had ever been rejected, waives the warranty on that point contained in the application.—*Hartford Fire Ins. Co. v. Walker*, 60 S. W. 820, reversed 61 S. W. 711.

380—Fraudulent or Collusive Acts of Agent. (See 28 Cent. Dig. Insurance, § 998.)

603. A fire policy showed a contract to insure certain property while in a particular house. The insured claimed that through mistake or fraud the house was misdescribed. Held, that the insurer was not estopped from disproving the claim and showing that the policy correctly stated the contract.—*Aetna Ins. Co. v. Brannon*, 89 S. W. 1057. See Cent. Dig. vol. 23, cols. 1733-1735, § 998; cols. 1743-1769, §§ 1001-1015.

382—Form and Requisite of Express Waiver. (A) Oral Waiver. (See 28 Cent. Dig. Insurance, §1018.)

604. An agent of an insurance company may verbally waive a condition in a policy though the policy provide that the condition can only be waived by writing indorsed thereon.—*Burlington Ins. Co. v. Rivers* (Tex. Civ. App.) 28 S. W. 453.

605. Though an insurance policy provides that none of the conditions can be waived unless such waiver be indorsed thereon, where an authorized agent accepts a premium having knowledge that a condition of the policy is being violated by the existence of concurrent insurance, without an indorsement of consent, the waiver may be shown by parol.—*Hibernia Ins. Co. v. Malevinsky*, 24 S. W. 804, 6 Tex. Civ. App. 81.

606. A local insurance agent, authorized to waive conditions and forfeitures contained in a fire policy may waive them by parol.—*New Jersey Fire Ins. Co. v. Baird*, 187 S. W. 356.

607. A condition in a policy, which recites that conditions therein contained can be waived by agents only in writing indorsed thereon, does not prevent a verbal waiver by the agent from binding the insurer.—*Pennsylvania Fire Ins. Co. v. Faires*, 35 S. W. 55.

it unfair to the insured to claim that the verbal consent was not sufficient, is a substitute for an endorsement on a policy.⁶¹¹

(2) **Waiver in Writing.**—An insurer is estopped to assert a forfeiture where a slip permitting additional insurance was issued before loss but not attached until after.⁶¹⁴

(3) **Waiver of Provisions of Policy as to Mode of Waiver.**—In a case where the defense was that the goods had been taken from the location specified in the policy, the insured, upon showing that the insurer's agent agreed to the change, is entitled to recover, even though the policy forbade waiver of its provisions except in writing upon or attached to the policy and no change had actually been made on the policy.⁶¹⁵

(4) **Construction and Operation of Express Waiver.**—The fact that the insurer permitted the insured to move his building does

608. Where an insurance agent had authority to consent on behalf of the insurer to a transfer of the property, and did orally consent to such transfer, such consent was binding on the insurer, though the policy provided that no agent should have power to give any permission affecting the insurance under the policy, unless in writing and attached thereto.—*Home Mut. Ins. Co. v. Nichols*, 72 S. W. 440.

609. Parol evidence is admissible to show that an insurance company has lost its right to invoke a stipulation in the policy, avoiding it if insured shall procure other insurance without the consent of the company.—*Reliance Ins. Co. of Philadelphia v. Dalton*, 178 S. W. 966.

610. Parol waiver as to forfeiture clauses in insurance contracts may be shown, notwithstanding an express provision of the policy forbidding it.—*British America Assur. Co. v. Francisco*, 123 S. W. 1144. See 28 Cent. Dig. Insurance, § 1018.

611. Requirement of consent to other insurance is reasonable and proper and that such requirement shall be indorsed in writing on the policy is valid. However, this requirement may be waived. Proof of a verbal consent and of any facts which would make it unfair to the assured to claim that the verbal consent was not sufficient, is a substitute for the indorsement.—*New Orleans Ins. Ass'n v. Griffin & Shook*, 66 Tex. 232.

612. A condition that other insurance shall not be obtained without the consent of the company is better fulfilled by obtaining the consent before than after the contract for additional insurance. Such a condition is satisfied by notice of an intention to take other insurance consented to by the agent of

the company. Verbal consent by the agent, with knowledge that it will be acted upon, is a waiver of the requirement that the consent shall be expressed in writing upon the policy.—*New Orleans Ins. Ass'n v. Griffin & Shook*, 66 Tex. 232.

613. A general agent of an insurance company, having authority to make contracts of insurance and issue policies, may make a valid parol agreement, waiving the conditions of a policy, though the policy declares such a waiver unauthorized unless in writing. Judgment (Civ. App. 1898) 48 S. W. 49, reversed.—*Wagner v. Westchester Fire Ins. Co.*, 50 S. W. 569, 92 Tex. 549.

384—(B) **Waiver in Writing.** (See 28 Cent. Dig. Insurance, § 1018.)

614. An insurer whose agent consented in advance to additional insurance, and issued a slip showing such agreement, was estopped from asserting a forfeiture, though such slip was not attached to the policy until after the loss.—*American Cent. Ins. Co. v. Hardin*, 151 S. W. 1152. See 28 Cent. Dig. Insurance, § 1019.

386—(C) **Waiver of Provisions of Policy as to Mode of Waiver.** (See 28 Cent. Dig. Insurance, § 1024.)

615. Where the defense was that the goods had been taken from the location specified in the policy, the insured, upon showing that the insurer's agent agreed to his request to change the location of the policy to the place of the fire, is entitled to recover, even though the policy forbade waiver of any of its provisions except in writing upon or attached to the policy, and no change had actually been made on the policy.—*Delaware Ins. Co. v. Wallace*, 160 S. W. 1130. 28 Cent. Dig. Insurance, § 1024.

not estop it from relying on the defense that the premises were vacant for over ten days.⁶¹⁶

Implied Waiver in General.—Where a policy on a stock of goods was forfeited by failure of insured to keep an account of cash sales, such forfeiture was not waived by requiring the insured to submit to several examinations also provided for under the policy.⁶¹⁷ Also, where an adjuster waived the production of inventories after a loss such waiver did not waive the production of the preceding inventory made before the policy was issued, unless he knew of its destruction.⁶¹⁸ An insurer, waiving impliedly the keeping of gasoline on the premises, can not insist that the increased hazard arising therefrom was not also waived.⁶²³ The suggestion of an adjuster that the burned and unburned goods be separated, which was done at some expense, does not show a waiver of a breach of a condition as to additional insurance.⁶¹⁸ The act of an agent in not objecting but making a memorandum of information that certain insured property had been sold and the deed was in escrow and requesting notification of the consummation of the trade, constituted a waiver of a provision of the policy rendering it void in case of transfer without the insurer's consent.⁶²⁰ An extension of time for payment of a premium note, not granted until after it had matured and collection of the note after loss do not estop the insurer from insisting on a forfeiture for failure to pay the note at maturity, where the policy provided that time was of the essence of the con-

337—(D) Construction and Operation of Express Waiver. (See 28 Cent. Dig. Insurance, § 1025.)

616. That insurance company allowed insured to move his building held not to estop it from relying upon the breach of a condition declaring that the policy should be void if the premises were unoccupied for over 10 days.—*Fireman's Fund Ins. Co. v. Lyon*, 171 S. W. 801.

338—Implied Waiver in General. (See 28 Cent. Dig. Insurance, §§ 1026, 1027, 1030, 1035, 1040.)

617. Under the provisions of a policy that insured should submit to examination by any person appointed by the company, and that the company should not be held to have waived any condition of the policy or have any forfeiture thereof, where a policy on a stock of goods was forfeited by failure of insured to keep an account of cash sales, as required, such forfeiture was not waived by requiring insured to submit to several examinations.—*Scottish Union & National Ins. Co. v. Weeks Drug Co.*, 118 S. W. 1086. See 28 Cent. Dig. Insurance, §§ 1026-1030, 1035, 1040, 1057.

618. Evidence that an insurance adjuster inspected the stock after the fire, and suggested that the burned and unburned goods be separated, and

that the assured did so at some expense, does not show a waiver of a breach of a condition as to additional insurance.—*Labell v. Georgia Home Ins. Co.*, 28 S. W. 133.

619. Where the iron-safe clause of an insurance policy provided that the inventory preceding the date of the policy, if any was taken, should be kept in an iron safe, and produced after loss, otherwise the policy should be void, the waiver of the production of inventories by the adjuster immediately after the loss was not a waiver of the production of said preceding inventory, unless the adjuster then knew of its destruction. Judgment, *Continental Fire Ins. Co. v. Cummings* (Civ. App. 1903) 78 S. W. 378, reversed.—*Continental Ins. Co. v. Cummings*, 81 S. W. 705.

620. Where insurer's agent was told that the property had been sold, and that, on payment of the cash consideration, the deed which was being held in escrow would be delivered to the purchaser, and such agent did not object, but made a memorandum of the information, and requested notification of the consummation of the sale, this constituted a waiver of a provision of the policy rendering it void in case of transfer without insurer's consent.—*British America Assur. Co. v. Francisco*, 123 S. W. 1144.

tract and that if the notes were not paid when due it should be void, the premium being considered earned.⁶²⁵ Where an open policy provided that risks covered by it should be advised as soon as known to the home office by the insured but it was shown that in numerous instances the notice was sent by the agent and the losses had been paid without objection, such a course of dealing waived the requirement of the policy and estopped the insurer from setting up the insured's failure to advise as a defense.⁶²⁴ (For facts

621. Where the insured asked the local agent for an extension when the premium note became due, but notified him of his intention to pay if it should be refused, and the agent promptly communicated this request to the general officers of the company, their silence for three months thereafter is strong, if not conclusive, evidence of their consent to the extension.—*East Texas Fire Ins. Co. v. Perkey*, 24 S. W. 1080, 5 Tex. Civ. App. 698. Reversed 35 S. W. 1050.

622. In an action on an insurance policy, where the issue is whether the company waived a condition of forfeiture for non-payment of the premium notes, and plaintiff proves that he asked the local agent for an extension, and that the latter stated that he would communicate with the general office and promptly inform plaintiff of the reply, further evidence by plaintiff, that he relied on the local agent to inform him if the payment should be insisted on, is not objectionable as being intended to elicit plaintiff's motive in not paying.—*East Texas Fire Ins. Co. v. Perkey*, 24 S. W. 1080, 5 Tex. Civ. App. 698. Reversed 35 S. W. 1050.

623. Where a fire policy provided that it should be void where the hazard as to the subject of insurance was increased by any means within the knowledge or control of insured, and the hazard came from the presence or the keeping of gasoline on the premises, elsewhere provided against in the policy, and insurer impliedly waived the latter condition, it could not insist that the increased hazard was not also waived.—*American Cent. Ins. Co. v. Chancey*, 127 S. W. 577. See 28 Cent. Dig. Insurance, §§ 1026, 1027, 1030.

624. Where an open policy of marine insurance contained a stipulation that risks covered by it should be advised, as soon as known to the insured, to the company at its home office, by telegram or letter, but in numerous cases under the policy the notice was not sent by plaintiff, but by the company's agent when application was made to cover a shipment, and that the company had always accepted such risks and the premiums therefor, and had paid losses thereon, without objecting that plaintiff had not advised them of the risk, such course of deal-

ing constituted a waiver of the requirement of the stipulation, and estopped the company from setting up plaintiff's failure to advise as a defense to a claim for a loss.—*Insurance Co. of North America v. Bell*, 60 S. W. 262.

625. Where a fire policy provided that time was of the essence of the contract, and that, if the premium notes were not promptly paid when due, the policy should be void, and the premium note declared that the policy should be void on failure to pay the note at maturity, without notice to insured, but that if it was not paid at maturity the full membership fee and premium should be considered earned during the currency of the policy, and the note should be payable without reviving the policy or any of its provisions, an extension of time for payment of the note, not granted until after it had matured, and collection of the note after loss, did not estop the insurer from insisting on a forfeiture of the policy for the failure to pay the note at maturity.—*Texas Fire Ins. Co. v. Knights of Tabor Lodge of Camp County*, 74 S. W. 809.

626. A policy of insurance on lumber contained a clause that a clear space of 200 feet should be maintained between the lumber and any wood-working establishment. Subsequently a planing mill was erected within 128 feet of the lumber, and the insurance company was notified that the insured wished to cancel the lumber policy and insure the mill, which was done. The company's agent saw the lumber when the change of insurance was effected, but paid no attention to the amount of the clear space. The manager of the mill stated that he told the agent he was contemplating re-insuring the lumber, whereupon the agent stepped the distance, and said, as the lumber was then situated, the rate would be 2½ per cent., but with a 200-foot space he could give 1 per cent. rate. Afterwards a policy was issued on the lumber for 2½ per cent., containing a 200-foot clear-space clause, and was received and retained by the assured without reading. Held, that no waiver of the clear-space clause could be implied from such evidence.—*Keller v. Liverpool & L. & G. Ins. Co.*, 65 S. W. 695. 27 Tex. Civ. App. 102.

showing that the clear-space clause in a lumber policy was not impliedly waived see Ann. 626.)

Issuance and Delivery of Policy Without Objection.—In general, the rule is that where a policy is delivered with full knowledge of the facts on which its validity may be disputed, the insurer is estopped from asserting such invalidity.^{629 632} A condition against incumbrances is waived by the company's delivering the policy with full knowledge of the incumbrance.^{634 635 636 637} Where the insurer issued a policy knowing that gasoline was kept on the insured's premises and was used in his business, such fact did not invalidate the policy although the policy provided for forfeiture in such event.⁶²⁸ Issuance of the policy with notice of the insured's intention to take out other insurance is not a waiver of a stipulation against other insurance.⁶³¹ However, it is held that an insurer is estopped to claim on such ground that the policy is forfeited if the agent who issued the policy is notified by the insured of his intention to take out further insurance and fails to object thereto.⁶³⁸ Where at the time of issuance of the policy the agent knew that the property belonged to a partnership of which the applicant was a member his denomination of the applicant as the owner waives the clause of warranty of sole ownership.⁶³⁰ However, the fact that an agent, without authority to waive the condition of the policy requiring a true statement of the insured's interest in the property, was notified at the execution of the contract that the insured's interest was other than expressed in the policy, did not preclude the company from setting up a forfeiture.⁶³⁹ The fact that a policy was issued and the premium accepted with knowledge that the building was vacant, is not a waiver of a condition rendering the policy void if the building became vacant or unoccupied and remained so for ten days.⁶²⁷ The issuance of a lumber policy with knowledge

328—Issuance and Delivery of Policy Without Objection. (See 28 Cent. Dig. Insurance, §§ 1022-1031.)

^{627.} The fact that a fire policy was issued, and the premium accepted, with knowledge that the building was vacant, is not a waiver of a condition rendering the policy void if the building became vacant or unoccupied, and remained so "for ten days."—*Bennett v. Agricultural Ins. Co.* (1887) 12 N. E. 609, 106 N. Y. 243, distinguished. *Queen Ins. Co. of America v. Chadwick*, 35 S. W. 26.

^{628.} Where insurer, when issuing a fire policy stipulating that it should be void if insured should keep gasoline on the premises, knew that gasoline was kept on the premises and used in insured's business, the keeping of the gasoline did not invalidate the policy.—*Oklahoma Fire Ins. Co. v. McKay*, 152 S. W. 440, 28 Cent. Dig. Insurance, §§ 1022-1031.

^{629.} Where a fire policy is delivered

with full knowledge of the facts on which its validity may be disputed, insurer is estopped from asserting such invalidity.—*Mecca Fire Ins. Co. v. Smith*, 135 S. W. 688. See 28 Cent. Dig. Insurance, §§ 1022-1031.

^{630.} Where, at the time an insurance agent issued a policy of fire insurance, he knew that the property insured belonged to a partnership of which the applicant was a member, his act in issuing the policy, describing the applicant as the owner, was a waiver of the clause of warranty of sole ownership. Judgment, *Continental Fire Ins. Co. v. Cummings* (Civ. App. 1903) 78 S. W. 378, reversed.—*Continental Ins. Co. v. Cummings*, 81 S. W. 705, 98 Tex. 115. See Cent. Dig. vol. 28, cols. 1795-1799, § 1022.

^{631.} Issuance of the policy with notice of insured's intention to take out other insurance is not a waiver of a stipulation against other insurance.—*Orient Ins. Co. v. Prather*, 62 S. W. 89, 25 Tex. Civ. App. 446.

that a clear-space clause therein is being violated waives such provision only to the extent of allowing the insured a reasonable time in which to remove the lumber.⁶³³

Failure to Assert Forfeiture or Cancel Policy.—When an insurer ascertains that its agent at the time of writing the policy was also the agent of the insured it is its duty to cancel the policy promptly if it desires to avoid it.⁶⁴⁰

Demand, Acceptance, or Retention of Premiums.—When a policy stipulates for a forfeiture for non-payment of premiums a demand for and payment of such premium constitutes a waiver of such forfeiture.⁶⁴⁴ It is otherwise however, when the policy in addition provides that upon default in any installment the insurance shall cease and the installment shall be considered as earned.⁶⁴⁴ A mere demand for the payment of a past due premium, without its payment, is not sufficient to reinstate a policy which is forfeited.⁶⁴⁶

632. Where an insurer issues a policy and accepts premiums thereon with knowledge of facts that constitute a violation of a provision in the policy and would make the same void when issued, such insurer has waived the provision violated.—*Hartford Fire Ins. Co. v. Post*, 62 S. W. 140, 25 Tex. Civ. App. 428.

633. Where a policy provides that a clear space of 100 feet shall be kept between insured lumber and a dry kiln, the issuance of a policy with knowledge that the lumber was within less than 100 feet of the dry kiln waives such provision only to the extent of allowing assured a reasonable time in which to remove the lumber.—*Hartford Fire Ins. Co. v. Post*, 62 S. W. 140, 25 Tex. Civ. App. 428.

634. A condition against incumbrances is waived by the company's delivering the policy with knowledge of the incumbrance.—*German Ins. Co. v. Everett*, 46 S. W. 95, 18 Tex. Civ. App. 514.

635. Issuance of insurance policy on application containing the question: "Incumbrance or Indebtedness. I. Is there any on the above-described property? * * * If so, (1) on what; (2) to whom; (3) in what amount; (4) when due?" answered merely, "Owe H. \$800; * * * one-half due this year, one-half due next year,"—is a waiver of omission in the application to contain a specific answer as to the question of "incumbrances," the inquiry answered appearing to relate to general indebtedness.—*Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.*, 49 S. W. 271.

636. An insurance company, which has delivered a policy of insurance with full knowledge that the insured property is mortgaged, is estopped to set up the mortgage in avoidance of the policy.—*Phoenix Ins. Co. v. Ward* (Tex. Civ. App.) 26 S.W. 763.

637. In an action on an insurance policy, the company cannot claim a forfeiture under a condition that the policy should be void if the insured premises were mortgaged, or otherwise incumbered, where the agent effected the insurance with knowledge of a vendor's lien on the premises.—*Hartford Fire Ins. Co. v. Josey*, 25 S. W. 685, 6 Tex. Civ. App. 290.

638. An insurance company is estopped to claim that a policy is avoided by breach of a condition therein that no other insurance shall be obtained on the property without the company's consent, if the agent who issued the policy is notified by the insured of his intention to take out further insurance, and fails to object thereto.—*Hartford Fire Ins. Co. v. McLemore*, 26 S. W. 928.

639. The fact that an insurance agent, without authority to waive the condition of the policy requiring a true statement of the assured's interest in the insured property, was notified at the execution of the contract that the assured's interest was other than expressed in the policy, does not preclude the company from setting up a forfeiture of the policy for breach of said condition.—*Westchester Fire Ins. Co. v. Wagner* (Tex. Civ. App.) 30 S. W. 959.

330—Failure to Assert Forfeiture or to Cancel or Rescind Policy. (See 23 Cent. Dig. Insurance, §§ 1037, 1038.)

640. Where the insurer in a fire policy ascertained that its agent at the time of writing the policy was also the agent of the insured, if it desired to avoid the policy, it was its duty to manifest such intention promptly.—*German Ins. Co. v. Gibbs, Wilson & Company*, 92 S. W. 1063, rehearing denied 96 S. W. 760. See 28 Cent. Dig. Insurance, § 1038.

Where the insurer receives the premium with knowledge of the true state of the title of the property it is estopped from urging the defense that the interest of the insured was other than entire, unconditional and sole.⁶⁴⁷ The fact that the agent of insurer made demand for the premium and threatened suit would not constitute a waiver of the forfeiture especially where it appeared that the agent did not have authority to make contracts of insurance.⁶⁴⁸ After acceptance of a premium by the insurer with knowledge that the policy issued to one partner is in fact partnership property, it is estopped to deny the validity of the policy on the ground of misrepresentation as to ownership.⁶⁴¹ Where an agent was instructed to cancel a vacancy permit upon expiration and a loss occurred afterwards the insurer did not, by accepting the premiums after loss, without knowledge of the fact that the building was vacant at the time of loss, waive the condition against vacancy.⁶⁴⁵ (For facts waiving forfeiture by insurer's failure to cancel a policy and return the unearned premium, in view of certain knowledge, see Ann. 642.)

Consent to Assignment of Policy.—Where the insurer consented

332—Demand, Acceptance, or Retention of Premiums or Assessments.
(See 23 Cent. Dig. Insurance, §§1041-1056, 1058-1070.)

641. Where an insurance company, whose agent is aware that property covered by the policy issued to one partner is in fact partnership property, receives a premium on the policy, it is estopped to deny its validity on the ground of misrepresentation as to ownership.—*Continental Fire Ins. Co. v. Cummings*, 78 S. W. 378, judgment reversed *Continental Ins. Co. v. Same* (1904) 81 S. W. 705, 98 Tex. 115.

642. The insurer's failure to cancel a policy and return the unearned premium held, in view of certain knowledge, to waive forfeiture of the policy.—*Hamilton v. Fireman's Fund Ins. Co.*, 177 S. W. 173.

643. Where a policy of fire insurance provided that the company should not be liable for any loss or damage under the policy if default should be made in the payment of any premium, and that the policy should be void if the assured should neglect to pay the premium, held, that the fact that an agent of the company made demand for the premium after default by the insured, and threatened to sue for it if it were not paid by a certain day, did not constitute a waiver of the forfeiture, so as to make the company liable for a subsequent loss; especially as it appeared that the agent who acted in the matter had authority to receive applications, and to collect premiums only, and not to make contracts of insurance.—*Cohen v. Continental Fire Ins. Co.*, 3 S. W. 296.

644. Where a policy of insurance provides for a forfeiture upon failure to pay premiums which are to fall due, but does not stipulate that upon such failure the overdue premium shall be considered as earned, a demand and payment of such premium constitutes a waiver of the forfeiture. But such is not the case when the policy provides that, upon default in any installment, the insurance shall cease, and the installment be considered as earned; for then the insurer has the right to the premium, although the insurance is forfeited, and hence demand and payment of the premium is no waiver.—*Cohen v. Continental Fire Ins. Co.*, 3 S. W. 296.

645. Where the agent was instructed to cancel a vacancy permit as soon as it expired, and a loss occurred after the expiration thereof, the company did not, by accepting premiums after loss, without knowledge of the fact that the building was vacant at the time of loss, waive the condition against vacancy.—*McLeary v. Orient Ins. Co.*, 32 S. W. 533.

646. A mere demand for the payment of a past due premium, without its payment, is not sufficient to reinstate a policy which is forfeited.—*Cohen et al. v. Continental Fire Ins. Co.*, 67 Tex. 325.

647. An insurance company in receiving the premium, with knowledge of the true state of the title of the property, the insurer is estopped from denying the right of plaintiff to recover on the ground that the interest of assured was other than entire, unconditional and sole.—*Liverpool & L. & G. Ins. Co. v. Ende*, 65 Tex. 118.

to the transfer of the property insured and to an assignment of the policy, a breach of condition by the original holder was no defense to an action by the transferee for a loss occurring after the transfer.⁶⁴⁸ Though a policy had become void by conveyance of the insured property, it becomes valid on the insurer's giving consent to transfer of the policy to even a remote grantee of insured.⁶⁴⁹

Requiring, Accepting or Retaining Proofs of Loss.—Where an insured refused to sign an agreement that the insurer waived no rights in investigating the loss and the adjuster proceeded to adjust the loss, stating that he did not waive any condition, although he knew the policy had been forfeited, requiring the insured to make a list of the damaged property and the insured employed lawyers to make out his proofs of loss, the forfeiture was waived.⁶⁵⁰ Where the proofs of loss expressly stipulate that the furnishing of such proofs of loss blanks and the making them up by the adjuster is not a waiver of any rights of the company the preparation of such proofs of loss by the insured at the instance of the insurer does not waive a breach of condition of the policy.⁶⁵¹ In the same way, where the policy provides that the insurer, by demanding an appraisal, should not be held to waive any forfeiture, the entering into such an appraisal did not constitute a waiver of a forfeiture.⁶⁵² Under a policy requiring the insured to submit to an examination

393—Consent to Assignment of Policy.
(See 28 Cent. Dig. Insurance, § 1039.)

648. Where an insurance company consented to the transfer of the property insured, and to an assignment of the policy, a breach of condition by the original holder was no defense to an action by the transferee for a loss occurring after the transfer.—*Home Mut. Ins. Co. v. Nichols*, 72 S. W. 440.

649. Though a policy has become void by conveyance of the insured property, it becomes valid on the company's giving consent to transfer of the policy to a remote grantee of insured, though it merely had knowledge that title had vested in such grantee, and did not have knowledge of the intermediate conveyances; and it is immaterial that the consent is in terms to the transfer of insured's interest in the policy.—*North British & Mercantile Ins. Co. v. Gunter*, 35 S. W. 715. 12 Tex. Civ. App. 598.

396—Requiring, Accepting or Retaining Proofs of Loss. (See 28 Cent. Dig. Insurance, §§ 1071-1077.)

650. An insurance adjuster knew that the policy had been forfeited by breach of a condition therein, and, insured having refused to sign an agreement stipulating that the insurer waived no rights by investigating the loss, the adjuster then stated that he did not waive any conditions, but pro-

ceeded to adjust the loss. He required insured to make a list of destroyed property, etc., and went away without having claimed a forfeiture, and insured went to the expense of employing lawyers to make out his proofs of loss. Held, that the forfeiture was waived.—*German-American Ins. Co. v. Evans*, 61 S. W. 536, 25 Tex. Civ. App. 300, writ of error dismissed 62 S. W. 417, 94 Tex. 490.

651. A fire insurance company did not waive insured's breach of a condition in the policy by causing him to have proofs of loss prepared, where the proofs of loss expressly stipulated that "the furnishing of this proof of loss blank to the assured, or making up proofs by an adjuster, * * * is not a waiver of any rights of said company."—*Curlee v. Texas Home Fire Ins. Co.*, 73 S. W. 831, 986.

652. Where an insurance policy provided that the insurer, by demanding an appraisal, should not be held to waive any forfeiture, and, to determine the loss, an appraisal was made, under an agreement that it should not constitute a waiver of insurer's right to claim a forfeiture,—the question of the latter's liability being reserved for settlement by the courts,—the entering into such an appraisal did not constitute a waiver of a forfeiture.—*City Drug Store v. Scottish Union & National Ins. Co.*, 44 S. W. 21.

at any time the insurer wished, without waiving any forfeiture, such an examination, when the insurer had knowledge of a forfeiture, will not constitute a waiver thereof.⁶⁵³ However, a later decision holds to the contrary.⁶⁵⁴

Participation in Adjustment of Loss.—An adjuster who, at the request of the insured and under an express agreement that he should not thereby waive a breach of an "iron-safe clause," requiring the production of an inventory, made an examination and estimate of the loss, did not, by requiring the procurement of duplicate invoices at insured's expense, waive such clause.⁶⁵⁵ A forfeiture is waived if the insurer, with knowledge of the breach, causes the insured to be examined under oath pursuant to a clause under a policy.⁶⁵⁷ Where an adjuster knew facts justifying a forfeiture but did not claim it and told the insured to go ahead and get up his proofs of loss, and the company later advised the insured that his proofs of loss were insufficient but did not point out the insufficiency, there was a waiver of the right of forfeiture.⁶⁵⁶

RISKS AND CAUSES OF LOSS

Marine Risks in General.—A policy of marine insurance upon a vessel while in the waters of the Mexican Gulf was held in force where the vessel was in a river where the Gulf tide ebbed and flowed.⁶⁵⁸ As a general rule, the statements of experienced persons as to how the business in question had been carried on for a

^{653.} Where an insurance policy required insured to submit to an examination under oath at any time the insurer wished, which examination should not be held a waiver of any forfeiture, such an examination when the insurer had knowledge of a forfeiture will not constitute a waiver thereof.—*City Drug Store v. Scottish Union & National Ins. Co.*, 44 S. W. 21.

^{654.} An insurance company waives its right to insist on a forfeiture for misrepresentations in the application as to the incumbrances on the property, where, after knowledge thereof, it demands an examination of, and examines, insured touching the fire and loss thereby, as provided by the policy, though the policy provides that forfeiture thereof shall not be waived by any examination therein provided for.—*Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.*, 49 S. W. 271.

³⁹⁷—Participating in Adjustment of Loss. (See 28 Cent. Dig. Insurance, §§ 1078-1082.)

^{655.} Where an adjuster, after learning of the destruction of the insured's itemized inventory, ledger, and scratch book, refused to proceed with the investigation of the loss until the insured agreed that further examination

into the loss should "not be taken as any waiver of any defense the companies may have by reason of the breach of warranty as contained in the iron-safe clause, we having lost our detailed inventory," there was evidence from which the jury might infer a waiver of the requirement to produce the books other than the detailed inventory, particularly as the adjuster, after making an estimate of the loss, pursuant to said agreement, applied to plaintiffs, to whom the policies had been assigned, for duplicate invoices of purchases of goods.—*Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.* 35 S. W. 955; *Same v. Lancashire Ins. Co.*, Id.

^{656.} The insured disclosed to the adjuster facts justifying a forfeiture, but the adjuster made no claim of forfeiture, telling the insured to get up his bills and proofs of loss. In a subsequent letter this was repeated, with a qualification that the company, in making the suggestion, did not intend to waive any of its rights. The insured forwarded to the company his proofs of loss. After some delay the company advised the insured that his proofs were insufficient, but did not point out the deficiency. Held, that there was a waiver of the right of forfeiture.—*Georgia Home Ins. Co. v. Moriarty*, 37 S. W. 628.

series of years are admissible as tending to show the usage and custom of the trade.⁶⁶¹ So to establish the liability of underwriters it is not necessary to show a custom among such underwriters to pay losses on goods carried on deck.⁶⁶² It is held that if from the nature of certain articles of freight they can only be carried on deck it is a condition that they shall be so carried.⁶⁶⁰

Perils of the Sea.—Where a watchman negligently fails to close the sea valve thereby causing the vessel to tip over and founder there can be no recovery under a policy insuring a vessel against the adventures and perils of the sea.⁶⁶⁴ In an action defended on the ground that certain freight was carried on deck and as a result lost, thereby releasing the insurer from liability, the general rule was laid down by the Supreme Court in a very early case that a policy on property in general terms "laden or to be laden on board," would not cover property laden on deck; but if the prop-

657. Forfeiture for noncompliance with conditions is waived if the company, with knowledge of the breach, causes the insured to be examined under oath pursuant to a clause in the policy.—*Georgia Home Ins. Co. v. O'Neal*, 38 S. W. 62.

658. An insurance adjuster, who, at request of insured, and under an express agreement that he should not thereby waive a breach of an "iron-safe clause," requiring the production of an inventory, made an examination and estimate of a loss, did not, by requiring the procurement of duplicate invoices at insured's expense, waive such clause.—*Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 48 S. W. 559, 19 Tex. Civ. App. 338.

659. The right to claim a forfeiture of a fire policy because of noncompliance with the iron-safe clause is waived, the insurer's adjuster, on whom it had conferred full authority to represent it in the investigation and adjustment of the loss, having subjected insured to an examination under oath as authorized by the policy, causing his trouble and expense, after full knowledge by the adjuster of the facts on which the right of forfeiture could be based, though the policy provided that no one but the president or secretary of the insurer had any authority to waive or modify any of its conditions, or to revive it where it has become void for violation of any of its conditions.—*American Cent. Ins. Co. v. Nunn*, 79 S. W. 88, reversed, 82 S. W. 497. See Cent. Dig. vol. 28, cols. 1869-1863, §§ 1078-1082.

RISKS AND CAUSES OF LOSS. (SEE 19 CYC. 827.)

402—Marine Risks in General. (See 28 Cent. Dig. Insurance, §§ 1080-1090, 1092, 1103-1105.)

660. If from the nature of articles they can be carried only on deck, it is a condition that they shall be so carried.—*Orient Mut. Ins. Co. v. Reymershoffer's Sons*, 56 Tex. 234.

661. Statements of experienced persons as to how the business in question had been carried on for a series of years were admissible as tending to show the usage and custom of the trade.—*Orient Mut. Ins. Co. v. Reymershoffer's Sons*, 56 Tex. 234.

662. To establish the liability of underwriters it was not necessary to show a custom among such underwriters to pay losses on goods carried on deck.—*Orient Mut. Ins. Co. v. Reymershoffer's Sons*, 56 Tex. 234.

663. A policy of marine insurance upon a vessel while in the waters of the Mexican gulf held in force, where the vessel was in a river where the gulf tide ebbed and flowed.—*Mannheim Ins. Co. v. Charles Clarke & Co.*, 157 S. W. 291. 28 Cent. Dig. Insurance, §§ 1088-1105.

403—Perils of the Sea. (See 28 Cent. Dig. Insurance, § 1091.)

664. There can be no recovery, under a policy insuring a vessel against the adventures and perils of the sea, for the sinking of the vessel caused by the negligence of the watchman in failing to close the sea valve, which caused it to tip over, or to tip so far that water ran in from the top and foundered it.—*Mannheim Ins. Co. v. Charles Clark & Co.*, 157 S. W. 291. 28 Cent. Dig. Insurance, §§ 1088-1105.

erty or goods are named, and are such as are usually laden upon deck, either from necessity, safety or convenience, this will be presumed to have been known to such persons as are doing an insurance business in that trade, to have been contemplated by them and hence binding on them.⁶⁶⁵

EXTENT OF LOSS AND LIABILITY OF INSURER

Policy Shall Be Considered a Liquidated Demand—Statutory Regulations.—A fire insurance policy in case of a total loss by fire of property insured is held to be a liquidated demand against the company for the full amount of such policy but this provision does not apply to personal property. (Art. 4874, Rev. St. 1914.)

Total Loss—(1) What Constitutes.—In general, a building is totally destroyed when it ceases to be, within the meaning of the law, a building, and when it loses its specific character as a building.^{666 662} A total loss does not mean an absolute extinction.⁶⁶² The question is not whether all the parts and materials composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building.⁶⁶² Although a large portion of the four walls are left standing, still if the building has lost its identity and specific character as a building the property is totally destroyed within the meaning of the policy.^{662 672} However, as long as there is a remnant of the structure standing which is reasonably adapted for use as a basis on which to restore the building to its original condition, it has been held that the loss was not total.⁶⁷³ But where the remnant is inconsiderable compared with the part entirely destroyed and does not constitute a sufficient basis to restore the burned building the loss is total.⁶⁷³ Where a city ordinance forbids the repair of any wooden building within the fire limits destroyed by fire to the extent of one-third of its value, a building within such limits injured to that extent is

⁶⁶⁵. An insurance company was sued for the value of eighty barrels of honey insured by them, said honey being lost in a storm at sea, defendants claiming that the honey was carried on deck thereby releasing them from liability. The general rule was laid down that a policy on property in general terms "laden or to be laden on board," would not cover property laden upon deck; but if the property or goods are named, and are such as are usually laden upon deck, either from necessity, safety or convenience this will be presumed to have been known to such persons as are doing an insurance business in that trade, to have been contemplated by them

and hence binding on them.—*Orient Mut. Ins. Co. v. Reymershoffer's Sons*, 56 Tex. 234.

EXTENT OF LOSS AND LIABILITY OF INSURER (SEE 19 CYC. 833).

493—**Total Loss.** (See 28 Cent. Dig. Insurance, §§ 1266-1268.)

⁶⁶⁶. Where a building is so injured by fire as to lose its specific character as a building, it is a total loss, within the terms of an insurance policy, notwithstanding the fact that some of the walls are standing and some of the material is not destroyed.—*Hamburg-Bremen Fire Ins. Co. v. Garlington*, 18 S. W. 337, 66 Tex. 103.

a total loss.^{667 668} In a case where a building which had been injured by fire, was insured as a building and later totally destroyed it was held that in the absence of fraud in procuring the policy it was a building at the time the policy issued and the fact that the total loss occurred from both fires could not affect the liability of the insurer.⁶⁶⁴ It is erroneous to charge that if a building could be repaired at one-half of its original cost and thereby made as good as it was before the fire, the loss is not total as a building totally destroyed might be replaced for half of what it cost.⁶⁷¹

(2) **Effect of Statutory Regulation.**—The evident intent of the statute in declaring a policy in case of a total loss to be a liqui-

^{667.} Where a city ordinance forbids the repair or rebuilding of any wooden building within the fire limits, destroyed by fire to the extent of one third of its value, a building within the fire limits injured to that extent is a total loss, within the terms of an insurance policy.—*Hamburg-Bremen Fire Ins. Co. v. Garlington*, 18 S. W. 337, 66 Tex. 108.

^{668.} Under *Sayles' Civil St. Art. 2971*, providing that a fire insurance policy in case of a total loss shall be liquidated demand against the company for the full amount thereof, except in case of personal property, a clause in a policy on a house allowing the company, if the house is burned, to rebuild, is void in case of a total loss.—*Phoenix Insurance Co. v. Levy*, 33 S. W. 992; 12 Tex. Civ. App. 46; *Id.* 33 S. W. 995; *Orient Ins. Co. v. Same*, *Id.* 995; *Merchants Ins. Co. v. Same*, *Id.* 996; *Fire Ass'n of Philadelphia v. Brown*, *Id.* 997.

^{669a.} A brick building was a total loss, in contemplation of *Rev. St. Art. 3089*, making a fire insurance company liable for the full amount of the policy in case of a total loss, when three of the walls were entirely destroyed by fire, and none of the joists, floor, and window sills were left, though a portion of the fourth wall was used in erecting a new building, against the protest of the architect, who condemned the wall as unfit for use.—*American Cent. Ins. Co. v. Murphy*, 61 S. W. 956.

^{669.} Under *Rev. St. Art. 2971*, making the amount of an insurance policy a liquidated demand against the insurer in case of the total loss of the property, where a petition on a policy alleged a total loss, a claim in the answer of the right to repair under its terms is not a defense, and was properly stricken out.—*Insurance Co. v. Levy* (1895) 33 S. W. 992, 12 Tex. Civ. App. 45, followed. *Royal Ins. Co. v. McIntyre*, 34 S. W. 669.

^{670.} The total loss of a building under *Rev. St. Art. 2971*, does not mean the entire destruction of its materials, but that the building has lost its

specific character and identity as a house; and, in an action to recover from an insurance company for a total loss, evidence that, by the use of the materials remaining, the building could be reconstructed for less than the amount of the policy, to authorize the company to rebuild, is inadmissible.—*Royal Ins. Co. v. McIntyre*, 34 S. W. 669.

^{671.} It was proper to refuse to charge that if the building could have been repaired for 50 per cent. of its original cost, and thereby made as good as it was before the fire, the loss was not total, since a building totally destroyed might be replaced for 50 per cent. of its cost.—*Commercial Union Assur. Co. of London v. Meyer*, 29 S. W. 93.

^{672.} Where there was evidence that the building was almost completely destroyed by fire, it was proper to charge that, if the building was so injured as to lose its identity and specific character as a building, the loss was total.—*Commercial Union Assur. Co. of London v. Meyer*, 29 S. W. 93.

^{673.} There can be no total loss so long as the remnant of the structure standing is reasonably adapted for use as a basis on which to restore the building to the condition in which it was before the injury.—*Royal Ins. Co. v. McIntyre*, 37 S. W. 1068, 35 L. R. A. 672.

^{674.} In case of the total loss of a building, an insurer cannot offset against the amount due on its policy the value of materials remaining undestroyed, in the absence of allegation and proof that the insured has converted such materials to his own use.—*Royal Ins. Co. v. McIntyre*, 34 S. W. 669. Reversed, 37 S. W. 1068.

^{675.} *Rev. St. 1879, Art. 2971*, providing that a fire insurance policy, in case of a total loss, shall be a liquidated demand for the full amount except in the case of personal property, applies to a house erected by the owner on leased land.—*Orient Ins. Co. v. Parlin & Orendorff Co.*, 38 S. W. 60.

dated demand against the insurer for the full amount of such policy, is to make all policies on real property in case of total loss, valued policies.⁶⁶¹ So a stipulation for partial indemnity in case additional policies are taken out in other companies does not change the insurer's liability to pay the full amount named in the policy.⁶⁶¹ And a clause allowing the insurer to rebuild in case of total loss is void.⁶⁶⁸ So a claim in an answer of the right to repair under the terms of the policy is not a defense under the statute, where the petition alleges a total loss.⁶⁶⁹ In an action to recover for a total loss evidence that, by the use of the materials remaining the building could be reconstructed for less than the amount of the policy, to authorize the insurer to rebuild, is inadmissible under the statute.⁶⁷⁰ Under the statute, a stipulation that the insurer shall be liable for indemnity only and that the amount of loss shall be fixed by appraisal is void in case of a total loss.⁶⁷⁶ Neither, in case of a total loss, can the insurer avoid liability by showing the insured stated an excessive valuation in the proof of loss.⁶⁷⁷ The statute (Art. 4874, Rev. St. 1914) also applies to a house erected by the owner on leased land.⁶⁷⁸ (For fact cases showing total losses under the statute, see Ann. 668a, 679, 680.)

Provisions Making Insured a Co-Insurer—Co-Insurance Clauses—Statutory Regulations.—All provisions in policies of fire insurance companies requiring the insured to maintain a larger amount of insurance than that expressed in the policy or in any way provid-

676. Under Sayles' Civ. St. Art. 2971, providing that, where insured property other than personalty is totally destroyed by fire, the policy shall become a liquidated demand for the full amount thereof, a stipulation in a policy that the company issuing it shall be liable for indemnity only, and that the amount of the loss shall in all cases be fixed by agreement or appraisal, is void in case of a total loss.—*Continental Ins. Co. v. McCulloch*, 39 S. W. 374.

677. Under Rev. St. 1895, Art 3089, providing that a fire insurance policy, in case of a total loss, shall be a liquidated demand against the company for the full amount thereof, the company cannot avoid its liability by showing that the assured stated an excessive valuation in the proof of loss.—*German Ins. Co. v. Jansen*, 45 S. W. 220, 18 Tex. Civ. App. 190.

678. A building is a total loss, within Rev. St. Art. 3089, rendering fire insurance companies liable for the full amount of the policy in case of total loss, where the remnant is inconsiderable, compared with the part entirely destroyed, and does not constitute a sufficient basis to restore the burnt building.—*Murphy v. American Central Ins. Co.*, 54 S. W. 407.

679. A brick building is a total loss, within the above statute, where three of its walls are entirely destroyed by fire, and none of the joists, floors, or window sills are left, though a portion of the fourth wall was used in the construction of a new building on the site of the old, over the protest of the constructors, who considered it unsafe.—*Murphy v. American Central Ins. Co.*, 54 S. W. 407.

680. The foundation of a building is not within the contemplation of the parties to an insurance contract, and hence the question of injury to the foundation should not be considered by the jury in reaching a conclusion as to total loss.—*Murphy v. American Central Ins. Co.*, 54 S. W. 407.

681. The evident intent of the statute in declaring a fire insurance policy in case of a total loss to be a liquidated demand against the company for the full amount of the policy, was to make all policies on real property in case of total loss, valued policies. A stipulation for partial indemnity in a policy in case additional policies were taken out in other companies, with the consent of insurer, does not change the defendant insurer's liability to pay the full sum named in the policy.—*Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578.

ing that the insured shall be liable as co-insurer with the company issuing the policy for any part of the loss or damage are null and void except in the case of policies written on cotton, grain or other products in the process of marketing, shipping, storing or manufacture. (Art. 4893, Rev. St. 1914.)

Case Law.—Under Art. 4893 of the Revised Civil Statutes a provision in a policy on personal property that the insurer should not be liable for more than three-fourths of its cash value at the time of loss, thereby making the insured a co-insurer was held void.⁶³⁵ Under a policy containing an eighty per cent co-insurance clause the insured was held entitled to recover that per cent of the policy less the amount of his premium note, expense of adjustment, etc., with interest.⁶³⁶

Value of Property Destroyed.—Where the policy provides that the insurer shall not be liable beyond the actual cash value at the time of loss, not to exceed the cost of replacing the goods, the measure of damages is what it would cost to replace them from the markets where such goods are usually manufactured or could be purchased within a reasonable time.⁶³⁷ Thirty days was held to be

632. A building is totally destroyed when it ceases to be within the meaning of the law, a building and, under the laws of this state, in such case the policy evidences a liquidated demand against the insurance company for the full amount for which it was issued. A total loss does not mean an absolute extinction. The question is not whether all the parts and materials composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building. Although a large portion of the four walls were left standing, still if the building has lost its identity and specific character as a building the property is totally destroyed within the meaning of the policy.—*Hamburg-Bremen Ins. Co. v. Garlington*, 66 Tex. 103.

633. An ordinance prohibited the repair of wooden buildings situated within the fire limits, which had been damaged by fire to the extent of one-third of their value. An insured building having been partially destroyed and an application to repair it having been refused by the city council in accordance with such ordinance it was held that the parties having contracted in view of the ordinance the fire must be deemed the proximate cause of the loss, and the loss total.—*Hamburg-Bremen Fire Ins. Co. v. Garlington*, 66 Tex. 103.

634. A building having been injured by fire, was insured as a "building" and was later totally destroyed by fire. It was held, that in the absence of averment and proof of fraud in pro-

curing the policy it was a building at the time the policy issued and the fact that the total loss occurred from both fires could not affect the liability of the makers of the policy in force at the time of the total loss.—*Hamburg-Bremen Ins. Co. v. Garlington*, 66 Tex. 103.

495—Provisions Making Insured a Co-Insurer.

635. Under Vernon's Sayles' Ann. Civ. St. 1914, Art. 4893, provision in policy covering piano that insurer should not be liable for more than three-fourths of its cash value at time of loss, so making insured a co-insurer, held void.—*Fireman's Ins. Co. v. Jesse French Piano & Organ Co.*, 187 S. W. 691.

636. Under Acts 31st Leg. (4th Called Sess.) ch. 8, § 18, insured, under policy containing an 80 per cent. co-insurance clause, held, entitled to that per cent. of the policy, less the amount of his premium note, expense of adjustment, etc., with interest.—*Merchants' & Bankers' Fire Underwriters v. Brooks*, 188 S. W. 243.

496—Value of Property Destroyed. (A) In General. (See 28 Cent. Dig. Insurance, §§ 1274-1276.)

637. Where a policy on a wholesale stock provided that the insurer should not be liable beyond the actual cash value of the property at the time of the loss, which in no event should exceed the then cost to insured to replace the same with material of like

a reasonable time and the cost thereof fixed the measure of the insured's recovery.⁶⁸⁸ The amount for which an insurer is liable in a loss of goods by a manufacturer is based on the market price of the goods when and where destroyed, regardless of what it actually cost the manufacturer to reproduce them.⁶⁸⁹ Under the statute a policy is held a liquidated demand for the full amount in case of total loss although the property is not worth such amount, where the insurance is not induced by any representation by the insured.⁶⁹⁰ The insured is entitled to recover what it would cost to replace the goods lost or their cash value.⁶⁹¹ The "actual value" of insured property is its saleable or cash value.⁶⁹²

Fraudulent Valuation of Goods.—Under a policy providing that fraud or false swearing on the part of the insured shall cause a forfeiture of all claim under it, a violation of the clause prevents recovery.⁶⁹¹ The fact that the stock of goods is shown to be of much less value than as sworn to in the proofs of loss does not of itself show that the proofs were willfully and falsely made,⁶⁹⁰ and it is necessary for the insurer to show that the fraud or false swearing was willful and not the result of mistake.⁶⁹²

Valued Policies.—Where different articles of personalty are valued separately in a policy and some are worth less and some more than the values stated, the amount of recovery cannot be more than any particular value even though the article is worth more nor less than any other value though the article is worth less.⁶⁹³ Where

kind and quality, etc., the measure of damages was not the cost of replacing the goods instantan on destruction, but what it would cost to replace the same from the markets where such goods were usually manufactured, or could be purchased within a reasonable time. *Texas Moline Plow Co. v. Niagara Fire Ins. Co.*, 87 S. W. 192. See Cent. Dig. vol. 28, cols. 2122-2129, §§ 1274-1276.

⁶⁸⁸. The goods having been replaced within 30 days, such was a reasonable time, and the cost thereof fixed the measure of plaintiff's recovery.—*Texas Moline Plow Co. v. Niagara Fire Ins. Co.*, 87 S. W. 192.

⁶⁸⁹. The amount for which an insurance company is liable because of a loss of goods while owned by the manufacturer is based upon the market price when and where destroyed, regardless of what it would actually cost the manufacturer to reproduce them.—*Hartford Fire Ins. Co. v. Cannon*, 46 S. W. 851, 19 Tex. Civ. App. 305.

⁶⁹⁰. The fact that stock of insured goods is shown to be of much less value than that sworn to in the proofs of loss does not, of itself, show that the said proofs were willfully and falsely made.—*Pelican Ins. Co. v. Schwartz*, 19 S. W. 374.

⁶⁹¹. Where the insured has been guilty of willful fraud or false swearing he cannot recover on a policy, the clauses of which provide that "any fraud, or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy."—*Lion Fire Ins. Co. v. Starr*, 12 S. W. 45.

⁶⁹². It is necessary for defendant to show that the fraud, or attempted fraud, or false swearing, was willful, and not the result of inadvertence or mistake; but it is error to charge that before the plaintiff's right to recover was forfeited it must appear that not only his own testimony, but also that of "other witnesses produced by him, was false and corrupt."—*Lion Ins. Co. v. Starr*, 12 S. W. 45.

⁶⁹³. Under Rev. St. 1911, Arts. 4874, 4848, policy for \$4,000 held a liquidated demand for that amount, where there was a total loss, though property was not worth such amount, where the insurance was induced by no representation by insured.—*Drummond v. White-Swearingen Realty Co.*, 165 S. W. 20. See 28 Cent. Dig. Insurance, § 1274.

⁶⁹⁴. The "actual value" of insured property is its salable or cash value.—*Milwaukee Mechanics' Ins. Co. v. Frosch*, 130 S. W. 600.

property insured is clearly real estate a stipulation that it shall be considered personalty is void as violating the statute. (Art. 4874, Rev. St. 1914.)⁶⁹⁵ And under this article a dwelling is not personal property as to a valued policy though the insured sells the land under it.⁶⁹⁶ In an early case a co-insurance clause limiting the risk of the insurer to such proportion of the loss as the sum insured bears to the value of the whole property covered, was held reasonable and valid.⁷⁰¹ So in a policy on personal property covering different items providing insurer shall be liable for only three-fourths thereof the insurer is liable for only three-fourths of the value of each item separately, not exceeding the amount of insurance on each item.⁷⁰⁰

Amount of Interest of the Insured.—Under a policy stipulating that the insurer was only liable for three-fourths of the value of each item of property covered, the agent thinking that the insured had title to the partitions, doors and windows in a leased building, which really belonged to the lessor, it was held that the insured in case of loss could not recover the rental value of the property or of office rooms by such partitions, doors and windows.⁷⁰⁴ The fact that the mortgagee foreclosed the mortgage to its full amount is immaterial as between the mortgagee and the insurer since the amount of recovery on the mortgage is a matter between the mortgagor and mortgagee.⁷⁰³ There can be no recovery on a policy in-

695. Insured is entitled to recover under a fire policy not merely what she could have sold the secondhand goods destroyed for in the market, but their cash value to her; that is, what it would have cost to replace them.—*Southern Nat. Ins. Co. v. Wood*, 133 S. W. 286.

500—(E) Valued Policies. (See 23 Cent. Dig. Insurance, §§ 1275-1276.)

696. A dwelling held not "personal property" within the proviso to *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4874*, as to valued policy, though insured sells the land under it.—*Fidelity-Phoenix Fire Ins. Co. v. O'Bannon*, 178 S. W. 731.

697. Under Rev. St. 1895, Art. 3089, the amount of insurance on a building held on the total destruction of the building to have become a liquidated demand.—*Co-operative Ins. Ass'n of San Angelo v. Ray*, 138 S. W. 1122. 28 Cent. Dig. Insurance, §§ 1275-1276.

698. Where property insured is clearly real estate, a stipulation that it shall be considered as personalty is void, as violative of Rev. St. 1895, Art. 3089, providing that a fire policy in case of total loss shall be considered to be a liquidated demand for the amount of the policy, but that such provisions shall not apply to person-

alty though it might be otherwise if the nature of the property were doubtful.—*Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House*, 147 S. W. 629.

699. Under a fire policy of \$900, distributed \$650 on furniture and \$250 on a violin, no more than \$650 can be recovered on furniture, though it is worth more than that, and the violin is worth less than \$250; or more than \$250 on the violin, whatever the value of it and the furniture.—*Phoenix Ins. Co. of Hartford, Conn., v. Pfeifer*, 39 S. W. 1001.

700. Where a policy on personal property covers different items, each for specific amounts, and provides that, in case of a loss, insurer shall be liable for only three-fourths thereof, insurer is liable for only three-fourths of the value of each item separately, not exceeding the amount of insurance on such item.—*Sun Mut. Ins. Co. v. Tufts*, 50 S. W. 180, 20 Tex. Civ. App. 147.

701. The co-insurance clause in a policy, limiting the risk of the insurer to such proportion of the loss as the sum insured bears to the value of the whole property covered, is reasonable and valid.—*Pennsylvania Fire Ins. Co. v. Moore*, 51 S. W. 878, 21 Tex. Civ. App. 528.

sureing a warehouseman against his liability on cotton consigned to him where the cotton was burned without his negligence since he was not liable.⁷⁰²

Effect of Other Insurance.—Where a policy, stipulating that the insurer should not be liable for a greater proportion of any loss than the amount insured by it bore to the whole insurance, covered property in one location only and another policy covered such property and also other property in other places, there was double insurance on the property covered by both policies and the insurer was liable as under the stipulation.⁷⁰⁵ In such a case where the loss sustained was not as much as the amount of the combined insurance, the court will apply the rule of pro rata liability and it is not necessary to make other insurers party defendants and ask for contribution.⁷⁰⁶ It is also held that a provision that if the whole amount of insurance is less than the actual cash market value of the property the insurer is liable for such portion only of the loss as the amount insured by the policy shall bear to such market value, does not nullify the stipulation in the policy limiting the insurer's liability to no greater proportion of the loss sustained than the amount

503—Amount of Interest of Insured. (See 28 Cent. Dig. Insurance, §§ 1278, 1279.)

702. Where the liability of assured on cotton consigned to him was that of warehouseman, and the cotton was burned without his negligence, there could be no recovery on a policy assuring him against his "liability" on such cotton, since he was not liable.—*Allen v. Royal Ins. Co.* 49 S. W. 931.

703. The fact that a mortgagee foreclosed her mortgage property partially destroyed by fire to the full amount of her debt is immaterial, as between the mortgagee and an insurance company insuring her interest in the property, since the amount of recovery on the mortgage is a matter between the mortgagors and mortgagee.—*Sun Ins. Office v. Beneke*, 53 S. W. 98.

704. A fire policy stipulated that insurer should not be liable for more than three-fourths of the actual cash value of each item of property covered by the policy. The agent who wrote the policy knew that insured was a lessee, but thought that he had title to partitions, doors, and windows in the building which in fact belonged to the lessor. Held, that insured, in case of a loss, could not recover the rental value of the property, or of office rooms formed by such partitions, doors, and windows.—*Williamsburgh City Fire Ins. Co. v. Weeks Drug Co.*, 132 S. W. 1097. See 28 Cent. Dig. Insurance, §§ 1280, 1281.

504—Effect of Other Insurance. (See 28 Cent. Dig. Insurance, §§ 1285-1290.)

705. Where a fire policy, stipulating that insurer should not be liable for a greater proportion of any loss on the property covered than the amount insured by it bore to the whole insurance on the property, covered property in one location only, and another policy covered such property, and also property in other places, there was double insurance on the property covered by both policies, and insurer was liable for no greater proportion of the loss of such property than the amount of its policy bore to the whole insurance.—*Liverpool & London & Globe Ins. Co. v. Delta County Farmers' Ass'n*, 121 S. W. 599. See 28 Cent. Dig. Insurance, §§ 1285-1290.

706. Where, in an action on a policy stipulating that insurer should not be liable for a greater proportion of any loss on the property than the amount insured bore to the whole insurance on the property, the insurer alleged in its answer the existence of other insurance and the amount thereof, and the evidence established the allegations, and the loss sustained was not as much as the amount of the combined insurance, the court must apply the rule of pro rata liability on the part of insurer, and it was not necessary to make the other insurer a party defendant, and ask for contribution.—*Id.*

insured by it bears to the whole insurance.⁷⁰⁷ Where a loss so far exceeds the whole insurance that each insurer by any method of computation is liable to the full amount of its policy an insurer cannot complain of the method of adjustment adopted by the court.⁷¹⁰ Whether void or voidable by the issuance of the second policy a prior policy should be considered as insurance in determining the second insurer's liability under a clause providing that it is liable for no greater amount than its policy bore to the whole insurance.⁷⁰⁸ Where a policy permits concurrent insurance but does not require it to cover the whole property, additional insurance on a part only is within the provision, and in prorating a loss such concurrent insurance should not be treated as on the whole property.⁷⁰⁹ The fact that several other policies on the property gave the insured full indemnity is no reason for denying the insured the indemnity contracted for.⁷¹² The statute provides that the policy shall be a liquidated demand in case of total loss.⁷¹³ In so far as a policy covers personal property, its provisions as to the share of loss to be suffered by the insured, as to contributions by all companies that issued policies on the same property, and other like things, are to be given full effect.⁷¹¹

707. A provision in a fire policy that, if at the time of a fire the whole amount of insurance on the property shall be less than the actual cash market value thereof, insurer shall in case of loss be liable for such portion only of the loss or damage as the amount insured by the policy shall bear to the actual cash market value of the property at the time of the fire, does not nullify the stipulation in the policy limiting insurer's liability to no greater proportion of the loss sustained than the amount insured by it bears to the whole insurance on the property.—*Id.*

708. Whether void or voidable by the issuance of a second policy, held, that a prior policy should be considered as insurance in determining the second insurance company's liability under a clause providing that it was liable for no greater amount than its policy bore to the whole amount of the insurance.—*Southern Nat. Ins. Co. of Austin v. Barr*, 143 S. W. 845. See 28 Cent. Dig. Insurance, §§ 1285-1290.

709. Where a fire policy permits concurrent insurance, but does not require it to cover the whole property, additional insurance on a part only is within the provision; and in prorating a loss such concurrent insurance should not be treated as on the whole property.—*American Cent. Ins. Co. v. Heath*, 69 S. W. 235.

710. Where a loss so far exceeds the whole insurance that each insurer by any method of computation will be liable to the full amount of its policy,

an insurer cannot complain of the method actually adopted by the court.—*American Cent. Ins. Co. v. Heath*, 69 S. W. 235.

711. In so far as the policy covered personal property its provisions as to the share of loss to be suffered by the insured, as to contributions by all companies that issued policies on the same property, and other like things, are to be given full effect.—*Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578.

712. The fact that several other policies on the property gave full indemnity furnished no reason for denying insured the indemnity contracted for. To induce care and good faith on the part of insured and thereby give greater security to the insurer, the first company could have refused to permit other insurance as the policy gave it power to do.—*Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578.

713. Where a policy provided that the insured should bear one-fourth of the loss and in the event of additional insurance, which could be made only with the consent of the first insurer, the company should only be liable for its proportion of three-fourths of the cash market value at the time of fire, the statute provides that a fire insurance policy in case of a total loss by fire of property insured, shall be held and considered a liquidated demand against the company for the full amount of the policy, provided it is not personal property.—*Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578.

Loss of Rent and Profits.—A policy indemnifying the insured against loss of rents caused by fire on rented premises for such period as may be reasonably necessary to restore the premises to the same tenantable condition as before the fire, does not cover such period as is necessary to place the contract for repairs and is not limited to the time actually spent in making the repairs.⁷¹⁴

NOTICE AND PROOF OF LOSS

Effect of Requirements of Policy.—A provision in a policy requiring proof of loss and a sworn statement by insured showing the property lost and his knowledge as to the time and origin of the fire, is reasonable and valid.⁷¹⁷ Under the statute (Art. 4874, Rev. St. 1914), where property is totally destroyed, the liability of the insurer accrues immediately, regardless of stipulations as to notice and proof of loss.⁷¹⁵ After proofs of loss are made as required by the insurer's agent, a mere notice that further proofs are wanted, without stating what is wanted, is not sufficient to place the insured upon action.⁷²⁰ The fact that the insurer objected to the proof of loss as being incomplete, not in conformity with the policy and untrue is no reason for excluding such proof from the evidence, when offered to show compliance with the policy.⁷¹⁸ The production of a summarized inventory as contained in a ledger is a sufficient compliance with a requirement in a policy for the production of an inventory.⁷¹⁹ (For facts excusing insured's failure to produce bills covering household goods, see Ann. 716.)

507—**Loss of Rent and Profits.** (See 28 Cent. Dig. Insurance, § 1283.)

714. An insurance policy, indemnifying insured against loss of rents caused by fire or lightning actually sustained on rented premises for and during such period as may reasonably be necessary to restore the premises to the same tenantable condition as before the fire, held, to cover such period as was necessary to place the contract for repairs, and was not limited to the time actually spent in making of the repairs.—*Hartford Fire Ins. Co. v. Pires*, 165 S. W. 565. 28 Cent. Dig. Insurance, § 1283.

NOTICE AND PROOF OF LOSS.
(SEE 19 CYC. 842.)

533—**Effect of Requirements of Policy.**
(See 28 Cent. Dig. Insurance, § 1320.)

715. Under Vernon's Sayles' Ann. Civ. St. 1914, Art. 4874, where property insured is totally destroyed by fire, the liability of the insurance company accrues immediately after the occurrence of the fire, regardless of stipulations as to notice and proof of loss.—*Fire* 10—1na.

Ass'n of Philadelphia v. Richards, 179 S. W. 926.

716. Failure of insured on demand after loss to furnish, as required by the policy, bills covering household goods destroyed by fire, held, under the circumstances in which the goods were acquired, not to defeat recovery on the policy.—*Fidelity Phoenix Fire Ins. Co. v. Sadau*, 178 S. W. 559.

717. A provision in a fire policy requiring proof of loss and a signed and sworn statement by insured showing the property lost or damaged and his knowledge and belief as to the time and origin of the fire was reasonable and valid.—*Fidelity-Phoenix Fire Ins. Co. v. Sadau*, 167 S. W. 334.

718. The fact that the company objected to the proof of loss when furnished to it, as being incomplete, not in conformity with the policy, and untrue, is no reason for excluding such proof from the evidence, when offered for the purpose of showing a compliance with the terms of the policy, since the final decision as to the sufficiency of the proof rests with the court, and not the company.—*Hibernia Ins. Co. v. Starr*, 13 S. W. 1017.

Necessity of Proof of Loss.—There can be no recovery where the insured fails to comply with the policy by making proofs of loss, unless the insurer waives the defect.⁷²¹

Persons Who May Make Proofs of Loss.—It was held not necessary under the statute that any proofs of loss should be made where the policy provided that the loss was payable to the mortgagee as his interest might appear and the building was totally destroyed.⁷²³ Therefore, it was immaterial that the proofs were furnished by the mortgagee instead of by the insured.⁷²³ Where a policy is issued to the husband on a building constituting his homestead and before loss he abandons his wife, she and a married woman, to whom the loss is made payable, and her husband may make proof of loss although the policy provides it shall be made by the original insured.⁷²²

Persons to Whom Notice or Proof May Be Made.—The insured must not rely on the statements of one not authorized to speak for the insurer, even though made in the hearing of the insurer's office.⁷²⁴ The insured must know that the party utters the intention of the insurer and a failure to know this would be negligence.⁷²⁴

Time for Notice and Proof.—Under the statute (Art. 5714, Rev. St. 1914) a stipulation in a policy that proof of loss must be made

719. The production of a summarized inventory as contained in a ledger was a sufficient compliance with a requirement in a policy for the production of an inventory.—*Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 35 S. W. 955; *Same v. Lancashire Ins. Co.*, Id.

720. After the proofs are made as required by the company's agent, mere notice to the insured or his attorney that further proofs are wanted, without stating what is wanted, is not sufficient to place the insured upon action.—*Merchants Ins. Co. of New Orleans v. Reichman*, 40 S. W. 831.

536—**Necessity of Statement or Proof of Loss.** (See 28 Cent. Dig. Insurance, § 1323.)

721. Where insured fails to make the proof of loss required by his policy, there can be no recovery thereon, unless the insurer waives the defect.—*Fidelity-Phoenix Fire Ins. Co. v. Sadau*, 178 S. W. 559.

537—**Persons Who May Give Notice or Make Proof.** (See 28 Cent. Dig. Insurance, §§ 1324-1326.)

722. Where a fire policy is issued to a husband on a building constituting his homestead, and before any loss occurs he abandons his wife, she

and a married woman to whom the loss is made payable, and her husband, may make proof of loss, though the policy provides that if it is made payable in case of loss to a third party, or held as collateral security, proofs of loss shall be made by the party originally insured.—*Warren v. Springfield Fire and Marine Ins. Co.*, 35 S. W. 810.

723. Where a building insured under a policy providing that the loss was payable to a mortgagee as his interest might appear was totally destroyed, it was not necessary under the statute that any proofs of loss should be made, and hence it was immaterial that they were furnished by the mortgagee instead of assured.—*Hamburg-Bremen Fire Ins. Co. v. Rudell*, 82 S. W. 826.

538—**Persons to Whom Notice or Proof May Be Made.** (See 28 Cent. Dig. Insurance, § 1327.)

724. Insured must not rely on statements of one not authorized to speak for company even though made in the hearing of company's officer. Insured must know that party utters the intention of company and a failure to know this would be negligence.—*East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287.

within ninety days after fire is void.⁷²⁶ An early case held that a policy requiring proofs of loss to be furnished "as soon as possible" was not forfeited by a failure to furnish them until sixty days thereafter in the absence of a stipulation that unnecessary delay shall work a forfeiture.⁷²⁷ "Immediate notice" was complied with where the insured, who was absent at the time of the fire, notified the agent of insurer on the day following and the latter immediately telegraphed the notice to the insurer.⁷²⁸ (For facts showing when limitation as to time of notice commenced to run on a steamboat shipment, see Ann. 728, 729.)

Necessity of Certificate of Magistrate.—Under the statute (Art. 4874a, Rev. St. 1914.) an insurer cannot escape liability for failure of insured to furnish a certificate of the magistrate nearest the fire as to the circumstances and the loss where there was no question as to the good faith of the insured.⁷³¹ Recovery will not be prevented where such a certificate was not requested till suit was brought sixty days after the loss.⁷³⁰

Fraud or False Swearing.—Willful presentation, by the insured, with intent to defraud, of proof of loss, containing items overvalued or not lost, will prevent recovery.⁷³² ⁷³⁴ In a policy provid-

539.—Time for Notice and Proof. (See 28 Cent. Dig. Insurance, §§ 1322-1336.)

725. A condition in a policy requiring immediate notice of loss was complied with where plaintiff, who was absent at the time of the fire, on the day following notified defendant's agent thereof, who immediately telegraphed defendant concerning it.—Oakland Home Ins. Co. v. Davis 33 S. W. 587.

726. Under Vernon's Sayles' Ann. Civ. St. 1914, Art. 5714, a stipulation in a fire insurance policy that proof of loss must be made within 90 days after fire was void.—Fire Ass'n of Philadelphia v. Richards, 179 S. W. 926.

727. An insurance policy requiring proofs of loss to be furnished "as soon as possible" is not forfeited by a failure to furnish them until 60 days thereafter, in the absence of a provision therein that unnecessary delay shall work a forfeiture.—Sun Mut. Ins. Co. v. Mattingly, 13 S. W. 1016.

728. When the general policy in favor of a commission merchant bound the merchant to return a monthly report of shipments, if the bills of lading kept by the clerk of the steamboat had the mark "no insurance," but that delivered by the shipper was a clean bill, the limitation as to time of notice did not commence to run from the date of the shipment, but from the date of the discovery of the fraud.—Marine Fire Ins. Co. v. Burnett, 29 Tex. 433.

729. In the case of no bills of lading, or of fraudulent and contradictory bills, formal proceedings to fix the liability of the underwriters are not necessary.—Marine Ins. Co. v. Burnett, 29 Tex. 433.

546.—Necessity of Certificate of Magistrate.

730. Failure to furnish magistrate's certificate of loss as required by a fire insurance policy will not prevent recovery on the policy, where such certificate was not requested till suit was brought 60 days after loss.—Aetna Ins. Co. v. Shacklett, 57 S. W. 583.

731. Under Act April 2, 1913, (Acts 33d Leg. ch. 105) § 1 (Vernon's Sayles' Ann. Civ. St. 1914, Art. 4874a), and section 3, insurer of personality destroyed by fire held unable to escape liability for failure of insured to comply with provision of policy that he would furnish a certificate of the magistrate nearest the fire as to the circumstances and the loss; there being no question as to the good faith of insured.—Springfield Fire & Marine Ins. Co. v. Nelms, 184 S. W. 1094.

553.—Fraud or False Swearing. (See 28 Cent. Dig. Insurance, §§ 1362-1366.)

732. Willful presentation by insured, with intent to defraud, of proof of loss containing items overvalued or not lost, will prevent recovery on a policy insuring household goods against fire.—Fidelity-Phoenix Fire Ins. Co. v. Sadau, 178 S. W. 559.

ing that it should be void if insured concealed or misrepresented in writing any material fact or in case of any fraud or false swearing, the "writing," "fraud," or "false swearing" were referable to misrepresentations and misstatements in the proof of loss.⁷³³ A policy is not avoided in case of false swearing where the insured honestly believes the value of the property to be as he swears.⁷³⁵ Where the insured had not concealed the fact that they did not own the property but had informed the insurers agent of the true status of the matter a subsequent statement in the proof of loss that they were the owners was held not made with intent to defraud so as to avoid the policy.⁷³⁶

Estoppel or Waiver as to Notice and Proofs or Defects and Objections—(1) In General.—To have the effect of waiver of proofs of loss, the acts relied on should be the acts of some one who had authority to bind the insurer, and should be such as are calculated to induce insured that an exact compliance with the policy as to proofs of loss would be of no effect if performed.⁷⁴⁰ The fact that the agent and adjuster appear upon the premises after the fire and commenced an examination as to the amount of damage, does not constitute a waiver of the strict proofs of loss where the insurer continuously insists thereon.⁷³⁷ A defect in omitting to name the occupant of the insured property which is not shown to have been material or to have injured the insurer will not defeat recovery.⁷³⁸

733. Where a policy provided that it should be void if insured concealed or misrepresented in writing any material fact or circumstance concerning the insurance, or in case of any fraud or false swearing, the "writing," "fraud," or "false swearing" were referable to misrepresentations and misstatements in the proof of loss.—*Fidelity-Phoenix Fire Ins. Co. v. Sadau*, 167 S. W. 334.

734. A condition that a policy shall be void in case of false swearing by the insured touching any matter relating to the insurance after loss is not violated except when the false statement is willful.—*Phoenix Ins. Co. v. Swann*, 41 S. W. 519.

735. A policy providing that it shall be void in case of false swearing by insured is not avoided where a person honestly believes the value of destroyed property to be as he swears, even though it is not the true value, when there is no motive for making a false statement, and the value, as found by the jury, is \$2,000 in excess of the amount of the insurance, though that sum was \$1,600 less than the amount fixed by insured.—*Phoenix Ins. Co. v. Shearman*, 43 S. W. 930, 17 Tex. Civ. App. 456.

736. When plaintiffs in whose name property was insured had informed the company's agent that they did not

own the property, but held it on commission, and after its loss made the same statement to the company's adjuster, a subsequent statement in the proof of loss that they were the owners of the property was not made with intent to defraud, so as to avoid the policy.—*Westchester Fire Ins. Co. v. Wagner*, 57 S. W. 876.

554—Estoppel or Waiver as to Notice and Proofs or Defects and Objections. (See 28 Cent. Dig. Insurance, §§ 1367-1409.)

737. The fact that the agent and adjuster of a fire insurance company appear upon the premises after a fire, and commence an examination as to the amount of damage, does not constitute a waiver of the strict proofs of loss, when the company continuously insists thereon, and upon having an appraisal in accordance with the terms of the policy.—*Scottish Union & Nat. Ins. Co. v. Clancy*, 18 S. W. 439.

738. Where proofs of loss were defective only in omitting the name of the occupant of the building, and such defect was not shown to have been material or to have injured the company, it will not defeat a recovery.—*Commercial Union Assur. Co. of London v. Meyer*, 29 S. W. 93.

A formal proof of loss is waived where the insurer demands as part of the proofs of loss an inventory destroyed in the fire, to which it was not entitled under the policy, the alternative given insured for non-production being that only a compromise would be entertained.⁷³⁹ Where a state agent and adjuster take the sworn statement of the insured as to all matters concerning the fire and tell him they do not care for further proofs of loss and later offer to pay a portion of the loss, the proofs of loss are waived.⁷⁴¹

(2) **Powers of Officers or Agents.**—A limitation in a policy on the authority of the agent to waive conditions has no application to waivers arising by operation of law from acts of the agent denying the company's liability.⁷⁴² Hence, the insured may show, for the purpose of excusing his failure to furnish proofs of loss, that the agent tendered back the premium to him after the loss, under circumstances rendering it a repudiation of the policy.⁷⁴² Where the agent of the insurer receives the proofs of loss and states they are correct, it is a waiver of any imperfections therein.⁷⁴³

(3) **Implied Waiver in General.**—A statement by the insurer's adjuster to the insured that if the latter would furnish him with a list of goods destroyed by the fire nothing more would be required, is a sufficient waiver of the proofs of loss.⁷⁴⁵ An inspection of the property after loss, an offer of settlement and an admission of partial liability is a waiver for preliminary proofs of loss.⁷⁴⁶ The requirement that proofs of loss be presented within a certain time is waived where the agents represent that the insurer will not take advantage of the delay and that the loss will be adjusted, especially

739. Where an insurance company demands, as part of the proofs of loss, an inventory destroyed in the fire, and which it was not entitled to under the policy, the alternative given the assured being that, if it was not furnished, only a compromise would be entertained, it waives formal proof of loss.—*Phoenix Ins. Co. v. Center*, 31 S. W. 446, 10 Tex. Civ. App. 535.

740. To have the effect of waiver of proofs of loss, the acts relied on should be the acts of some one who had authority to bind the company and should be such as are calculated to induce assured that an exact compliance with the policy as to proofs of loss would be of no effect if performed.—*East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287.

741. Where a state agent and adjuster for an insurance company visits insured after loss, and takes his sworn statement as to all matters concerning the fire, and says he does not care for further proofs of loss, and later writes a letter offering to pay a portion of the loss, it is a waiver of proofs of loss.—(*Civ. App.* 1903). *Continental Fire Ins. Co. v. Cummings*, 78 S. W. 378, judgment reversed *Continental*

Ins. Co. v. Same (1904) 81 S. W. 705, 98 Tex. 115. See *Cent. Dig.* vol. 28, cols. 2256-2262, §§ 1378-1381.

556—**Estoppel or Waiver as to Notice and Proofs or Defects and Objections—Powers of Officers or Agents.** (See 38 *Cent. Dig. Insurance*, §§ 1374-1377.)

742. A limitation in a policy on the authority of the agent to waive conditions has no application to waivers arising by operation of law from acts of the agent denying the company's liability; and hence insured may show, for the purpose of excusing his failure to furnish proofs of loss, that the agent tendered back the premium to him after the loss, under circumstances rendering it a repudiation of the policy.—*Fire Ass'n of Philadelphia v. Jones*, 40 S. W. 44.

743. Where, after a loss, the insured, acting under the suggestions of the agent of the insurance company, prepares the proofs of loss, which the agent receives and states are correct, it is a waiver of any imperfections therein.—*Merchants Ins. Co. of New Orleans v. Reichman*, 40 S. W. 831.

where the policy did not provide for forfeiture for failure to present proofs.⁷⁴⁷ It was held that the insurer's waiver of formal proof of loss was to be dated from the time of its examination of the insured.⁷⁴⁸ (For facts showing a waiver of the provision requiring proof of loss, see Ann. 744.)

(4) **Denial of Liability.**—Where the insurer denies liability under the policy in toto, it thereby waives the provision requiring proofs of loss,⁷⁴⁹ 750 751 752 753 754 755 757 763 or it operates as a waiver of irregularities in the proof of loss.⁷⁵⁵

558—Estoppel or Waiver as to Notice and Proofs or Defects and Objections. (A) Implied Waiver in General. (See 28 Cent. Dig. Insurance, §§ 1382-1390, 1405.)

744. In an action on a fire policy, facts held not to show a waiver of the provision requiring proof of loss.—*Fidelity-Phoenix Fire Ins. Co. v. Sadau*, 167 S. W. 334.

745. A statement by the company's adjuster to insured that, if the latter would furnish him a list of the goods destroyed by the fire, nothing more would be required, was a sufficient waiver of the proofs of loss required by the terms of the policy.—*German Ins. Co. v. Norris* (Tex. Civ. App.) 32 S. W. 727. 11 Tex. Civ. App. 250.

746. An inspection of insured property after its destruction, coupled with an offer of settlement for a specific sum, and an admission of liability for part of the amount of the policy, is a waiver of a requirement in the policy for preliminary proof of loss.—*Commercial Union Assur. Co. of London v. Meyer*, 29 S. W. 93.

747. Where proofs of loss were not presented to an insurance company within the required time, but its agents represented that the company would take no advantage of the delay, and that the loss would be adjusted, it is a waiver of the delay, especially where the policy did not provide for a forfeiture in case of failure to present such proofs.—*Burlington Ins. Co. v. Tobey* (Tex. Civ. App.) 30 S. W. 1111.

748. The insurer's waiver of formal proof of loss was to be dated from the time of its examination of the insured.—*Merchants' & Bankers' Fire Underwriters v. Brooks*, 188 S. W. 243.

559—(B) Denial of Liability. (See 28 Cent. Dig. Insurance, §§ 1391, 1392.)

749. Where an insurance company informs the insured after the loss that by reason of unauthorized transfers of the policy or property, the policy is avoided, and that the loss will not be paid, the insured is released from the obligation to furnish proofs of loss.—*Niagara Ins. Co. v. Lee*, (Tex.) 11 S. W. 1024.

750. A letter written by an insurance company informing the policyholder that the proofs of loss furnished were unsatisfactory, and notifying him that payment of the claim would be resisted because of misrepresentations regarding title and property, operates a waiver of further proofs.—*Sun Mut. Ins. Co. v. Mattingly* (Tex.) 13 S. W. 1016.

751. The proof of loss is waived by a denial, with full knowledge of all the facts, of liability on the policy.—*Hanover Fire Ins. Co. v. Shrader*, (Tex. Civ. App.) 31 S. W. 1100.

752. Where, prior to the bringing of an action on a policy, defendant denied liability in toto, it thereby waived a provision requiring proof of loss.—*Connecticut Fire Ins. Co. v. Hilbrant*, 73 S. W. 558.

753. A denial of liability upon a policy made by an insurance company to a third party, within the period prescribed for making proofs of loss, will, if it comes to the knowledge of the insured, operate as a waiver of proofs of loss.—*Merchants' Ins. Co. of New Orleans v. Nowlin*, 56 S. W. 198.

754. The provisions in an insurance policy requiring proofs of loss, and allowing the company a limited time after proof in which to determine the matter and pay the loss, are waived by a denial of liability by the company.—*Hartford Fire Ins. v. Josey* (Tex. Civ. App.) 25 S. W. 685. 6 Tex. Civ. App. 290.

755. Where a fire company denied its liability in toto, there was a waiver of irregularities in the proof of loss.—*Hanover Fire Ins. Co. of New York v. Huff*, 175 S. W. 465.

756. Where an adjuster representing defendant adjusted the loss immediately after the fire, and then informed the insured that the company would not pay him, such refusal constitutes a waiver of proof of loss.—*East Texas Fire Ins. Co. v. Brown*, (Tex. Sup.) 18 S. W. 713.

757. Proofs of loss under a fire policy are waived, where the insurer denies its liability on the policy.—*Scottish Union & National Ins. Co. v. Moore*, 81 S. W. 573, 36 Tex. Civ. App. 312.

(5) **Failure to Object or to State Ground of Objection.**—The failure of the insurer to notify the insured of defects in proofs of loss which can be corrected is a waiver of its right to object to the proofs on the ground of such defects.^{758 759 760} An insurer's acceptance of a statement of the material used in the cost of construction of a building and its failure to comply with a request to specify anything else that might be necessary, is a waiver of formal proofs of loss.⁷⁶²

(6) **Adjustment of Loss and Negotiations for Settlement.**—A forfeiture is not waived by requiring the insured to submit to a sworn examination.⁷⁶⁵ A non-waiver clause, the purpose of which is to enable the insurer to negotiate in regard to the loss without waiving its right to contest liability, does not apply after an adjustment of the loss has been made.⁷⁶⁴ And the fact that the insurer had no knowledge of facts sufficient to defeat the claim before the adjustment is of no avail where it might have known them by inquiry and was not prevented from so doing by any fraud of the insured.⁷⁶⁶

560—(C) Failure to Object or to State Ground of Objection. (See 28 Cent. Dig. Insurance, §§ 1393-1404.)

758. Failure of the insurer to notify the insured of defects in proofs of loss which can be corrected is a waiver of his right to object to the proofs on the ground of such defects.—*North-ern Assur. Co. v. Samuels*, 33 S. W. 239, 11 Tex. Civ. App. 417.

759. Failure of insurer of household goods to point out specifically defects in proof of loss held a waiver of any defects.—*Fidelity-Phoenix Fire Ins. Co. v. Sadau*, 178 S. W. 559.

760. Where proof of loss was defective because the notary before whom it was sworn was interested, the insurer to raise that question must object to it on that ground.—*Hanover Fire Ins. Co. of New York v. Huff*, 175 S. W. 465.

761. Where an insurance company receives proofs of loss, and makes no objection to their sufficiency, it waives the right to object to them in an action to recover on its policy.—*Royal Ins. Co. v. McIntyre* (Tex. Civ. App.) 34 S. W. 669, reversed 37 S. W. 1068.

762. After being notified of the loss, defendant's acceptance of a statement of the material used in, and the cost of construction of, a building destroyed by fire, and its failure to comply with a request to specify anything else that might be necessary, is a waiver of formal proofs of loss.—*Gerard Fire & Marine Ins. Co. v. Frymier* (Tex. Civ. App.) 32 S. W. 55.

763. A distinct denial of liability and refusal to pay on the ground that

there is no contract or that there is no liability, is a waiver of the condition requiring proof of loss.—*East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287.

561—(D) Adjustment of Loss and Negotiations for Settlement. (See 28 Cent. Dig. Insurance, §§ 1406, 1407, 1409.)

764. A nonwaiver clause in a fire policy, the purpose of which is to enable the company's agent to negotiate in regard to the loss without any waiver by the company of its right to contest its liability, does not apply after an adjustment of the loss has been made.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 760, 23 Cent. Dig. Insurance, § 1406.

765. Where a policy on a stock of goods was forfeited by failure of insured to produce books showing a record of his business transactions, as required by the policy, such forfeiture was not waived by requiring insured to submit to a sworn examination.—*American Cent. Ins. Co. v. Nunn*, 82 S. W. 497, 98 Tex. 191.

766. After an adjustment of the loss under a fire policy, the fact that insurer had no knowledge of facts which, if known, might have been effectual to defeat the claim under the policy, is of no avail, if the insurer might have known them upon inquiry, and was not fraudulently prevented from learning them by the insured.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 760.

ADJUSTMENT OF LOSS

Effect of Adjustment.—An adjustment may be set aside on a showing that it was fraudulent or made through a mistake of fact.⁷⁶⁷

Effect of provisions of Policy for Appraisal or Arbitration.—Where an arbitration and award were made by the policy a prerequisite to instituting suit, a suit could be maintained although the award was invalid, but through no fault of the insured.⁷⁷⁰ A disagreement between the insurer and insured as to the basis of estimating a loss does not call an arbitration provision into force, not being as to the amount of the loss.⁷⁶⁹ Where the policy provides for the loss to be estimated according to the cash value of the property at the time of loss the measure of damages is the amount it would cost the insured in cash to purchase property of like kind and quality.⁷⁶⁸

Demand of Appraisal or Arbitration.—Where an insurer fails to demand an appraisal within the time prescribed by the policy, it waives its right thereto.^{773 771 772} Where a policy provides that the extent of loss shall, on demand by either party, be appraised by arbitrators, that such appraisal shall be made a part of the proofs

ADJUSTMENT OF LOSS. (SEE 19 CYC. 872.)

566—Effect of Adjustment.

767. An adjustment of a loss under a fire policy may be set aside, on a showing that it was fraudulent, or made through a mistake of fact.—(Civ. App.) German Ins. Co. v. Gibbs, Wilson & Co., 92 S. W. 1068, rehearing denied 96 S. W. 760. See 28 Cent. Dig. Insurance, §§ 1413-1419.

567—Effect of Provisions of Policy for Appraisal or Arbitration. (See 28 Cent. Dig. Insurance, §§ 1420, 1421.)

768. Where a policy provides that the loss shall be estimated according to the cash value of the property at the time of the fire, the measure of damages is the amount, which it would cost the insured in cash to purchase property of like kind and quality.—German Ins. Co. v. Everett (Tex. Civ. App.) 36 S. W. 125.

769. Under a policy providing that, in case insurer and insured differed as to the amount of loss, it may be determined by arbitration if parties so elect, a disagreement merely as to the basis of estimating the loss does not call such provision into force.—Virginia Fire and Marine Ins. Co. v. Cannon, 45 S. W. 945, 18 Tex. Civ. App. 588.

770. Arbitration and award was made by an insurance policy a prerequisite to instituting suit. The award was invalid, but through no fault of the assured. Held, that the suit could

be maintained.—Phoenix Ins. Co. v. Moore, 46 S. W. 1131.

568—Demand of Appraisal or Arbitration. (See 28 Cent. Dig. Insurance, § 1425.)

771. Where an insurance policy requires proofs of loss to be made within 60 days from the loss, and provides that if the parties disagree as to the amount of loss it shall be determined by appraisers and the loss shall not be payable until 60 days after the receipt by the company of the proofs of loss accompanied by the award of the appraisers, if appraisement has been required, a demand by the company for an appraisement, made more than 60 days after the loss, and after proofs of loss had been retained more than three weeks without objection, was too late.—Lion Fire Ins. Co. v. Heath, 68 S. W. 305.

772. Where a fire policy requires proofs of loss within 60 days, to be accompanied by an award when appraisal has been required, a demand for an appraisal made 6 months after loss and 5 months after proofs have been received and retained without objection, and not until suit is instituted, is too late; as, to be effectual, appraisal should be required within the 60 days.—American Cent. Ins. Co. v. Heath, 69 S. W. 235.

773. Where an insurer fails to demand an appraisal within the time prescribed by the policy, it waives its right thereto.—American Cent. Ins. Co. v. Heath, 69 S. W. 235.

of loss and that nothing shall be payable until such proofs are furnished, such appraisal, when demanded, is a condition precedent to right of action by the insured."⁷⁷⁴

Proceedings on Appraisal or Arbitration.—The failure of appraisers to give notice of their hearing and to take evidence does not invalidate their award where neither the policy nor the agreement appointing them prescribes the procedure before them."⁷⁷⁵ The insurer cannot complain where it made no request to present evidence."⁷⁷⁶ Where both appraisers agree to it an umpire selected by them is authorized under the policy to fix an award exceeding that of either appraiser."⁷⁷⁷ An award was held void where the arbitrators gave no notice of the time and place of their meeting and refused permission to a party to appear before them."⁷⁷⁸ The failure of arbitrators to value personal property in a one story part of a two story building rendered the whole award invalid where it was held that the whole house was insured together with the personal property specified therein."⁷⁷⁹

Validity and Effect of Appraisal or Award.—Under an agreement to arbitrate a loss, the award binds the insurer, especially where the policy provides for arbitration on disagreement,"⁷⁸⁰ and it will not be disturbed except where fraud, partiality, misconduct or

⁷⁷⁴ Where a policy provides that the extent of any loss shall, on demand of either party, be appraised by arbitrators, that the report of such appraisal shall be made part of the proofs of loss, and that nothing shall be payable until such proofs are furnished, such appraisal, when demanded, is a condition precedent to right of action by the assured.—*Scottish Union & Nat. Ins. Co. v. Clancy*, (Tex.) 8 S. W. 630.

572—Proceedings on Appraisal or Arbitration. (See 28 Cent. Dig. Insurance, §§ 1422, 1423, 1427, 1429.)

⁷⁷⁵ Where neither the provisions of a fire insurance policy, nor the agreement of appointing appraisers, prescribed the procedure before them, their failure to give notice of the hearing, and to take evidence, does not invalidate their award.—*Orient Ins. Co. of Hartford, Conn., v. Harmon*, 177 S. W. 192.

⁷⁷⁶ An award of insurance appraisers, subject to the common-law rules of arbitration, is not void for failure to give notice and hear evidence where the insurer made no request to present evidence.—Id.

⁷⁷⁷ An umpire selected by fire insurance appraisers held authorized, under the policy, to fix an award exceeding that of either appraiser, where both appraisers agreed thereto.—Id.

⁷⁷⁸ Arbitrators under an insurance policy gave no notice of the time and place of their meeting, and refused permission to a party to appear before them. Held, the award was void.—*Phoenix Ins. Co. v. Moore*, 46 S. W. 1131.

⁷⁷⁹ A policy of insurance was "on the two-story . . . building occupied by assured or tenant as an hotel, . . . known as the 'Central Hotel,' and on furniture and other personal property while contained in the above-described building" Held, that the whole house was insured, together with the specified personal property therein, and the failure of arbitrators to value personal property in a one-story part thereof rendered the award invalid.—Id.

574—Validity and Effect of Appraisal or Award. (See 28 Cent. Dig. Insurance, §§ 1430-1432, 1434.)

⁷⁸⁰ In an action on an award by appraisers appointed under a fire insurance policy, proof that the award was void for a reason not pleaded does not defeat recovery.—*Orient Ins. Co. of Hartford, Conn., v. Harmon*, 177 S. W. 192.

⁷⁸¹ Where the award of fire insurance appraisers does not show that they allowed for depreciation, but does not conclusively show that they failed to make such allowance, the award will be sustained.—Id.

gross mistake is shown.⁷⁸² An arbitration clause in a policy to be used in the event of disagreement is valid but does not bar a suit where no disagreement has arisen on account of the loss.^{789 788} An insurer cannot, by declining or neglecting to take any action, after proof of loss, urge, as a bar to an action, that the amount of loss has not been agreed upon or fixed by appraisers.⁷⁸⁸ Where the policy provided for an appraisal showing separately the sound value and loss, an award showing one lump sum as sound value and another as loss is admissible in a suit on the policies where the insurers though represented before the appraisers did not suggest noncompliance with the policy and where they appeared to have fully understood the award.⁷⁸⁴ In a case where part of the property was damaged and part totally destroyed it was held that since the arbitration clause had no reference to property totally destroyed, the award of the arbitrators did not preclude an additional recovery for the total loss.^{787 786} An appraisement must include all the items claimed by the insured to have been lost; otherwise it will be void.⁷⁸³ Where the award does not show that the appraisers allowed for depreciation, but does not conclusively show that they failed to make such allowance, the award will be sus-

782. An award by fire insurance appraisers will be disturbed only where fraud, partiality, misconduct, or gross mistake is shown.—*Id.*

783. Under a fire policy providing that, in case of disagreement as to the amount of loss, the same shall be ascertained by appraisers, etc., the appraisers have no authority to refuse to appraise property claimed by the insured to have been destroyed, and an appraisement omitting such items is void.—*American Fire Ins. Co. v. Bell*, 75 S. W. 319.

784. Under fire policies, and an agreement thereunder, provided for disinterested appraisal of loss, showing separately the sound value and loss an award showing one lump sum as sound value, and another as loss, was not inadmissible in a suit on policies as not complying with such provisions, where insurers, though represented before the appraisers, did not suggest such noncompliance, and where they appeared to have fully understood the award.—*Milwaukee Mechanics' Ins. Co. v. Frosch*, 130 S. W. 600.

785. Under an agreement to arbitrate a fire loss, the award binds insurer, especially where the policy provides for arbitration on disagreement.—*Id.*

786. Where it was not contemplated, in the policy or agreement to arbitrate, that any question should be submitted to appraisers, except what arose from damage to goods, it will not be presumed that damages for total loss of goods were included in the award, in

the absence of allegations and proof of fraud or mistake.—*Fire Ass'n of Philadelphia v. Colgin*, 33 S. W. 1004.

787. Part of the insured property having been totally destroyed, and part damaged, the amount of the loss was submitted to arbitration. Held, that, since the arbitration clause in a policy has no reference to property totally destroyed, the award of the arbitrators did not preclude an additional recovery for the loss sustained by total destruction of the property.—*Liverpool, London & Globe Ins. Co. v. Colgin* (Tex. Civ. App.) 34 S. W. 291.

788. Where a policy of insurance provided that the estimate of the loss incurred by the insured should be made by the insured and the company, or, if they disagreed, by appraisers, the ascertainment of the amount of loss by the recovery on the policy, except in case of actual disagreement; and the company cannot, by declining or neglecting to take any action after proof of loss, urge, as a bar to an action for recovery under the policy, that the amount of loss has not been agreed upon or fixed by appraisers.—*Manchester Fire Ins. Co. v. Simmons*, 35 S. W. 722. 12 Tex. Civ. App. 607.

789. A condition in a fire policy that, in the event of disagreement between the insured and the company as to the loss, it shall be ascertained by appraisers before suit can be maintained, though valid, does not bar a suit on the policy where no disagreement has arisen as to the amount of the loss.—*American Fire Ins. Co. v. Stuart* (Tex. Civ. App.) 38 S. W. 395.

tained.⁷⁸¹ In an action on an award, proof that such award was void for a reason not pleaded does not defeat recovery.⁷⁸⁰

Estoppel or Waiver as to Adjustment or Arbitration.—An insurer which accepts proofs of loss made by the insured waives the right to have the question of loss determined by arbitrators, as reserved to it by the policy.^{790 791 794 795} An insurer denying liability in toto waives a provision requiring adjustment.⁷⁹⁶ It is held though that a denial of liability after appraisalment of loss, on the ground of breach of condition does not waive the insurer's right to insist on the appraisalment as conclusive of the amount of loss.⁷⁹⁸ A failure of the insurer to appear, after demanding an appraisalment, is a waiver of its right of appraisalment.⁷⁹⁹ An inspection and partial adjustment, with an offer to settle and the acceptance of certain papers without objection will not waive a stipulation requiring proof of loss and an appraisalment where the insured is notified that such proof and appraisalment would be required.⁸⁰¹ An insurer waives its right to another appraisalment by insisting that a void appraisalment is valid.⁷⁹⁷ A provision that the insured shall give

576—**Estoppel or Waiver as to Adjustment or Arbitration.** (See 28 Cent. Dig. Insurance, §§ 1436-1438.)

790. A fire policy provided that the insured and the company should adjust the loss, or, in the event of disagreement, that the loss should be ascertained by appraisers, before proofs of loss were required. The insured furnished proofs of loss within the required time, and the company retained them without objection until after the time for furnishing them had expired, when it objected for specified reasons, not including want of appraisalment. Held, that the condition requiring appraisalment was waived.—*American Fire Ins. Co. v. Stuart* (Tex. Civ. App.) 38 S. W. 395.

791. An insurance company which accepts proofs of loss made by the insured waives the right to have the question of loss determined by arbitrators, as reserved to it by the policy.—*Virginia Fire & Marine Ins. Co. v. Cannon*, 45 S. W. 945, 18 Tex. Civ. App. 588.

792. A fire insurance policy provided that, in the event of fire, the insured should separate the undamaged property from that damaged, and the parties should estimate the value of that not damaged, and that the insurer might, at its option, take such goods at their appraised value. Held, that three days after loss, in the absence of unusual conditions, was ample time for the insurer to avail itself of such provisions, and failure to do so was a waiver, so that the insured did not break the contract by disposing of the goods at the end of that time.—*Phoenix Assur. Co. v. Stenson*, 79 S. W. 866,

34 Tex. Civ. App. 471. See Cent. Dig. vol. 28, cols. 2323, 2324, § 1421.

793. A provision that the insured shall give opportunity to adjusters to examine the property is waived, where they made no examination for 10 days after request by the insured and disclaimed all liability under the policy.—*Fidelity Phoenix Fire Ins. Co. of New York v. Abilene Dry Goods Co.*, 159 S. W. 172. 28 Cent. Dig. Insurance, §§ 1436-1438.

794. The provision in an insurance policy which requires the submission of the amount of loss to appraisers in the event of a disagreement between the company and the insured as to the amount is waived by the acceptance of the proofs of loss.—*Springfield Fire & Marine Ins. Co. v. Cannon*, 46 S. W. 375.

795. Where a tacit agreement is reached between the agent of an insurance company and the insured upon all points touching the loss except the amount, and the company retains the proofs of loss sent it without objection, the circumstances establish a waiver of appraisalment and every other point except as to the manner of determining the amount of loss.—*Hartford Fire Ins. Co. v. Cannon*, 46 S. W. 851, 19 Tex. Civ. App. 305.

796. Where prior to the bringing of an action on a policy, defendant denied its liability in toto, it thereby waived a provision requiring adjustment.—*Connecticut Fire Ins. Co. v. Hilbrant*, 73 S. W. 558.

797. Where appraisers made a void appraisalment, the company, by insisting that it was valid, waived its right to another appraisalment.—*American Fire Ins. Co. v. Bell*, 75 S. W. 319.

adjusters an opportunity to examine the property is waived where they made no examination for ten days after request by insured and disclaimed all liability.⁷⁹³ Further, a provision that the insurer might, after separation of the damaged from the undamaged goods, take the latter goods at their appraised value, is waived after three days in the absence of unusual conditions, that being ample time.⁷⁹³ The limitation of an agent's power in a policy to waive certain condition does not apply to an adjuster after the policy has become a demand against the insurer.⁸⁰⁰

Rights of Parties After Adjustment.—The general rule is that action on the original claim may be maintained where it appears there was an accord, but no satisfaction, unless the agreement to execute the accord was accepted in lieu of performance.⁸⁰⁵ The fact that a sum in settlement had been agreed upon but on tender the insured had refused it, constituted no defense to a suit on the policy.⁸⁰⁴ Either the insured or the insurer may, after adjustment and before payment, upon clear proof avail themselves of any defense which may exist under the policy arising from facts not considered in such adjustment.⁸⁰³ An adjustment made by the insurer's adjuster is not binding upon an assignee, under permission in the policy, and who, after expressing a desire to participate in the adjustment, was not permitted to do so.⁸⁰²

793. Under a policy providing for ascertaining loss by appraisal, and that any proceeding relative to appraisal shall not waive any condition of the policy, denial of liability by the insurer, after appraisal of loss, on the ground of breach of condition of the policy, does not waive its right to insist on the appraisal as conclusive of the amount of loss.—*American Cent. Ins. Co. v. Bass* (Tex. Sup.) 38 S. W. 1119.

799. Failure of an insurer, after demanding an appraisal of a fire loss at a given time and place, to appear at the time and place designated by agent or otherwise, without the intervention of any act of the insured, is a waiver of his right of appraisal.—*Northern Assur. Co. v. Samuels* (Tex. Civ. App.) 33 S. W. 239. 11 Tex. Civ. App. 417.

800. The limitation in a policy of the power of an agent to waive certain conditions in the policy does not apply to the adjuster after the policy has become a demand against the insurer.—*Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, (Tex. Civ. App.) 35 S. W. 995; same *v. Lancashire Ins. Co. Ltd.*

801. An inspection and partial adjustment of loss, with an offer to pay a certain sum in satisfaction, and the acceptance of an inventory of lost and damaged goods without objection, will not waive a stipulation requiring

proof of loss to be produced, and appraisal of damage to be made, the assured being notified that such proof and appraisal would be required according to the policy.—*Scottish Union & Nat. Ins. Co. v. Clancy*, (Tex.) 8 S. W. 630.

Rights of Parties After Adjustment.

802. An adjustment of loss made by the company's representative is not binding upon one to whom the policy has been assigned, under permission in the policy, and who after expressing a desire to participate in the adjustment, was not permitted to do so.—*Fire Ass'n v. Blum*, 63 Tex. 282.

803. Either insured or company may, after adjustment and before payment upon clear proof avail himself of any defense which may exist under policy arising from facts not considered in such adjustment.—*Fire Ass'n v. Blum*, 63 Tex. 282.

804. Where the insurer offered to pay \$385 on a policy loss of \$500, and the insured agreed to accept it, but on tender of such sum refused it, there was at most an accord without satisfaction, and such facts were not a defense to the suit on the policy.—*Camden Fire Ins. Ass'n v. Baird*, 187 S. W. 699.

805. The general rule is that action on the original claim may be maintained where it appears there was an

RIGHT TO PROCEEDS

Policy Payable to Owner of Property or Interest Insured.—It is held that a purchaser of land subject to a vendor's lien, but who assumed no personal liability on the purchase money notes and who insured premises for his own benefit is entitled to the proceeds as against the owner of the lien.⁸⁰⁸ Where a policy is payable to one having merely a life estate the remaindermen in case of loss are entitled only to the excess over the value of the life estate.⁸⁰⁷

Proceeds of Insurance on a Homestead.—The Supreme Court has held that the right of exemption which attaches to a homestead under the Constitution, attaches also to money due for insurance on the homestead to any amount whatever.⁸⁰⁹ Insurance on homestead property is exempt from the claims of general creditors,^{810 818} from garnishment^{815 818} and from the payment of a husband's debts other than such debts as are owing for purchase money or for taxes.⁸¹⁴ However, a husband, without the consent of the wife, may waive the exemption from garnishment.⁸¹⁹ The proceeds of a pol-

accord, but no satisfaction, unless the agreement to execute the accord was accepted in lieu of performance.—Id.

Adjusters not Entitled to Extra Compensation.

806. In action on policy, agents of the insurer, who attempted to make an adjustment and who were being paid a salary by the insurer without reference to such adjustment, were properly disallowed their claim of \$10 per day as expenses of adjustment.—*Merchants' & Bankers' Fire Underwriters v. Brooks*, 188 S. W. 243.

RIGHT TO PROCEEDS. (SEE 19 CYC. 883.)

580—Policy Payable to Owner of Property or Interest Insured. (See 38 Cent. Dig. Insurance, §§ 1439-1443.)

807. Where a fire policy is payable to one having merely a life estate in the insured property, in case of a loss the remaindermen are entitled only to the excess over the value of the life estate.—*Grant v. Buchanan*, 81 S. W. 820, 36 Tex. Civ. App. 334.

808. Purchaser of land subject to a vendor's lien, but who assumed no personal liability on the purchase-money notes, and who insured premises for his own behalf, held entitled to proceeds as against owner of the lien.—*Gassaway v. Browning*, 175 S. W. 481.

Proceeds of Insurance on Homestead.

809. The right of exemption which attaches to a homestead under Const.

Art 16, Art. 50, attaches also to money due for insurance on the homestead to any amount whatever.—29 S. W. 418 reversed; *Swayne v. Chase*, 29 S. W. 418, Id., 30 S. W. 1049.

810. Insurance on homestead property is exempt from the claims of general creditors.—*Jones v. Whiteselle*, 29 S. W. 177.

811. Under the constitutional exemption of the homestead from forced sale, money, to a reasonable amount, arising from a fire insurance policy thereon, is exempt also.—*Swayne v. Chase* (Tex. Civ. App.) 29 S. W. 418 reversed; 30 S. W. 1049.

812. An assignment of an insurance policy on homestead property for the purpose of collection, and under agreement that the assignee should apply part of the sum collected on a debt due from the insured, does not destroy the exempt character of the balance.—*Jones v. Whiteselle*, 29 S. W. 177.

813. The proceeds of an insurance policy on permanent fixtures in a building on the homestead of insured are proceeds of the homestead, and as such are exempt from garnishment.—*Cullers v. James*, 1 S. W. 314, 66 Tex. 493, distinguished; *New Orleans Ins. Ass'n v. Jameson*, 25 S. W. 307, 6 Tex. Civ. App. 282.

814. The proceeds of a fire insurance policy issued on a building which is part of a homestead are exempt from the payment of a husband's debt other than for such debts as are owing for purchase money of the homestead or for taxes thereon.—*Alvord Nat'l Bank v. Ferguson*, 126 S. W. 622.

icy on permanent fixtures in a homestead are proceeds of the homestead and as such are exempt from garnishment.⁸¹³ An assignment of a policy on the homestead for the purpose of collection, under an agreement that the assignee should apply part of the sum collected on a debt, does not destroy the exempt character of the balance.⁸¹² A provision in a policy taken out by a husband on a homestead, that in case of garnishment, any suit on the policy by him or his representatives, shall, on application of the insurer, be stayed until such garnishment is disposed of, is void.⁸¹⁷ Insurance money on a homestead, when insured by the purchaser under express reservation of the vendor's lien, without agreement to insure for the benefit of the vendor, is not subject to payment of the vendor's foreclosure judgment.^{822 821 823} (For facts not showing an estoppel to claim insurance money which had been garnisheed by showing that the plaintiff knew of the garnishment proceedings in time to have objected on the ground that it was a homestead insurance, see Ann. 820.) (For facts showing garnishee entitled to recover of vendor its costs and attorney's fees, see Ann. 825.)

Proceeds of Insurance on a House Not a Homestead.—The proceeds of a policy on a house not the insured's homestead is subject to garnishment and the payment of his debts.⁸²⁴ (For facts

Homestead, Garnishment, Mechanic's Lien.

815. Insurance due to owners of homestead for loss of home building by fire is not subject to garnishment by the holder of a mechanic's lien on the building before the fire.—Camden et al. v. Fay et al., 55 Tex. 58.

816. The insurance money on the homestead is not subject to the payment of debts of a general character.—Cameron et al. v. Fay et al., 55 Tex. 59.

817. A provision in a policy of insurance, taken out by the husband on a homestead, that, in case of garnishment in consequence of any debt of the insured, any suit on the policy by him, his representatives or assigns, shall, on application of the company, be stayed until said garnishment suit shall be disposed of, is void.—Traders' Insurance Co. v. Chase (Tex. Civ. App.) 81 S. W. 1103, 11 Tex. Civ. App. 13.

818. Money due on an insurance policy on a homestead is not subject to garnishment.—Whiteselle v. Jones (Tex. Civ. App.) 39 S. W. 405.

819. A husband, without the knowledge or consent of his wife, may waive the exemptions from garnishment of money derived from a policy on a homestead.—Whiteselle v. Jones, 39 S. W. 405.

820. In an action to recover the amount of a policy on plaintiff's homestead, in which the insurance company alleged that such amount had been garnished, evidence held not to

show an estoppel to claim the money by showing that plaintiff knew of the garnishment proceedings in time to have objected to the garnishment of the fund on the ground that it was the proceeds of his homestead.—Johnson v. Hall, 168 S. W. 399.

821. An equitable title founded upon a conveyance in which an express lien is retained to secure unpaid purchase money may be the subject of a homestead, and exempt from the payment of ordinary debts.—Stratton v. Westchester Fire Ins. Co. v. New York, 182 S. W. 4.

822. Insurance money on a homestead, occupied as such, when insured by the purchaser, under express reservation of a vendor's lien, without agreement to insure for the benefit of the vendor, was not subject to payment of the vendor's foreclosure judgment against the purchaser.—Stratton v. Westchester Fire Ins. Co. of New York, 182 S. W. 4.

823. A purchaser of land holding under a deed expressly retaining a lien for part of the purchase money cannot hold the land as a homestead against the vendor holding vendor's lien purchase-money notes.—Stratton v. Westchester Fire Ins. Co. of New York, 182 S. W. 4.

Proceeds of Insurance on a House Not a Homestead.

824. Money paid upon an insurance policy upon a house not the insured's homestead is not exempt from garnishment for payment of his debts.—

showing garnishee entitled to recover of vendor its costs and attorney's fees, see Ann. 825.)

Proceeds of Warehouse Insurance.—Where a warehouseman, in accordance with custom, takes out in his name insurance on his property and that of one whose goods are stored with him, sufficient to cover the goods destroyed, but without cause settles for less, such warehouseman is liable for the loss to his customer.⁸²⁶ Adoption of the insurance is not necessary where the insurance was taken out pursuant to a custom of the trade.⁸²⁷ The customer may adopt the insurance, where it was taken out without his knowledge by the warehouseman, even after loss and is entitled to the benefit.⁸²⁷

Proceeds of Insurance on Tools of a Trade.—The proceeds of insurance on pool tables used in running a pool hall are exempt.⁸²⁸

Policy Payable to or for Benefit of Mortgagee.—A petition by a mortgagee to whom policies are made payable as its interest may appear, showing that the mortgage is in excess of the amount of the policies and does not show that the debt has been paid, shows such an interest in the property as will entitle the mortgagee to collect the entire insurance.^{831 830} A mortgagee who is the beneficiary of a policy procured by the mortgagor at the latter's expense cannot recover on the policy when the mortgage debt has been paid,

Stratton v. Westchester Fire Ins. Co. of New York, 182 S. W. 4.

825. In a vendor's garnishment proceeding against the insurer of realty, where the answer of the garnishee was not denied, and it was discharged from garnishment upon its answer, although judgment went against it for the purchaser, such garnishee was entitled to recover of the vendor its costs, including a reasonable attorney's fee, under Rev. St. 1911, Art. 307.—*Stratton v. Westchester Fire Ins. Co. of New York*, 182 S. W. 4.

Proceeds of Warehouse Insurance.

826. Where a storage company, in accordance with custom, takes out in its name insurance on its property and that of one whose goods were stored with it, sufficient to cover goods destroyed, but, without cause, settles for less, it is liable for the loss to its customer.—*Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.*, 73 S. W. 545.

827. Where a storage company insures in its name property stored with it, without the owner's knowledge, he, by adopting it, even after the loss; is entitled to the benefit; and adoption is not necessary where the insurance is taken out pursuant to a custom of the trade.—*Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.*, 73 S. W. 545.

Proceeds of Insurance on Pool Tables.

828. The proceeds of insurance on pool tables used in running a pool hall, are exempt.—*Harris v. Todd*, 158 S. W. 1189.

581—Policy Payable to or for Benefit of Mortgagee of Property Insured. (See 28 Cent. Dig. Insurance, §§ 1444, 1447.)

829. Certain insurance policies on an intestate's mortgaged property, obtained by his administrator were made payable to the mortgagees in conformity with the mortgage provisions. The property was injured by fire, but was repaired by the administrator, with money on which the mortgagees had no lien, before the insurance money was paid. Held, that the mortgagees were not entitled to the insurance money, but it should be paid to the administrator, since he had restored the property to the condition it was in before the fire.—*Huey v. Ewell*, 55 S. W. 606, 22 Tex. Civ. App. 638.

830. In an action by the mortgagee against the mortgagor for insurance money collected by the latter an answer stating that plaintiff having a mortgage on the property, and defendant being the owner, and the policies being issued in its name, defendant had no objection to having them made payable to plaintiff, as its in-

even though it was not paid until after loss.⁸³³ In the same way, a debtor, who takes out a policy for the benefit of his sureties on property he has given them a lien on for their protection, is, on payment of the debt, subrogated to the rights of the sureties in the policy.⁸³⁴ Where an administrator repairs property injured by fire with money on which the mortgagees of the property had no lien, before the insurance money was paid, the mortgagees were not entitled to the insurance money, although it was payable to them, but it should be paid to the administrator.⁸³⁵ In a case where a real estate association contracted to convey land to a purchaser to be paid for in certain installments, the purchaser to keep the improvements insured for the benefit of the association, the purchaser could not, after loss, require the insurance money to be applied on the unmatured installments without the consent of the association, which could apply the fund to rebuilding the improvements.⁸³⁶ (For facts showing right of mortgagees to a pro rata share of the insurance money, see Ann. 832.) After foreclosure of a vendor's lien the vendor cannot thereafter claim that he continued to hold the superior title to make out his right to the insurance money payable after loss.⁸³⁷ Where the insurance exceeds

terest might appear, and admitting an implied agreement that insurance should be carried for plaintiff's indemnity against loss, did not admit that the policies were made payable to plaintiff, as its interest might appear, as alleged in the petition.—*Panhandle Nat. Bank v. Security Co.*, 44 S. W. 15, 18 Tex. Civ. App. 96.

831. Where insurance policies are made payable to a mortgagee as its interest may appear, a petition by it, in an action on the policies, which shows that it holds a mortgage on the property for an amount in excess of the policies, and does not show that the debt has been paid or the property released, shows such an interest in the property as will entitle plaintiff to sue for and collect the entire amount due on the policies.—*Panhandle Nat. Bank v. Security Co.*, 44 S. W. 15, 18 Tex. Civ. App. 96.

832. The owner of land executed a trust-deed to defendant to secure two notes payable to him, one of which was to be transferred to plaintiff, but defendant's note was made the prior lien on the land, and the land-owner, for further security of plaintiff's note, agreed to keep insurance on the property to an amount sufficient to cover both notes, and recited in the trust-deed that such insurance should be for the benefit of defendant "or the owner of said notes." Insurance policies were taken out, payable to defendant "as his interest may appear," and he had possession of them. Held that, on collecting for a loss under the policies, defendant was liable to plaintiff

for a pro rata share of the amount collected.—*Parker v. Ross*, (Tex.) 11 S. W. 865.

833. A mortgagee, the beneficiary of a fire insurance policy, procured by the mortgagor at the latter's expense, cannot recover on the policy if the mortgage debt has been paid, though it was not paid until after the loss.—*Phoenix Assur. Co. v. Allison* (Tex. Civ. App.) 27 S. W. 894.

834. A debtor who takes out a policy of insurance, payable to persons liable as his sureties, upon property on which he has given them a lien for their protection, is, upon payment of the debt subrogated to the rights of the sureties in the policy. 27 S. W. 894, affirmed.—*Phoenix Assur. Co. v. Allison* (Tex. Sup.) 30 S. W. 547.

835. A real estate association contracted to convey land to defendant to be paid for in certain prescribed installments, he "to keep the improvements insured for the benefit of said association" in a certain amount. Insurance was accordingly affected and after payment of part of the installments, but before maturity of the balance, the improvements were destroyed by fire. Held, that defendant could not require the application of the insurance money to the satisfaction of the unmatured installments without the consent of the association, which could apply the fund to the rebuilding of the improvements and the placing of the parties in statu quo.—*Naquin v. Texas Savings & Real Estate Inv. Ass'n*, 67 S. W. 85, 95 Tex. 313.

the amount of the mortgage, the mortgagee, to whom the policy is made payable, may, to the extent of its debt, recover thereon in its own name, and is properly made a plaintiff with the owner in an action on the policy.⁸³⁶

Policy for Benefit of Person's Interest in Property Insured.—An owner's right to recover the full amount due under a policy is established where the trustee, to whom it was payable as his interest might appear, disclaimed interest.⁸³⁸

Assignment of Claim for Loss.—A fire policy may be assigned orally after a loss.⁸⁴⁰ Where it is payable to a third person, the insured cannot assign his claim without the payee's consent, so as to defeat the latter's rights under the policy.⁸³⁹ If an insurer has notice of an assignment of the proceeds of a policy the assignment need not be accepted by the insurer's agent in order to be effective.⁸⁴¹ Since a policy, the proceeds of which were assigned by a written order, is non-negotiable, no question of bona fide purchaser without notice could arise with respect to conflicting claimants; the rule that the first in time is the first in right obtaining.^{845 846} If the assignee has no knowledge of fraud by the in-

836. Where an owner of property has it insured for more than the amount of a mortgage thereon, the mortgagee, to whom the policy is made payable, may, to the extent of its debt, recover thereon in its own name and is properly made a plaintiff with the owner in an action on the policy.—*Georgia Home Ins. Co. v. Leaverton* (Tex. Civ. App.) 33 S. W. 579.

837. Where the vendor of realty by deed reserving a vendor's lien foreclosed, he could not thereafter claim that he continued to hold the superior title to make out his right to the insurance money payable on the burning of the house.—*Stratton v. Westchester Fire Ins. Co. of New York*, 182 S. W. 4.

838—Policy for Benefit of Persons Interested in Property Insured.

838. Where the trustee, to whom insurance was payable as his interest might appear in action on the policy by the owner, answered, disclaiming interest, the owner's right to recover the full amount due under the policy was established.—*Camden Fire Ins. Ass'n v. Baird*, 187 S. W. 699.

839—Assignment of Claim for Loss. (See 28 Cent. Dig. Insurance, §§ 1455-1458, 1483, 1485.)

839. Where a fire policy by its terms was payable to a third person, insured, could not after the loss assign his claim, without the payee's consent, so as to defeat the rights of the payee under the terms of the policy.—*German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 11—Ins.

W. 760. See 28 Cent. Dig. Insurance, §§ 1455-1458, 1483.

840. A fire policy may be assigned orally after the loss.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 760.

841. An assignment of the proceeds of a fire insurance policy need not be accepted by the company's agent in order to become effective, if the company had notice of the assignment.—*Prentice v. Security Co.*, 153 S. W. 925. 28 Cent. Dig. Insurance, §§ 1455-1485.

842. An instruction which required a finding that all parties to a contract assigning an interest in an insurance policy must have agreed to its terms at the same time to make it effective was properly refused.—Id.

843. If the assignee of the proceeds of a fire policy had no knowledge of fraud by the insurance company in adjusting the loss with insured, another claimant to the proceeds could not rely upon fraud as against such assignee.—Id.

844. An order by an insured requesting the local agents of a fire company to pay to defendant out of insured's policy the amount of a specified note for the sum named therein was drawn upon a specific fund so as to operate as an assignment thereof within the rule that an interest in a chose in action can only be assigned by an order drawn upon a specific fund.—Id.

845. Since a fire policy, the proceeds of which were assigned by a written order, was nonnegotiable, no question of bona fide purchaser with-

surer in adjusting the loss with insured, another claimant to the proceeds could not rely upon fraud as against such assignee.⁸⁴³ An order by an insured requesting the local agents of the insurer to pay the defendant out of the insured's policy a certain amount operated as an assignment thereof.⁸⁴⁴ All the parties to a contract assigning an interest in a policy do not have to agree to its terms at the same time to make it effective and an instruction to this effect is erroneous.⁸⁴²

PAYMENT OR DISCHARGE, CONTRIBUTION AND SUBROGATION

Election to Rebuild or Replace Property.—Where, under a policy, the insurer may repair or rebuild in case of loss, an offer to repair will not relieve the insurer from liability when the building is incapable of being put in the same condition it was before the loss.⁸⁴⁵ And where the insurer was offered an opportunity to rebuild the house destroyed and failed to do so, a plea that it offered to repair and was refused permission to do so, will not avail it.⁸⁴⁷

Interest on Amount of Loss.—Interest on a policy is recoverable from the date of the loss.^{850 851} However, where the policy pro-

out notice could arise with respect to conflicting claimants; the rule that the first in time is the first in right obtaining.—*Id.*

846. Where it was agreed when plaintiff sold land in consideration of an assignment of an interest in a fire policy that the deed should not be delivered to insured until plaintiff received the proceeds of the policy, no question of innocent purchaser could arise as between plaintiff and another assignee of such proceeds.—*Id.*

PAYMENT OR DISCHARGE, CONTRI- BUTION, AND SUBROGATION. (SEE 19 CYC. 832.)

595—Election to Rebuild or Replace Property.

847. Where the insurer was offered an opportunity to rebuild the house destroyed, and failed to do so, a plea that it offered to rebuild, and was refused permission to do so, will not avail it.—*Northwestern Nat. Ins. Co. v. Woodward*, 45 S. W. 185, 18 Tex. Civ. App. 496.

848. Under a clause in an insurance policy reserving to the insurer the option to repair or rebuild the property in case of loss, an offer to repair, where the building is incapable of being put in the same condition it was in before the loss, will not relieve the insurer from liability under the policy.—*Northwestern Nat. Ins. Co. v. Woodward*, 45 S. W. 185, 18 Tex. Civ. App. 496.

849. Interest cannot run on a policy which provides for sixty days within which to pay the amount of the policy after proofs of loss have been furnished, until the sixty days are up. The contract of insurance is one from which indemnity against loss is intended to be secured; the parties fixed a time at which it should be paid and interest on the amount due, prior to this date is no part of the indemnity for which they contracted.—*Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578.

598—Interest on Amount of Loss. (See 28 Cent. Dig. Insurance, § 1494.)

850. Under Rev. St. 1911, Art. 4874, where insured building was totally destroyed, interest held recoverable from the date of the fire.—*Camden Fire Ass'n v. Bomar*, 176 S. W. 156.

851. Where an insured building is destroyed, the amount of the policy is due when the loss occurred, and it will bear interest from that date.—*Fire Ass'n of Philadelphia v. Strayhorn*, 165 S. W. 901. See 28 Cent. Dig. Insurance, § 1494.

852. Under a policy of insurance, giving the insurance company 90 days after proof of loss in which to pay the loss, interest on the amount due will not begin to run until the expiration of the 90 days.—*Mecca Fire Ins. Co. of Waco v. Wilderspin*, 118 S. W. 1131. See 28 Cent. Dig. Insurance, § 1494.

vides for a certain time within which to pay the amount of the policy, interest on such amount will not begin to run until the expiration of that time.^{849 852 853}

Recovery of Payment.—Where a marine insurer was found not to be liable under a policy it was entitled to recover back money it had expended in salving the sunken vessel.^{852a}

Subrogation of Insurer—(1) On Payment of Loss in General.—In general, the right of subrogation given to an insurer issuing a policy which stipulates that if it shall claim that a fire causing a loss was caused by the neglect of another person, it shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss, is a valuable right and material to the risk.⁸⁵⁶ However, where an owner of property may not recover for its destruction by fire negligently set by a railroad company, the insurer of the property may not recover from the company.⁸⁶⁰ An insurer which had issued a policy on property destroyed by fire from a railroad engine, being a party to an action against the railroad company by the owner, is concluded by a judgment as to any claim it might have against the company by reason of any agreement with the owner.⁸⁶⁴ There is no privity between a railroad company and an insurer and hence payment by an insurer for property negligently burned by such railroad company does not inure to the benefit of such railroad company.⁸⁶³ An insurer, on payment of insurance on property destroyed by fire

853. Where a fire policy stipulates that insurer will not be liable until 60 days after proof of loss, interest does not begin to run on the amount of a loss until the expiration of 60 days after receipt of proof of loss.—Hamburg-Bremen Fire Ins. Co. v. Swift, 130 S. W. 670. See 28 Cent. Dig. Insurance, § 1494.

601—**Recovery of Payment.** (See 28 Cent. Dig. Insurance, §§ 1500, 1501.)

853a. A marine insurer, which expended money in salving a sunken vessel, held entitled to recover back such expenditures it appearing that it was not liable under the policy.—Mannheim Ins. Co. v. Charles Clarke & Co., 157 S. W. 291. See 28 Cent. Dig. Insurance, §§ 1500, 1501.

606—**Subrogation of Insurer. (A) On Payment of Loss in General.** See 28 Cent. Dig. Insurance, §§ 1504-1511, 1514.)

854. The rights of a lien holder and of the insurance companies under a provision of a fire policy that whenever the company shall pay the mortgagee for any loss and claim that no liability existed toward insured, the company should be subrogated to the

rights of the party receiving payment were not affected by the payment of premiums by the owner.—Washington Fire Ins. Co. v. Cobb, 163 S. W. 608. See 28 Cent. Dig. Insurance, §§ 1504-1516.

855. Where the parties of a fire policy understood that a provision that whenever the company paid the "mortgagee" any sum for loss and claimed that as to the mortgagor or owner, no liability existed, the company should be subrogated to the rights of the party receiving payment as to all collateral securities was intended to cover a mechanic's lien on the premises, the insurance company, upon paying such lienor's claim, became subrogated to her rights as against the owner.—Id.

856. The right of subrogation given to an insurer issuing a fire policy which stipulates that if it shall claim that a fire causing a loss was caused by the neglect of another person, it shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss is a valuable right and material to the risk.—Fire Ass'n of Philadelphia v. LaGrange & Lockhart Compress Co., 109 S. W. 1134. See 28 Cent. Dig. Insurance, §§ 1504-1511, 1514-1516.

while in transit, is subrogated to the rights of the owner against the carrier for the loss.⁸⁵⁵ In such case, an insured is liable only for the surplus remaining after satisfying his loss and reasonable expense in prosecuting an action against the railroad.⁸⁵⁷ Where a policy contained a stipulation that when the insurer paid any sum as loss to the mortgagee, claiming that no liability existed as to the owner, the insurer should be subrogated to the mortgagee's rights and legally entitled to all securities held as collateral to the mortgage, it was held that in an action on a policy in which the insurer denied liability to either owner or mortgagee, a judgment in the latter's favor should subrogate the insurer to any rights under such securities.^{859 855} In such a case the rights of the mortgagee and of the insurer were not affected by the payments of premiums by the owner.⁸⁶⁴ (For petition by insurer against railroad company to recover fire loss held not subject to exception, see

857. In an action by an insurance company, held, that the insured was liable only for the surplus remaining in his hands after satisfying his loss and reasonable expenses in prosecuting an action against the railroad company whose negligence had caused the loss.—*Camden Fire Ins. Ass'n v. Missouri K. & T. Ry. Co. of Texas*, 175 S. W. 816.

858. An insurance company, on payment of insurance on property destroyed by fire while in transit, is subrogated to the rights of the owner of the property against the carrier for the loss.—*Houston Direct Nav. Co. v. Insurance Co. of North America* (Tex. Civ. App.) 31 S. W. 560, 685.

858a. Liability of Municipality on Contract to Reimburse Insurers for Amount Paid on Fire Losses Caused by Failure of Water Company to Furnish Sufficient Water Pressure to Extinguish Fires.—A water company having agreed to furnish a city with water to extinguish fires, which it failed to do, causing the destruction of the city's market house, the city brought suit therefor, which was settled by the city taking over the water company's plant and agreeing to reimburse the insurers to the amount of \$100,000. Held, that the insurers thereby acquired a right to sue the city for such indemnity, though the original contract between the city and the water company's assignor, giving it exclusive right to furnish water, was invalid as creating a monopoly. Judgment (Civ. App. 1908) 110 S. W. 973 reversed.—*Hartford Fire Ins. Co. v. City of Houston*, 116 S. W. 36, 102 Tex. 317.

867—(E) Under Assignment of Rights of Insured. (See 28 Cent. Dig. Insurance, §§ 1512, 1513.)

859. An insurance policy contained a stipulation that when the insurer paid any sum as loss to the mortgagee,

claiming that no liability existed as to the owner, the insurer should be subrogated to the mortgagee's rights, and legally entitled to all securities held as collateral to the mortgage. Held, that, in an action on a policy in which the insurer denied liability to either owner or mortgagee, a judgment in the mortgagee's favor should subrogate the insurer to any rights under any such securities.—*Alamo Fire Ins. Co. v. Davis*, 60 S. W. 802.

860. Where an owner of property may not recover for its destruction by fire, negligently set by a railroad company, the insurer of the property may not recover from the company.—*Spring Garden Ins. Co. v. International & G. N. Ry. Co.*, 131 S. W. 1147.

861. Petition by insurer against railroad company to recover fire loss paid held not subject to exception.—*Texas & N. O. R. Co. v. Commercial Union Assur. Co. of London, Eng.*, 137 S. W. 401. See 28 Cent. Dig. Insurance, §§ 1512, 1513.

862. In an action by insurer against railroad company to recover fire loss paid, defendant held entitled to instruction as to effect of explanation of settlement with insured.—*Id.*

863. Payment by an insurance company for cotton negligently burned by a railroad company does not inure to the benefit of the railway company; there being no privity between it and the insurer.—*Nussbaum & Scharff v. Trinity & Brazos Valley Ry. Co.*, 149 S. W. 1083.

864. An insurance company which had issued a policy on property destroyed by fire from a railroad engine, being a party to the action against the railroad company by the owner, was concluded by judgment as to any claim it might have against the company by reason of any agreement with the owner.—*Missouri, K. & T. Ry. Co. of Texas v. Murray*, 150 S. W. 217.

Ann. 861.) (And for facts showing railroad company entitled to instruction as to effect of explanation of settlement with insured, see Ann. 862.)

(2) **Under Assignment of Rights of Insured.**—Under a policy providing for subrogation of insurer to the rights of the insured after payment of a loss caused by the negligence of another, the insurer may cause the party whose negligence caused the fire to be impleaded and have the rights of all three parties determined, though it has not paid the loss to the insured.⁸⁶⁸ Where an insurer became subrogated to the rights of an insured against a railroad company, and the certificate describes the property as having already been shipped, the insurer is affected with notice of a reservation in the bill of lading that in case of loss the railroad should have the full benefit of any insurance.⁸⁶⁹ Under such circumstances where the insurer paid the insured for the loss and then sued the railroad the court held it could not recover and that if the carrier had desired it could have insured the goods for their full value.⁸⁷⁰ It was further held that as a result the carrier could stipulate for the insurance effected by the shipper.⁸⁷⁰ Though a car-

^{868.} Though a carrier may have the right to reimburse himself from a third party for losses under the bill of lading this will afford no defense to an action against him by the shipper. He must first pay and can then sue on the policy. The right of the insurance company to recover against the railroad, if it existed at all, was the result of an equitable subrogation to the remedy of the owner of the goods against the carrier, and of the assignment made subsequent to its loss. This right could not be enforced for both shipper and carrier had contracted in effect that it should not exist.—*British & Foreign Marine Ins. Co. v. G. C. & S. F. Ry. Co.*, 63 Tex. 475.

^{867.} The railroad company had the right to make the stipulation in the bill of lading that in case the goods were destroyed the carrier should have the full benefit of any insurance thereon and the insurance company could not recover from the railroad company the amount paid on the policy to the owner.—*British & Foreign Marine Ins. Co. v. G. C. & S. F. Ry. Co.*, 63 Tex. 475.

^{868.} Where an insurance policy provided that, in the event of fire caused by the act or negligence of another, the insurer, on payment of the loss, should be subrogated, to the extent of such payment, to all right of recovery of the insured, in an action on the policy by the insured to recover for such loss the insurer may cause the party whose negligence caused the fire to be impleaded, and have the rights of all three parties determined, though the insurer has not paid the loss to the insured.—*Philadelphia*

Underwriters v. Ft. Worth & D. C. Ry. Co., 71 S. W. 419.

^{869.} The statute says that a railroad shall not limit its common law liability. An owner shipped goods by rail and stipulated in the bill of lading that in case the goods were destroyed the carrier should have the full benefit of any insurance thereon. When the goods were burned the insurance company paid the owner, the latter transferring his claim to the insurance company. Since the certificate of insurance describes the cotton as having been already shipped by the railroad company the insurance company was affected with notice of the reservation contained in the bill of lading. The insurance company had no rights against the railroad company when the bill of lading was signed and the reservation made; the railroad had all the right which the reservation could give it as against the insurance company at the time the insurance was effected.—*British & Foreign Marine Ins. Co. v. G. C. & S. F. Ry. Co.*, 63 Tex. 475.

^{870.} A bill of lading stipulated that in case the goods were destroyed the carrier should have the full benefit of any insurance thereon and after having paid an owner for loss of goods the insurance company sued the railroad. The court held it could not recover and that if the carrier had desired it could have insured the goods for their full value. The right would follow that the carrier could stipulate for the insurance effected by the shipper.—*British & Foreign Marine Ins. Co. v. G. C. & S. F. Ry. Co.*, 63 Tex. 475.

rier may have the right to reimburse himself from a third party for losses under the bill of lading this will afford no defense to an action against him by the shipper—he must first pay and then sue on the policy.⁸⁶⁶

Insurance on Goods During Transportation.—A stipulation that a carrier shall have the benefit of insurance on goods to be transported is valid, without any special consideration therefor to the shipper.⁸⁷¹ A policy obtained by a shipper reciting the release by him of the carrier from liability and a waiver by the insurer of any right of subrogation against the carrier constitutes no defense to a claim by the shipper against the carrier for loss.^{875 872} In a case where a policy on a shipment of goods termed the payment of its policy an “advance” and provided that if a carrier proved liable the insured should return to the insurer the amount received from the carrier, it was held that the railroad was liable for loss resulting from its negligence though the bill of lading stipulated that the company should have full benefit of all insurance on the goods shipped,⁸⁷³ and the advancement by the insurer did not constitute such a payment as to preclude the insured from recovering from the railroad the amount of its common-law liability.⁸⁷⁴

Insurance on Goods in Possession of Warehouseman.—In general, one under a duty to insure the property of another is presumptively required to insure it for its full value.⁸⁷⁶ A contract to procure in-

871. Insurance of Goods During Transportation.—A stipulation that the carrier should have the benefit of any insurance on the goods to be carried, is valid without a special consideration therefor to the shipper.—*Missouri Pac. Ry. Co. v. International Marine Ins. Co.*, 19 S. W. 459.

872. Even if the carrier could be considered a party to the contract of insurance, consisting of a fire policy taken out by a shipper on goods shipped, reciting the release by insured of the carrier from liability under its bill of lading, and the waiver by the insurer of any right of subrogation against the carrier, it would be an indirect way of limiting its liability as a common carrier as existing at common law, and so would be ineffective as against the shipper's claim against it for the burning of the goods through its negligence.—*St. Louis & S. W. Ry. Co. of Texas v. Brass*, 133 S. W. 1075.

873. An insurance policy on cotton consigned from Texas to Liverpool stipulated that it was not to cover the common law liability of the common carrier, but that, if the cotton were lost, while in the care of any common carrier, the underwriter should “advance” to the assured an amount equivalent to the insured value of the cotton so lost; and, if the carrier proved liable, the assured should return to the underwriter the amount received

from the carrier. Held, that a railroad company to whom the cotton was consigned was liable for loss resulting from its negligence, though the bill of lading stipulated that the company should have full benefit of any insurance that had been effected on the cotton.—*Gulf C. & S. F. Ry. Co. v. Zimmermann* (Tex. Sup.) 17 S. W. 239.

874. The “advancement” by the underwriter to the assured of the insured value of the cotton does not constitute a “payment” in such sense as to preclude the assured from recovering from the railroad company, the amount of its common-law liability.—*Gulf C. & S. F. Ry. Co. v. Zimmerman*, (Tex. Sup.) 17 S. W. 239.

875. A fire policy obtained by a shipper on goods shipped, reciting the release by assured of the carrier from liability under its bill of lading, and the waiver by the insurer of any right of subrogation against the carrier, constitutes no defense to a claim of the shipper against the carrier for the burning of the goods, there being no such privity between it and the parties to the contract of insurance, with reference thereto, as to authorize it to receive any benefit from it as against insured.—*St. Louis & S. W. Ry. Co. of Texas v. Brass*, 133 S. W. 1075. See 9 Cent. Dig. Carr., §§ 552-556.

876. Insurance on Goods in Possession of Warehouseman.—One under a duty to insure the property of another

insurance on property left to be milled and sold may be implied by a charge for insurance and it would be further implied that insurance would be obtained for every dollar that the amount would procure.⁸⁷⁸ Where for years past a certain charge had been made for insurance, it was the duty of the warehouseman to insure such products for their full value, and where he did not do so, and a loss occurred, he was liable for the resulting damages, although he procured insurance to the amount which the charge made would purchase.⁸⁷⁷ Allegations in a petition that in previous dealings for a long time past the warehouseman had charged the owner and others with premiums sufficient to cover full insurance, are sufficient to admit proof of an implied contract to insure at full value.⁸⁷⁹ Proof of the meaning attached by other mills of a like character to insurance of the same kind is admissible to show the real intention of the parties.⁸⁸¹ (For facts showing that the warehouseman by his acts and dealings bound himself to fully insure the goods, see Ann. 880.)

ACTIONS

Jurisdiction as Affected by Net Amount in Controversy.—In an action on a policy for two hundred dollars before a county court, an arbitrary allegation of three hundred dollars without anything in the petition to support it, has no effect in determining the jurisdiction.⁸⁸² If the action is not on a valued policy and suit is brought

is presumptively required to insure it for its full value.—(Sup. 1910) *Broussard v. South Texas Rice Co.*, 131 S. W. 412, affirming judgment (Civ. App. 1909) 120 S. W. 587.

877. One engaged in the business of milling rice, who, during the several years a person took his rice to the mill to be milled, charged two cents per sack for insurance, and who rendered an account in which two cents was charged as paid for insurance, and who obtained a settlement of the accounts on that basis, was under the duty to insure the rice to its full value, and where he did not do so, and a loss occurred, he was liable for the resulting damages, although he procured insurance to the amount which the two cents would purchase.—*Id.*

878. A contract to procure insurance on rice left to be milled and sold may be implied by a charge for insurance; and, in absence of a contrary stipulation, it would be implied that insurance would be obtained for every dollar that the amount would procure.—*Broussard v. South Texas Rice Co.* 120 S. W. 587. See 48 Cent. Dig. Warehouse, § 17.

879. In a suit to recover for loss by failure to fully insure rice left to be milled and sold, allegations in the petition that in previous dealings with defendant, extending over a long time

prior to transactions complained of, defendant insured rice received, and insured the present lot, or at least charged plaintiff and other customers with premiums sufficient to cover full insurance thereon, are sufficient to admit proof of an implied contract to insure it at its full value.—*Broussard v. South Texas Rice Co.*, 120 S. W. 587.

880. In suit for loss by failure to fully insure rice left to be milled and sold, evidence held to show that defendants by their acts and dealings with plaintiff bound themselves to fully insure the rice.—*Id.*

881. In suit for loss sustained by failure to fully insure rice left to be milled and sold, in which plaintiff showed the custom of millers was to collect so much on a sack to pay for full insurance, proof of the meaning attached by other rice mills to insurance to be obtained by payment of the amount on each sack was admissible to show real intention of the parties.—*Id.*

ACTIONS (SEE 19 CYC. 898).

Jurisdiction as Affected by Net Amount in Controversy.

882. In an action on an insurance policy for \$200 before a court having jurisdiction only of actions involving

for the amount of the policy and interest the interest will be considered as damages.⁸⁸² Where the insured sued originally to recover a thousand dollars and afterwards settlement was obtained on all the property except one item to recover the value of which an amended petition was filed asking judgment for three-fourths of \$750, and the insured filed a plea to the jurisdiction asserting that it was only liable for three-fourths of \$555.75, the true value of the item, it was held that the amount claimed in the original petition controlled in determining the trial court's jurisdiction.⁸⁸³

Joinder of Causes of Action.—Actions are improperly joined where the insured sued two insurers on two policies issued at different times, although covering the same property.⁸⁸⁴ A joint petition by an owner of property destroyed by fire and an insurer which had paid a loss thereon, against a railroad company for causing a fire, states a single cause of action.⁸⁸⁷ There was no misjoinder of causes of action where plaintiff, holding a note secured by a mortgage on property insured by a policy making loss payable to a trustee as the plaintiff's interest might appear, on destruction of the property, sued to foreclose the mortgage and recover on the policy, making the makers of the note and the insurer defendants.⁸⁸⁶ (For facts showing misjoinder in the matter of an agency contract, see Ann. 885.) An insurance company may sue its agent and the sureties on his bond together.^{885a}

an amount in excess of \$200, the arbitrary allegation of \$300 with nothing in the petition to support it has no effect in determining the existence of the jurisdiction, and if the action is not on a valued policy, and suit is brought for the entire amount of the policy and for interest, the interest will be considered as damages, and the court will have jurisdiction.—*Allemania Fire Ins. Co. v. Fordtran*, 128 S. W. 692.

883. Plaintiff sued originally to recover \$1000, the full amount of an insurance policy. After the suit was entered, settlement was obtained as to all property except the safe, for which the insurer declined to pay. After settlement plaintiff filed an amended petition to recover damages to the safe only, alleging such damage to be \$750, and prayed judgment for three-fourths of that amount. Defendant then filed a plea to the jurisdiction that the damage to the safe did not exceed \$555.75, and that, if it was covered by the policy, it would be only liable for three-fourths of such sum, and that the alleged value stated in the amended petition was not alleged in good faith, but solely to confer jurisdiction on the trial court. Held, that the amount claimed in the original petition, and not that stated in the amended petition, controlled in determining the trial court's jurisdiction.—*Mecca*

Fire Ins. Co. (Mut.) of Waco v. First State Bank of Hamlin, 135 S. W. 1083.

Joinder of Causes of Action.

884. Where plaintiffs sued two insurance companies on two policies issued at different times, covering the same property, the actions were improperly joined.—*Hartford Fire Ins. Co. v. Post*, 62 S. W. 140, 25 Tex. Civ. App. 423.

885. Where plaintiff and B. were employed by defendant insurance company to represent it and, after plaintiff was discharged, he sued the company for breach of contract and joined B., alleging that he conspired to aid the company in ousting plaintiff, there was a misjoinder of causes of action.—*Oklahoma Fire Ins. Co. v. Ross*, 170 S. W. 1062.

885a. There was no misjoinder of parties, where a life insurance company sued together its agent and the sureties on his bond securing his indebtedness to the company.—*Shaw v. Southland Life Ins. Co.*, 185 S. W. 915.

886. Where plaintiff held a note secured by a mortgage on property insured by a policy making loss payable to a trustee as plaintiff's interest might appear, and on destruction of the property sued to foreclose the mortgage and recover on the policy, making the makers of the note and the insurer

Conditions Precedent.—Under the statute, where the loss is total, compliance with a clause in a policy requiring an appraisal is not necessary to recovery on the policy.⁸⁸⁸

Defenses in General.—An insurer cannot, after a contract has been executed and it has received the benefits thereof, defend an action on a policy insuring property in a foreign country by showing its want of power to issue the policy.⁸⁸⁴ It is no defense that a policy was issued in the name of one of two partners, where the agent knew the building was owned by the firm and that the premium was paid by both.⁸⁸⁹ In an action by the owners against a railroad for damages on account of the loss of goods by the latter's negligence, the fact that the owner had received the value of the goods paid by the insurer, would constitute no defense, there being no privity between the railroad and the insurer.⁸⁹³ A mortgagee, not being in privity of contract with the insurer, is subject to any defense which could properly be made against the insured, where the policy does not exempt him from the defaults of the mortgagor or insured.⁸⁹⁰ An insurer cannot defend an action by an assignee on a policy on the ground that the assignment was in fraud of the assignor's creditors, no final judgment having been shown to have been obtained against the assignor.⁸⁹¹ (For facts showing that the claiming by the insured of premiums tendered back by the insurer to the plaintiff, who was the beneficiary and creditor of the insured, did not deprive the plaintiff of his right to prosecute the action, see Ann. 892.)

defendants, there was no misjoinder of causes of action.—*Sun Ins. Office v. Benecke*, 53 S. W. 98.

887. A joint petition by an owner of property destroyed by fire, and by a fire insurance company which had paid a loss thereon, against a railroad company, for causing the fire, states a single cause of action.—*St. Louis & S. W. Ry. Co. v. Miller*, 66 S. W. 139, 27 Tex. Civ. App. 344.

615—**Conditions Precedent in General.** (See 28 Cent. Dig. Insurance, §§ 1520-1523.)

888. Under Sayles' Civ. St. Art. 3089, providing that a fire insurance policy, in case of a total loss, shall be a liquidated demand against the company for the full amount of the policy, where the loss is total compliance with a clause of the policy requiring an appraisal is not necessary to recovery on the policy.—*Aetna Ins. Co. v. Shacklett*, 57 S. W. 583.

615—**Defenses in General.** (See 28 Cent. Dig. Insurance, §§ 1530, 1532-1534.)

889. It is no defense to an action on a policy that it was issued in the name of one of two partners, where

the agent knew that the building was owned by the firm, and that the premium was paid by both.—*Gerard Fire & Marine Ins. Co. v. Frymlier* (Tex. Civ. App.) 32 S. W. 55.

890. Where a fire policy was payable to a mortgagee of the property insured as his interest might appear, and contained no stipulation exempting the mortgagee and those claiming under him from the effect of the acts or defaults of the mortgagor, the mortgagee was not in privity of contract with the insurer, and was therefore subject to any defense which could be properly made against the insured.—*Hamburg-Bremen Fire Ins. Co. v. Rud-dell*, 82 S. W. 826. See Cent. Dig. Vol. 28, cols. 2494-2498, §§ 1530-1534.

891. A company cannot set up in defense of an action on a policy by an assignee that the assignment was in fraud of the assignor's creditors, where no final judgment is shown to have been obtained against the assignor. The fact that his creditors have obtained judgments against the company as garnishee is insufficient, as judgment against the garnishee is invalid without a judgment against the debtor.—*Horst v. City of London Fire Ins. Co.*, (Tex.) 11 S. W. 148.

892. Plaintiff, a creditor of insured, sued on a fire policy payable to plain-

Limitations by Provisions of Policy—(1) Time Before Action May Be Maintained.—Under the statute, a provision that the policy should be payable a certain length of time after receipt of proof of loss, does not apply, where there is a total loss and a denial of liability.⁸⁹⁵ Where a policy provides that the loss shall not be payable for a certain length of time after receipt of proof of loss, the institution of a suit before that time is, in the absence of amendment, ground for reversal, even though the answer setting up that defense was not filed until after the debt became due.⁸⁹⁶

(2) Time Within Which Action Must Be Brought.—A provision in a policy that suit thereon should be brought before the expiration of two years from the accrual of the cause of action is invalid under the statute.^{898 897} However, if the course of conduct pursued by the insurer is such as to induce the insured to believe that the sum admitted to be due would be paid without suit, and for that reason suit is not brought within the time prescribed, then the action may be brought even after the time so prescribed in the

tiff, attaching the policy to the petition as an exhibit. Subsequently defendant paid into the hands of the clerk of the court the amount of the premium which had been paid for the policy, and pleaded the tender, and sought to avoid the policy. Thereafter insured claimed the money deposited and received it from the clerk without the knowledge or consent of plaintiff. Held, that such transaction did not deprive plaintiff of his interest in the policy and right to prosecute the action.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 760. See 28 Cent. Dig. Insurance, §§ 1530-1532, 1534.

^{893.} In an action by the owner of cotton against a railroad for damages on account of its loss by the alleged negligence of defendant, the fact that the plaintiff had received the value of the cotton paid by the insurance companies under policies held by the owner, would constitute no defense. There is no legal privity between the defendant and the insurer so as to give the former the right to avail itself of a payment by the latter.—*Texas & Pacific v. Levi & Bro.*, 59 Tex. 674.

^{894.} Where the charter of a mutual fire insurance company required all its members to be residents of the state of incorporation, and permitted it to insure property in that state only, the company cannot, where the contract is executed, and the company has received the benefits thereof, defend an action on a policy insuring property in a foreign country by showing its want of power to issue the policy either under the laws of its own state or those of the foreign country.—*Continental Fire Ass'n v. Masonic Temple Co.*, 62 S. W. 930, 26 Tex. Civ. App. 139.

621—Limitations by Provisions of Policy.—(A) Time Before Action May Be Maintained. (See 28 Cent. Dig. Insurance, §§ 1542, 1543.)

^{895.} Under Rev. Civ. St. 1911, Art. 4874, provision that the sum for which the insurer was liable should be payable 60 days after the receipt of proof of loss held not to apply, when there was a total loss and a denial of liability, and the action could be brought without waiting 60 days.—*Northern Assur. Co., Limited, of London v. Morrison*, 162 S. W. 411. See 28 Cent. Dig. Insurance, §§ 1542-1543.

^{896.} As a policy provided that the loss should not be payable until 60 days after the receipt of proofs of loss, the institution of a suit before that time is, in the absence of amendment, ground for reversal of a judgment for the insured, though the answer setting up that defense was not filed until after the debt was due.—*Fire Ass'n of Philadelphia v. Colgin*, 33 S. W. 1004.

622—Limitations by Provisions of Policy.—(B) Time Within Which Action Must Be Brought. (See 28 Cent. Dig. Insurance, §§ 1540, 1544-1550.)

^{897.} Act March 4, 1891, forbidding stipulations for a period of time less than two years in which to sue, and including, in terms, "any stipulation, contract or agreement," invalidates a stipulation limiting to six months the time in which suit may be brought on a policy.—*German Ins. Co. v. Luckett*, 34 S. W. 173; 12 Tex. Civ. App. 139.

^{898.} A provision in a fire insurance policy that suit thereon should be brought before the expiration of 2 years from the accrual of the cause of

policy.^{903 901 902 900} Where a policy stipulates that claims must be "prosecuted" within a specified time after a loss, it is held that the presentation of the loss and a demand for payment are not such a prosecution of the claim as is meant by the policy, but a suit or action is meant.⁹⁰⁵

(3) **Waiver of Limitation.**—Where an insurer denies its liability in toto it thereby waives a provision in the policy entitling it to a certain length of time after notice and proof of loss in which to pay the same.^{907 909 910} Refusal by an insurer to pay a policy on the sole ground that garnishment proceedings by creditors were pending and a promise to pay on the determination of such proceedings are sufficient to support a waiver of the condition in the policy that suit thereon must be brought within a specified time after the loss.⁹⁰⁶ And such a provision in a policy will also

action held invalid, under *Vernons Sayles' Ann. Civ. St. 1914, § 5713.*—*Fire Ass'n of Philadelphia v. Richards*, 179 S. W. 926.

899. A condition in a policy of insurance to the effect that all claims under the policy shall be barred, unless prosecuted within one year from the date of loss, and that no claim shall bear interest before judicial demand, is legal and valid as a part of the contract of insurance.—*Merchants Mut. Ins. Co. v. N. V. Lacroix*, 45 Tex. 158.

900. A waiver of one's rights under a contract, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on a performance of the contract.—*Id.*

901. When a policy of insurance stipulates that all claims for loss shall be barred unless prosecuted within one year from the date of loss, an allegation in the petition in a suit by the insured, which in effect declares that the company agreed not to take advantage of the delay in suing on the claim for the loss until the company had completed the investigation touching the circumstances attending the loss, would, if coupled with an averment that such agreement was made before the expiration of twelve months, state a sufficient excuse for not filing the suit within one year. It would be otherwise when the agreement was made after the expiration of the year.—*Id.*

902. To authorize a written agreement to be set aside and superseded upon the ground that an additional agreement has been made, verbally, in reference to the same matter, the allegations setting up such agreement should, with reasonable certainty, set out the terms of, and parties to the new contract.—*Merchants Mut. Ins. Co. v. N. V. Lacroix*, 45 Tex. 158.

903. If the course of conduct pursued by the company was such as to induce plaintiff to believe that the sum admitted to be due on the adjustment made would be paid without suit, and that for this reason suit was not brought within the time prescribed, then the action may be brought even after the time so prescribed in the policy.—*St. Paul Fire & M. Ins. Co. v. McGregor*, 63 Tex. 399.

904. A condition in a fire insurance policy that "all claims under this policy are barred, unless prosecuted within one year from the date of the loss," is a lawful and valid stipulation. It is not in contravention of public policy, nor is it incompatible with or merged in the limitation laws of the state.—*Ins. Co. v. Lacroix*, 35 Tex. 249.

905. A fire insurance policy stipulated that claims under it must be "prosecuted" within a limited time after the loss. Held, that the presentation of the loss, and a demand of its payment, are not such a prosecution of the claim as is meant by the policy. The policy means prosecution by a suit or action.—*Insurance Co. v. Lacroix*, 35 Tex. 249.

623—(C) Waiver of Limitation.

906. Recognition by a company of its liability on a policy, that no adjustment or further proofs of loss were necessary, and a refusal to pay on the ground that garnishment proceedings by creditors of the insured were pending, and a promise to pay on the determination of these proceedings, are sufficient to support a waiver of the condition in the policy requiring suit thereon to be brought within 12 months after the loss.—*Horst v. City of London Fire Ins. Co.*, 11 S. W. 148, 73 Tex. 67.

907. An insurer, who denies liability under a fire policy, thereby waives the stipulation therein that any loss shall not be payable until 60 days after re-

be waived where the insurer delays settlement by promises that during the negotiations no advantage would be taken of the delay until the time specified in the policy has expired.⁹⁰⁸ (See above.)

Parties.—A creditor, holding a policy as collateral security for a debt in excess of the amount of the policy, may sue alone and recover the loss.⁹¹⁰ In such a case neither the insured nor his legal representatives are necessary parties.⁹¹⁰ Both partners of a firm are proper parties plaintiff in an action on a policy made with the firm, though one of them is merely a nominal partner and has no interest in the property insured.⁹¹¹ The person to whom the loss is payable on the face of the policy may sue alone, the insured not being a necessary party.⁹¹²

Venue—Statutory Regulations.—Suits against fire, marine or inland insurance companies may be commenced in any county in which any part of the insured property was situated. (Art. 1830-29, Rev. St. 1914; also Art. 2308-12, Rev. St. 1914.)

Process.—A court does not acquire jurisdiction over an insurance company, garnishee, when the citation directs the agent to be summoned, to answer upon oath, etc.; the writ should have directed the officer to summon the insurance company and service should have been on the agent.⁹¹³

ceipt of proofs of loss, and cannot claim that a suit brought on the policy within such time is premature.—*Oklahoma Fire Ins. Co. v. McKey*, 152 S. W. 440. See 28 Cent. Dig. Insurance, §§ 1551-1553.

908. Where the agents of an insurance company promised to adjust the loss if plaintiff would come to Texas, and plaintiff did so, and endeavored to effect a settlement, which was evaded by the company's adjuster, and the agents represented that no advantage would be taken of the delay, and the company acquiesced in the conduct of its agents, such acts will amount to a waiver of a provision in the policy that suit must be brought within six months after the loss, whether plaintiff knew of the limitation of the agents' authority forbidding them to waive such provision, or not.—*Burlington Ins. Co. v. Tobey* (Tex Civ. App.) 30 S. W. 1111.

909. Where, prior to the bringing of an action on a policy, defendant denied its liability in toto, it thereby waived a provision entitling defendant to 60 days after notice and proofs of loss in which to pay the same.—*Connecticut Fire Ins. Co. v. Helbrant*, 73 S. W. 558.

910. Although a company has sixty days after proofs are made to determine the matter and pay the loss, still where an authorized agent before the end of the time informed claimant that the claim would not be paid the latter may proceed at once to bring suit.—*Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366.

910a. *(See 28 Cent. Dig. Insurance, §§ 1557-1770.)*

910a. A creditor, holding a fire policy as collateral security for an indebtedness in excess of the face of the policy, may sue alone and recover the loss; neither the insured nor his legal representatives being necessary parties.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 760.

911. Where a contract of insurance was made with a mercantile firm composed of two partners, both partners are proper parties plaintiff to an action to recover for a loss thereunder, though one of them is a merely nominal partner, has no interest in the property, and is working for the other on a salary.—*Lion Fire Ins. Co. v. Heath*, 68 S. W. 305.

912. Where the person to whom a loss is payable is stipulated on the face of a fire policy, he may sue alone; neither the insured nor his legal representatives being necessary parties.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 760. See 28 Cent. Dig. Insurance, §§ 1557-1571.

913. *(See 28 Cent. Dig. Insurance, §§ 1572-1574.)*

913. The court does not acquire jurisdiction over an insurance company, garnishee, when the citation directs the agent to be summoned to answer upon oath, etc. The writ of garnish-

Process Against Foreign Insurance Companies.—It is not necessary for the insured in an action on a policy to prove that the party served is the agent of the insurer, as alleged in the petition, where the process was certified by the return to have been so made.⁹¹⁵ The return of service is sufficient where it recites that the citation was executed by delivering to a local agent at a certain place, "the within named defendant, in person, a true copy."⁹¹⁴

The Petition—(1) Form and Requisites in General.—A petition need not exhibit a policy; neither need it set forth those parts or conditions of the contract which are matters in the nature of conditions subsequent, or in the nature of exceptions, or which are prohibitory of certain acts of the insured, for these are matters of defense.^{928 928} A petition need not allege that a loss was not caused by any of certain causes set out in a policy.⁹¹⁷ So a petition alleging that a fire occurred "under circumstances not directly or indirectly made an exception by the terms of said policy of insurance," is sufficient.⁹¹⁶ A complaint alleging facts authorizing proof of either a written or an oral contract of insurance is not demurrable.⁹¹⁹ The insured must prove his policy, although he has set out its terms in a special plea, where the insurer has pleaded a general denial.⁹²⁰ An allegation that there was attached to and made a part of a policy an iron-safe clause, which is set out in full, is a sufficient allegation that such clause constituted a part of the

ment should have directed the officer to summon the defendant. Service could be made on an agent of the company and the writ should so direct but the summons must be of the defendant.—*Sun. Mut. Ins. Co. Sellingson & Co.*, 59 Tex. 8.

627—Process Against Foreign Insurance Companies. (1873, 1874.)

914. The return of service of citation, in an action against an insurance company having local agents in the county, which recites that the citation was executed by delivering to one of the local agents at a specified place, "the within named defendant, in person, a true copy" of the writ, is sufficient to show service on the company.—*Delaware Ins. Co. v. Hutto*, 159 S. W. 73. See 28 Cent. Dig. Insurance, §§ 1573-1574.

915. In an action against a foreign insurance company, process having been certified by the return to have been served on the person alleged in the petition to be defendant's agent, it was not necessary for plaintiffs to prove that the party served was such agent.—*Liverpool & London & Globe Ins. Co. v. McCollum*, 149 S. W. 775. See 28 Cent. Dig. Insurance, § 1573.

629—Petition. (A) Form and Requisites in General. (See 28 Cent. Dig. Insurance, §§ 1575-1590, 1594-1596, 1592, 1593.)

916. In an action on a policy of fire insurance, an allegation in the petition that the fire occurred "under circumstances not directly or indirectly made an exception by the terms of said policies of insurance" sufficiently shows that the fire was not produced by any causes excepted in the policy.—*Alamo Fire Ins. Co. v. Shacklett*, 26 S. W. 630.

917. In an action on a fire insurance policy providing that "the company shall not be liable for loss" from certain causes, the complaint need not allege that the loss was not caused by any of such causes.—*Burlington Ins. Co. v. Rivers*, 28 S. W. 453.

918. A petition on a policy held not to show that the agent writing the policy was agent of both parties, so as to render the policy void.—*Liverpool & London & Globe Ins. Co. v. McCollum*, 149 S. W. 775. See 28 Cent. Dig. Insurance, §§ 1575, 1579.

919. A petition in an action on a fire insurance contract, which alleges facts authorizing proof of either a written or an oral contract of insurance, is not demurrable.—*Niagara Fire Ins. Co. v. Lollar*, 156 S. W. 1140.

920. Special plea, setting out terms of policy, held not to relieve plaintiff of the burden of proving the policy.

policy.⁹²¹ Where the insured sought to recover for a concrete building and the insurer sought to avoid liability because of additional insurance for an iron building, a supplemental petition alleging that, if the policy included such building, the inclusion was fraudulent, does not set up a new cause of action.⁹²¹ A petition, filed ninety days after loss but failing to show when the proofs of loss were made, is not subject to exception because it does not show that the cause of action had accrued sixty days after proofs of loss had been filed.⁹²⁵ In recovering on a retail stock of merchandise a petition need not be accompanied by an itemized list where it is impossible to make a correct inventory due to the constant change in the stock.⁹²² (For petition sufficiently stating a cause of action, see Ann. 924.) (For a petition held not to show that the agent writing the policy was agent for both parties, thereby rendering the policy void, see Ann. 918.)

(2) **Insurable Interest.**—In an early case it was held that a petition which did not set out the terms of the policy or show that the insured had an insurable interest in the insured property at the time of loss was demurrable.⁹³² ⁹²⁹ However, the petition is

where defendant also pleaded a general denial.—*Fidelity Phenix Fire Ins. Co. v. Sadau*, 159 S. W. 137.

921. Where insured sought a recovery for the destruction of a concrete building, and defendant sought to avoid liability because of additional insurance for an iron building, a supplemental petition alleging that, if the policy included such building, the inclusion was fraudulent, did not set up a new cause of action.—*Fire Ass'n of Philadelphia v. Strayhorn*, 165 S. W. 901.

922. Petition in an action for insurance on a retail stock of merchandise need not be accompanied by an itemized list, it being impossible to make a correct inventory where stock is constantly changing.—*German Ins. Co. v. Pearlistone*, 45 S. W. 832, 18 Tex. Civ. App. 706.

923. The petition in an action on a fire policy, though merely giving the description of the property as in the policy, insured's books of account being burned, and he being unable to produce an itemized list of the property, is sufficient.—*American Cent. Ins. Co. v. Nunn*, 79 S. W. 88. Reversed 82 S. W. 497.

924. A petition alleging that on a certain date defendant, by the policy sued on, insured plaintiff's shingle-roof frame building, used as a barn, in the sum of \$150, and his feed stuffs contained therein in the sum of \$100, against loss by fire, and that on a subsequent date said barn and its contents were destroyed by fire, to plaintiff's damage in the sum of \$150 for the loss of the barn, and \$21 for the loss of the stock feed, sufficiently stated a

cause of action.—*Underwriters' Fire Ass'n v. Henry*, 79 S. W. 1072.

925. A complaint in an action on a fire insurance policy, showing that suit was commenced more than 90 days after the loss, but failing to show when proofs of loss were made, is not subject to exception, on the ground that it does not show that the cause of action had accrued, because it does not show that 60 days had elapsed after proofs of loss.—*Pennsylvania Fire Ins. Co. v. Faires*, 35 S. W. 55.

926. In an action on a certificate of insurance, issued subject to all the conditions in an open policy which was retained by the insurer, it is not necessary for the insured to allege and prove compliance with the conditions of said policy, as that is a matter of defense.—*Merchants' Ins. Co. v. Arnold* 32 S. W. 579.

927. An allegation that there was attached to, and made a part of, an insurance policy, an iron-safe clause, which is set out in *haec verba*, is a sufficient allegation that such clause properly constituted a part of the policy.—*City Drug Store v. Scottish Union & National Ins. Co.*, 44 S. W. 21.

928. The petition need not exhibit the policy; neither need it set forth those parts or conditions of the contract which are matters in the nature of conditions subsequent, or in the nature of exceptions, or which are prohibitory of certain acts of assured for these are matters of defense.—*East Texas Ins. Co. v. Dyches*, 56 S. W. 565.

(3) **Insurable Interest.**

929. In an action on a fire insurance policy, brought for the benefit of an

sufficient where the interest may be inferred from the other allegations therein.^{931 930} In an action to reform a policy by inserting the name of the plaintiff as mortgagee and payee, an allegation that the person named the insured was building on the premises and had no interest therein was not an admission that such insured had no interest in the building.⁹³³

(3) **Title or Interest of the Insured.**—The insured must allege that he was the owner of the property at the time of the contract of insurance.⁹³⁴ A petition alleging that the policy was on "his certain stock of merchandise" is sufficient as against a general demurrer.⁹³⁵ (For a sufficient allegation of ownership of household furniture, see Ann. 936.)

(4) **Performance or Waiver of Conditions.**—The insured must allege compliance with a condition in a policy requiring notice to the insurer of the loss within a certain period.^{937 940} The allegation

association, plaintiff alleged that, after the policy was issued to him, he executed a mortgage of the premises to said association, "to secure the sum of ——— dollars," and, with the consent of the insurance company, assigned the policy to said association, in accordance with the terms of the policy. Held, that the averments did not show that the association had any insurable interest in the property, and hence they did not support a judgment for plaintiff.—*Alamo Fire Ins. Co. v. Davis*, 45 S. W. 604.

930. A petition on fire insurance policy, alleging that the parties entered into a contract of insurance whereby defendant issued a policy and insured plaintiffs on wool owned or held by assured, while contained in a certain house on assured's premises, against all direct loss or damage by fire, and that, while the contract was in force, the property insured was totally destroyed by fire, whereby a direct loss occurred to plaintiffs, etc., is sufficient as against a general exception, although it does not specifically allege that plaintiffs were owners of the property insured, or that they had any insurable interest therein.—*Pennsylvania Fire Ins. Co. v. Jameson Bros.*, 73 S. W. 418.

931. That insured had an insurable interest in the premises at the time they were destroyed can be inferred from an allegation in the petition stating that the loss happened under circumstances rendering defendant liable on the policy.—*Northwestern Nat. Ins. Co. v. Woodward*, 45 S. W. 185, 18 Tex. Civ. App. 496.

932. In an action on a policy of fire insurance, a petition which does not set out the terms of the policy, or show that plaintiff had an insurable interest in the insured property at the time of the fire, is demurrable.—*Commercial Union Assur. Co. v. Dunbar* (Tex. Civ. App.) 26 S. W. 628.

933. In an action to reform a policy by inserting the name of plaintiff as mortgagee and payee, an allegation in the petition that the person named the insured was building on the premises, and had no interest therein at the time of loss or at any time, Held not an admission that such insured had no interest in the building so as to avoid the policy for want of insurable interest.—*Western Assur. Co. v. Hillyer-Deutsch-Jarrett Co.*, 167 S. W. 816.

633—(C) **Title or Interest of Insured.** (See 28 Cent. Dig. Insurance, § 1594.)

934. In an action on a fire policy plaintiff must allege that he was the owner of the property at the time of the contract of insurance.—*Continental Fire Ass'n v. Bearden*, 69 S. W. 932.

935. Plaintiff's petition in an action on an insurance policy, alleging that the policy was on "his certain stock of merchandise," was a sufficient allegation of ownership of the property destroyed as against a general demurrer.—*Royal Ins. Co. v. W. P. Wright & Co.*, 148 S. W. 824.

936. A petition alleged that defendant executed and delivered to plaintiff a policy of insurance insuring plaintiff against loss by fire on his household and kitchen furniture (describing it), and that, while the policy was in full force, "all of plaintiff's said household and kitchen furniture * * * was totally destroyed by fire, and was the property of plaintiff at the time of loss." Held to sufficiently allege ownership of the property as against a general demurrer.—*American Cent. Ins. Co. v. White*, 73 S. W. 827.

634—(D) **Performance or Waiver of Condition.** (See 28 Cent. Dig. Insurance, §§ 1593, 1596, 1598, 1603-1606.)

937. It is necessary that insured should allege compliance with the condition in the policy requiring notice to

that the condition was waived can only be dispensed with when the facts averred admit of no other fair conclusion.⁹³⁷ A petition is sufficient if it alleges notice of loss and that specified proofs had been taken by the insurer's authorized agent, who had waived further proof and promised to settle.⁹³⁹ A waiver of a defense must be specially pleaded by the insured and if the acts of the insurer constitute an estoppel, the particular acts, representations or conduct relied on should be pleaded with reasonable certainty.⁹³⁸ An allegation that the insured performed all the conditions and stipulations of the policy, the policy being attached as an exhibit, is sufficient.⁹⁴² A petition on a parol contract free from conditions is not bad for failing to allege compliance with conditions.⁹⁴¹ Ignorance is no excuse for failure to perform the conditions in a policy in the absence of allegations of fraud or misrepresentations.⁹⁴³

(5) **Loss and Cause Thereof.**—A petition need not allege that the fire did not result from causes for which the insurer was not liable.⁹⁴⁴

(6) **Non-Payment.**—A petition does not state a cause of action

the insurer of the loss within a defined period. The allegation of the conclusion of fact that the condition was waived can only be dispensed with when the facts averred admit of no other fair conclusion.—*Crescent Ins. Co. v. Camp et al*, 64 Tex. 521.

933. Where the insurer pleads invalidity of policy for concealment and breach of warranty and the plaintiff by supplemental petition sets up a waiver of this defense, it must be specially pleaded, and must amount to either an agreement or an estoppel. If the acts of insurer constitute an estoppel the particular acts, representations or conduct relied on should be pleaded with reasonable certainty.—*Texas Banking & Ins. Co. v. Hutchins*, 53 Tex. 61.

939. Although proofs of loss are by the policy made conditions precedent, the petition is sufficient on this point if it alleges notice of the loss, and that at a time and place specified proofs were taken by the Company's agent, authorized thereto, and also authorized to settle and adjust the loss, who waived further proof and promised to settle the loss. Such facts would estop the company from setting up failure to furnish proofs.—*East Texas Fire Ins. Co. v. Dyches*, 56 Tex. 565.

940. Where a policy sued on required as a condition precedent to liability that assured should furnish proofs of loss, a petition to which the policy was attached, and made a part thereof, which failed to allege compliance with such condition was demurrable.—

Texas Home Mut. Fire Ins. Co. v. Bowlin, 70 S. W. 797.

941. The petition in an action on a fire insurance contract, which alleges facts showing a parol contract free from conditions, is not bad for failing to allege compliance with conditions.—*Niagara Fire Ins. Co. v. Lollar*, 156 S. W. 1140. See 28 Cent. Dig. Insurance, § 1593.

942. An allegation in a complaint in an action on a fire insurance policy that plaintiff performed all the conditions and stipulations of said contract or policy, the policy being attached to the complaint as an exhibit, sufficiently alleges the performance of conditions stipulated in the policy to be performed by the assured.—*London & L. Fire Ins. Co. v. Schwulst*, 46 S. W. 39.

943. A pleading which sets up that the assured failed to perform the conditions in the policy because of ignorance of such conditions, but which fails to allege fraud, misrepresentation, or concealment, does not excuse such failure.—*Morrison v. Insurance Co.*, (Tex.) 6 S. W. 605.

635—(B) **Loss and Cause Thereof.**
(See 28 Cent. Dig. Insurance, §§ 1599-1602.)

944. A complaint on a fire policy need not allege that the fire did not result from causes for which insurer was not liable.—*St. Paul Fire & Marine Ins. Co. v. Laster*, 187, S. W. 969.

where it does not allege that the money sued for has not been paid.⁹⁴⁶

Plea, Answer, or Affidavit of Defense.—The general rule is that no defenses will be considered which are not pleaded.⁹⁴⁷ Procuring additional insurance without the insurer's consent,⁹⁴⁸ that property shall be considered personalty,⁹⁴⁹ fraud,⁹⁵⁰ and waiver of breach of conditions of a policy,⁹⁵¹ must all be pleaded to be available as defenses. A general denial puts in issue all the allegations of the plaintiff's pleadings,⁹⁵² but the willful burning of the insured property by the plaintiff cannot be shown under such a plea.⁹⁵³ Where the plaintiff alleges that property belongs to him a general denial will put such ownership in issue and evidence can be introduced to disprove it.⁹⁵⁴ Facts pleaded in defense for the first time should not be incorporated in a supplemental answer.⁹⁵⁵ In a case where the insured's allegation of total loss was not denied by the insurer, a defense of failure to furnish proof of loss within the time prescribed is insufficient on demurrer since in such case proof of loss is unnecessary under the statute.⁹⁵⁶ Failure to furnish proofs of loss within the prescribed time is no defense where it is not averred that the insured's right to recover is forfeited by such failure.⁹⁵⁷ Allegations of indebtedness on the insured property exceeding the amount stated must be specifically alleged by the insurer.⁹⁵⁸ It is not necessary to verify a plea admitting the issuance of the policy but denying that the plaintiff is the person insured.⁹⁵⁹ (For allegations showing an assignment of

940—*Plea, Answer, or Affidavit of Defense.* (See 28 Cent. Dig. Insurance, §§ 1554, 1609-1612, 1614, 1624.)

946. A plea admitting the issuance of an insurance policy, but denying that plaintiff was the person insured, was not required to be verified.—*McCarty v. Hartford Fire Ins. Co.*, 75 S. W. 934.

947. In an action on a policy of fire insurance no defenses not pleaded will be considered.—*German Ins. Co. v. Cain*, 37 S. W. 657.

948. The allegations in the answer in an action on an insurance policy that when it was issued there existed on the property indebtedness exceeding the amounts stated in the application, and "that the amounts of each of these excessive incumbrances are well known to plaintiff and the persons to whom the same are due, but the particular amounts thereof, and to whom the same are due, are at this time unknown to defendant," are too general.—*Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.*, 49 S. W. 271.

950. Rev. St. Art. 2971 provides that a fire insurance policy covering real property shall, in case of total loss, be considered a liquidated demand against the company for the full amount there-

of. Held, that an answer in an action on a policy covering buildings wherein the declaration alleged a total loss, which, without denying that the loss was total, and without alleging that the buildings destroyed were personalty, set up that plaintiff failed to furnish proof of loss within the time prescribed by the policy, was insufficient on demurrer, since, under the statute, proof of loss was unnecessary.—*Continental Ins. Co. v. Chase*, 33 S. W. 602.

951. It was no defense to an action on a policy that proofs of loss were not furnished within the time prescribed by the policy, where it was not averred that assured's right to recover was forfeited by his failure to furnish them within that time. 33 S. W. 602 (Civ. App. 1895) affirmed.—*Continental Ins. Co. v. Chase* (Tex Sup.) 34 S. W. 93, 39 Tex. 212.

952. Where defenses alleged in an answer to a petition on an insurance policy were available only in case of a partial destruction of the property, the sustaining of exceptions to such defenses, though erroneous at the time, affords no ground for a reversal of the judgment where the issue as to a total or partial loss remained, and the undisputed evidence on the trial showed a total loss.—*Continental Ins. Co. v. McCulloch*, 39 S. W. 374.

proceeds of policy, see Ann. 959.) (For certain defenses available only in case of partial loss affording no grounds for reversal where the principle issue remains, see Ann. 952.)

Demurrer.—A petition alleging that the policy sued on was issued to plaintiff is equivalent to alleging ownership as against a general demurrer.⁹⁶⁷ Ownership may be inferred from other facts alleged and the petition be good as against a general demurrer.⁹⁶⁸ A petition alleging that the insurer insured the plaintiff against loss "on their stock of merchandise" and that the policies were in force at the time of the fire, is good as against a general demurrer.⁹⁶⁴ A petition is demurrable, which does not allege that the

953. In an action on a fire policy, defendant cannot show, under a general denial, the willful burning of the property by plaintiff.—*Alamo Fire Ins. Co. v. Heidemann Manuf'g. Co.*, 28 S. W. 910.

954. Supplementary answers are to meet matters appearing for the first time in a supplemental pleading of the opposite party and facts pleaded in defense for the first time should not be incorporated in a supplemental answer.—*Philadelphia Underwriter's Agency of Fire Ass'n of Philadelphia v. Brown*, 151 S. W. 899.

955. A policy provided the insurance company should only be liable for the interest of the assured in the property destroyed. Plaintiff alleged that the property belonged to him in a suit and it was held that a general denial put the ownership in issue and evidence could be introduced to disprove the claim of plaintiff.—*Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578.

956. That insured procured other insurance without insurer's consent, in violation of the policy, held a matter of defense, and, to be available, must be pleaded.—*Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House*, 147 S. W. 629.

957. The provision in a fire policy that property insured shall be considered personalty is defensive, and, to be available, must be pleaded.—*Id.*

958. A general denial puts in issue all the allegations of plaintiff's pleadings.—*Fidelity Phoenix Fire Ins. Co. v. Sadau*, 159 S. W. 137.

959. The answer in an action to recover the proceeds of a fire policy, which alleged that insured gave defendant an order upon the local agents, directing the company to pay defendant the amount of a note executed to him by insured, that the company agreed to pay him such amount in settlement of policy, which insured consented to accept if defendant accepted the same in settlement of his claim, which he agreed to do, held to allege an actual assignment of the proceeds of the policy to defendant.—*Prentice v. Secur-*

ity Ins. Co., 153 S. W. 925. See 28 Cent. Dig. Insurance, §§ 1554-1609.

960. In an action on a policy of fire insurance which exempts the company from liability for fire caused by a hurricane, and provides that, if the insured building shall fall except as the result of a fire, the insurance shall cease, where such policy is attached as an exhibit to the petition, the jury should find for the defendant if they believe from the evidence that the fire was caused by a hurricane, though the answer does not expressly allege that the fire was so caused, since that point is put in issue by the general denial.—*Pelican Fire Ins. Co. v. Troy Co-op. Ass'n, (Tex.)* 13 S. W. 980.

961. Fraud available to avoid a recovery on a policy must be specially pleaded, and only such fraud as is averred can be considered.—*Delaware Ins. Co. of Philadelphia v. Hill*, 127 S. W. 283. See 28 Cent. Dig. Insurance, §§ 1554, 1609-1614.

962. An insurer's waiver of a breach of the conditions of a policy must be pleaded, to be available.—*Mecca Fire Ins. Co. of Waco v. Moore*, 128 S. W. 441.

642—Demurrer.

963. A petition setting forth that a fire policy was issued in the name of one of the petitioners, but that it was applied for and intended for the use and benefit of the estate of which petitioner was executor with entire management, and that the estate was owned by the petitioner and others as heirs of the deceased owner, which facts were known to the company's agent when the insurance was taken, and containing a further allegation of a loss by fire, states a good cause of action, as against a general demurrer.—*Shawnee Fire Ins. Co. v. Chapman*, 132 S. W. 854. See 28 Cent. Dig. Insurance, §§ 1554, 1630.

964. Petition, as against general demurrer, sufficiently alleges plaintiff's ownership of the property at the time of the fire, by alleging that defendant insured plaintiffs against loss by fire

plaintiff was the owner of the goods destroyed at the time of the fire.⁹⁶⁶ (For allegations stating a good cause of action as against a general demurrer in a suit by an executor for the use of the estate, see Ann. 963.)

The Reply of the Insured.—Facts showing the responsibility of an agent for an omission or improper statement of matters in an application, which are made warranties, and of which the insured is ignorant, must be pleaded in reply to the defense of breach of warranty.⁹⁶⁸ Where the insured relies on a ratification by the insurer of his agent's unauthorized act in issuing the policy, such ratification need not be averred in his reply.⁹⁶⁹

Issues, Proofs, and Variance—(1) In General.—The defense is confined to the specific matters set up by the insurer, where it admits the insured has a good cause of action except in so far as it may be defeated by the facts of the answer constituting a good defense, which may be established on the trial.⁹⁷²

(2) Issues and Proof in General.—The insured cannot prove a waiver of a condition where it is not pleaded.⁹⁷⁰ Neither is proof of waiver of a condition precedent admissible under a general allegation of performance.⁹⁸⁸ An insured is not entitled to recover on proof of a waiver of a compliance with conditions precedent

"on their stock of merchandise," and that the policies were in force and effect at the time of the fire.—*German Ins. Co. v. Pearlstone*, 45 S. W. 832, 18 Tex. Civ. App. 706.

965. A complaint in an action on an insurance policy which fails to allege that plaintiff was the owner of the premises at the time they were destroyed is good on general demurrer, where such ownership can be inferred from other facts alleged.—*Northwestern Nat. Ins. Co. v. Woodward*, 45 S. W. 185, 18 Tex. Civ. App. 496.

966. A complaint in an action on a policy which alleges that plaintiff was the owner of the goods destroyed at the date of the issuance of the policy and prior thereto, but which fails to allege that she was the owner thereof at the date of the fire, is demurrable.—*German Ins. Co. v. Everett* (Tex. Civ. App.) 36 S. W. 125.

967. As against a general demurrer a petition which alleges that the policy sued on was issued to plaintiff will be held equivalent to alleging ownership.—*German Ins. Co. v. Gibbs* (Tex. Civ. App.) 35 S. W. 679.

641—Replication and Reply and Subsequent Pleadings. (See 28 Cent. Dig. Insurance, §§ 1554, 1636, 1638, 1639.)

968. When an agent is responsible for an omission or improper statement of matters in application, which are made warranties, the insured being

ignorant of such misstatement and not being responsible therefor—such facts should be pleaded in reply to the breach of warranty pleaded in defense; and in the absence of such allegations and when such testimony, not objected to, was admitted, and by charge of court made a controlling issue and a verdict based on such testimony and charge was rendered, a judgment thereon will be reversed.—*Texas Banking & Ins. Co. v. Stone*, 49 Tex. 4.

969. Where an insured relies on a ratification by the insurer of his agent's unauthorized act in issuing the policy he need not aver such ratification in his reply.—*Hanover Fire Ins. Co. v. Shrader* (Tex. Civ. App.) 32 S. W. 344, 11 Tex. Civ. App. 255.

645—Issues, Proofs and Variance. (See 28 Cent. Dig. Insurance, §§ 1554, 1632-1644.)

970. It was error to allow plaintiff to prove the waiver of a condition of the policy, where he did not plead such waiver.—*German Ins. Co. v. Daniels* (Tex. Civ. App.) 33 S. W. 549.

971. Where the complaint in an action on a fire policy requiring proof of loss by the insured alleges compliance with the condition by the plaintiffs, it is error to admit in evidence proofs of loss signed by one of the plaintiffs and a third person, who has no interest in the property.—*Citizens' Ins. Co. v. Shrader*, 33 S. W. 584.

when he pleads such compliance.⁹⁶⁷ Where the only issue was whether the insurer had waived a right to insist upon a forfeiture, a general denial was sufficient to require the court to consider a stipulation in the policy that the insurer should not be held to have waived any of its provisions by any act relating to an examination as to liability and appraisal of the property.⁹⁶⁸ An insurer must specially set up the provision in its policy that failure to make proofs of loss shall work a forfeiture and allege their breach, if it wishes to avail itself of such defense.⁹⁶⁹ Proofs of loss signed by one of the plaintiffs and a third person who has no interest in the property are not admissible under an allegation of compliance with the condition requiring proofs of loss.⁹⁷¹ It is no defense that proofs of loss were not furnished within the time prescribed by the policy where it is not alleged that the insured's right to recover was thereby forfeited.⁹⁷² Under an allegation that satisfactory proofs of loss were furnished and the further allegation that such method of determining loss was waived by the insurer and that such insurer failed to carry out or insist upon the carrying out of said provision, the acceptance of proofs of loss without objection to the want of appraisal and the fact that the insurer had not required an arbitration to which it was entitled, may be proved.⁹⁹¹ A court may ignore a defense that the insured was not the sole owner of the building if it is not pleaded.⁹⁸⁴ A defense that the property insured was community property and not the wife's separate property as represented, must be pleaded and it is not covered by a plea that the applicant made false representations as to title.⁹⁸⁶ Evidence of non-payment of premiums is inadmissible in the absence of a plea of failure of consideration.⁹⁷³ A policy is admissible, under a general denial, to prove by an endorsement thereon that the insured had assigned it, the latter having alleged ownership.⁹⁷⁴ Under the statute a defense of fraud or misrepresentation is unavailable in the absence of pleading or proof that the insurer had been misled or had been caused to waive or lose any valid defense.⁹⁷⁷ It is not necessary to plead that the false statement was unintentional to enable an insured to introduce evidence to that effect in a case defended on the ground of false swearing.⁹⁹⁰ An allegation that an incorporated insurance company undertook and promised to pay the insured a

972. It was no defense to an action on a policy that proofs of loss were not furnished in the time prescribed by the policy, where it was not averred that insured's right to recover was forfeited by his failure to furnish them within that time.—*Continental Ins. Co. v. Chase*, 33 S. W. 602.

973. As a policy, as a written instrument, imports a consideration, in an action thereon, in the absence of a

plea of want or failure of consideration, evidence of non-payment of premiums is inadmissible.—*Phoenix Ins. Co. v. Hague*, 34 S. W. 654.

974. Where plaintiff has alleged the ownership of a policy, which for some reason is in the possession of defendant, the policy is admissible, under a general denial, to prove by an endorsement thereon that plaintiff had assigned it to another.—*German Ins. Co. v. Gibbs*, 35 S. W. 679.

certain sum is sufficient to authorize evidence showing such a promise made in any manner which could bind the corporation which can only act through an agent.⁹⁷⁸

Variance.—Where the allegation was that the policy was assigned to a certain firm but the evidence showed that it was to a member of the firm individually, the variance was material.⁹⁷⁹ A slight variance in the number of the policy offered in evidence and the copy attached to the petition is immaterial.⁹⁸⁰ Where the insured alleged a requirement as to an inventory was waived on a certain day but the evidence showed it was waived two weeks later, there was no variance.⁹⁸¹ A material misdescription of the property insured as set out in the petition and as shown by the proof constitutes a variance.⁹⁸² In the absence of pleading setting up the mistake evidence showing the loss of property located in a different building than that described in the policy is inadmissible.⁹⁸³

975. In an action on a policy of fire insurance which forbade assignment of the policy without consent of defendant, plaintiffs alleged that with defendant's consent the policy was assigned to the firm of L. & Co. The policy offered in evidence showed that the assignment was to L. individually and not to L. & Co. Held, that the court erred in admitting it, the variance being material.—*Niagara Ins. Co. v. Lee* (Tex.) 11 S. W. 1024.

976. An allegation that an incorporated insurance company undertook and promised to pay the plaintiff a certain sum is sufficient to authorize evidence showing such a promise made in any manner which could bind a corporation which can only act through an agent.—*St. Paul Fire & M. Ins. Co. v. McGregor*, 63 Tex. 399.

977. Under Rev. St. 1911, Art. 4949, a defense of fraud and misrepresentations in proofs loss held unavailable, where there was no pleading or proof that the insurer had been misled, or had been caused thereby to waive or lose any valid defense to the policy.—*Fidelity-Phoenix Fire Ins. Co. v. Sadau*, 167 S. W. 334.

978. In an action on an insurance policy excepting loss by fire resulting from certain specified causes, where the policy is made an exhibit to the petition, defendant cannot object to its introduction in evidence on the ground of variance or surprise, though the petition may not, as it should, allege that the fire was not occasioned by any of the excepted causes, since under the pleadings and exhibit defendant must have known that the action was based on the policy, and that it would be offered in evidence.—*Phoenix Ins. Co. v. Boren*, 13 S. W. 484.

979. An insurance policy, on which suit had been brought, limited the liability of the insurer to three-fourths of the value of the property destroyed,

and, if there were other insurance, then to three-fourths of the loss, and provided, also, for exemption in case of fire occasioned by invasion, insurrection, etc. In the description of the policy in the petition, there was no mention of the provisions above referred to, and the general words "stock of goods" were used, while the policy was for the insurance of a "stock of merchandise," consisting of certain goods therein enumerated. Held, that the variance was not such as to have misled the insurer and the policy was admissible in evidence.—*Pelican Ins. Co. v. Schwartz*, 19 S. W. 374.

980. Where a petition described the property insured and burned as a shingle-roof frame building and foundations, occupied as a private barn, about 400 feet from plaintiff's residence, proof showing the building destroyed to have been constructed partly of logs and partly of oak and pine lumber, covered with a board roof, and situated about 219 feet from plaintiff's residence, constituted a variance.—*Underwriters' Fire Ass'n v. Henry*, 79 S. W. 1072.

981. In an action on a policy insuring property located in a certain building, where there was no pleading alleging mistake in the terms of the contract, it was error to admit evidence showing the destruction of property in a different building than the one described in the policy, and that defendant knew at the time the contract was made that the property was not located in the building described therein, and to submit the questions of mistake and fraud raised by such evidence to the jury.—*Aetna Fire Ins. Co. v. Brannon*, 81 S. W. 560.

982. Where, in an action on a fire policy, plaintiff alleged an agreement between himself and insurer's agent, whereby a requirement of the policy as to an inventory was waived on De-

Where a policy excepts loss resulting from certain specified causes and it is made an exhibit to the petition the insurer cannot object to its introduction in evidence on the ground of variance or surprise.⁹⁷⁸ In a case where a petition failed to set up the coinsurance

December 16, 1899, evidence tending to show such waiver on the 1st of January, 1900, did not amount to a variance.—*Fire Ass'n of Philadelphia v. Masterson*, 83 S. W. 49.

983. Where, in an action on an insurance policy, the only issue was whether the company had waived the right to insist upon a forfeiture, the general denial pleaded by it was sufficient to require the court to consider a stipulation in the policy that the company should not be held to have waived any provision or condition by any requirement, act, or proceeding relating to an examination as to liability and any appraisalment of the property.—*Germania Fire Ins. Co. v. McChristy*, 101 S. W. 822. See 28 Cent. Dig. Insurance, § 1632.

984. Where the defense that the insured was not the sole owner of the building is not pleaded, the trial court may properly ignore it, though established by the evidence, in submitting the issues to the jury.—*American Cent. Ins. Co. v. Murphy*, 61 S. W. 956.

985. A policy offered in evidence showed the number to be 300,012, and contained marginal figures, \$1,600, corresponding to the averments in a petition. A copy of the policy attached to the petition, and referred to as part of it, recited the amount, \$1,600, but appeared to be numbered 300,001, and contained marginal figures \$1,000. Held, that the variance was immaterial.—*Hanover Fire Ins. Co. v. Shrader*, 31 S. W. 1100. 11 Tex. Civ. App. 255.

986. Where a policy of insurance provided that if the interest of the applicant was not the absolute ownership, it must be so represented, the defense that the property insured was community property, and not the wife's separate property, as represented, must be pleaded, and is not covered by a plea that the applicant made false representations as to title.—*German Ins. Co. v. Hunter* (Tex. Civ. App.) 32 S. W. 344.

987. Where plaintiff in an action on a fire policy pleaded compliance with conditions precedent relating to the furnishing of proofs of loss required, and the evidence showed a failure to comply with all such conditions, plaintiff was not entitled to recover on proof of a waiver thereof.—*St. Paul Fire & Marine Ins. Co. v. Hodge*, 70 S. W. 574, rehearing denied 71 S. W. 386.

988. Proof of a waiver of the conditions precedent to an action on a fire policy is not admissible under the general allegation of performance. Re-

hearing, 70 S. W. 574, denied.—*St. Paul Fire & Marine Ins. Co. v. Hodge*, 71 S. W. 386.

989. In a suit on a policy providing that failure to make proofs of loss shall work a forfeiture, defendant must specially set up such provisions in its answer, and allege their breach, if it wishes to avail itself of such defense, though plaintiff has alleged that he furnished said proof, and has made the policy an exhibit.—*Phoenix Assur. Co. of London v. Deavenport* (Tex. Civ. App.) 41 S. W. 399, 16 Tex. Civ. App. 283.

990. Where the insurer seeks to avoid liability by reason of false swearing of the insured, it is not necessary for the insured to plead that the false statement was unintentional, to enable him to introduce evidence to that effect.—*Phoenix Ins. Co. v. Swann*, 41 S. W. 519.

991. The acceptance of proofs of loss without objection to the want of an appraisal by arbitrators, and the fact that the insurer had not required an arbitration to which it was entitled, may be proved under allegations that "satisfactory proofs of loss were furnished," and that such method of determining loss was "waived and dispensed with by defendant, * * * and defendant utterly failed to carry out or insist upon the carrying out of said provision."—*Virginia Fire & Marine Ins. Co. v. Cannon*, 45 S. W. 945, 18 Tex. Civ. App. 588.

992. The defense is confined to the specific matters set up by defendant, where it files an admission under the rules admitting that plaintiff has a good cause of action in the petition, except so far as it may be defeated by the facts of the answer constituting a good defense, which may be established on the trial.—*Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.*, 49 S. W. 271.

646—Presumptions and Burden of Proof. (See 28 Cent. Dig. Insurance, §§ 1555, 1645-1668.)

993. In an action on a policy of fire insurance which exempts the company from liability for fire caused by a hurricane, and provides that, if the insured building shall fall except as a result of a fire, the insurance shall cease, the jury should be instructed that the burden of proof is on the plaintiff to show by the preponderance of evidence that the fire was not caused by hurricane, or by the fall of the building.—*Pelican Fire Ins. Co. v. Troy Co-op Ass'n*, (Tex.) 13 S. W. 980.

clauses and exemption in case of invasion or insurrection and used the words "stock of goods" instead of "stock of merchandise" the variance could not have misled the insurer and the policy was admissible in evidence.⁹⁷⁹

Presumption and Burden of Proof.—In general, the insured need only prove his insurance and his loss under it, and the burden is then on the insurer to establish its defenses as alleged.¹⁰⁰⁴ The insured, to make out a prima facie case need not negative his failure to comply with all the stipulations of the policy.¹⁰⁰³ The burden is on the insurer to prove the insured's breach of conditions,⁹⁹⁸ over-valuation,⁹⁹⁹ that the fire occurred at a time when the policy required the books to be kept in the safe,¹⁰⁰² to show loss by theft under a clause exempting the insurer from liability for such loss,¹⁰⁰¹ to show that the insured caused or procured the destruction of the property.^{995 1000 996} There is no presumption that the owner of insured property causes the property to be burned whenever it is lost by fire—in fact the contrary presumption exists.¹⁰⁰⁵ The in-

994. Where, in an action on a fire insurance policy, defendant, to secure the right to open and close, filed an admission, under a rule of court, that plaintiff was entitled to recover unless defendant established one or more of the defenses affirmatively pleaded by it, one of which was a breach of the contract, the burden was on defendant to establish a substantial breach by plaintiff.—*Phoenix Assur. Co. v. Stenson*, 79 S. W. 866, 34 Tex. Civ. App. 471.

995. Where defendant, in an action on a policy, alleges that the building insured was burned through the agency of the owner, the burden is on him to prove it.—*Alamo Fire Ins. Co. v. Lancaster*, 28 S. W. 126.

996. In an action on a fire policy, the defendant was bound to establish its defense that plaintiff set fire to the house by a preponderance of the evidence, but not beyond a reasonable doubt.—*Mott v. Spring Garden Ins. Co.*, 154 S. W. 658. See 28 Cent. Dig. Insurance, §§ 1555-1645.

997. The fact that the insured filed a waiver of service in foreclosure proceedings was not proof that he knew of the commencement of such proceedings.—*Philadelphia Underwriters' Agency of the Fire Ass'n of Philadelphia v. Neurenberg*, 144 S. W. 357. See 28 Cent. Dig. Insurance, §§ 1555-1645.

998. In an action on a fire policy, the burden was on the insurer to prove plaintiff's breach of conditions.—*Northern Assur. Co. of London v. Applegate*, 145 S. W. 295.

999. The burden of proof of insurer's plea of overvaluation is on it.—*Delaware Ins. Co. of Philadelphia v. Hill*, 127 S. W. 283. See 28 Cent. Dig. Insurance, §§ 1555-1645.

1000. In an action on a policy, the burden was on insurer to prove that plaintiffs, or one of them, caused or procured the destruction of the property.—Id.

1001. Under a fire policy exempting insurer from liability for loss caused by theft, the burden is on insurer to show loss from such cause.—*Milwaukee Mechanics' Ins. Co. v. Frosch*, 130 S. W. 600.

1002. Where an iron-safe clause in an insurance policy required assured to keep his books in a fireproof safe at night and at all times when the house was not open for business, the burden was on the insurance company, claiming a breach of such clause, to show that the fire occurred at a time when the policy required the books to be kept in the safe.—*First Nat. Bank v. Cleland*, 82 S. W. 337, 36 Tex. Civ. App. 478.

1003. In an action on an insurance policy, plaintiff, to make out a prima facie case, need not negative his failure to comply with all the stipulations of the policy.—*Phoenix Assur. Co. of London, England, v. Coffman*, 32 S. W. 810. 10 Tex. Civ. App. 631.

1004. In an action on a policy of fire insurance, plaintiff need only prove his insurance and his loss under it, and the burden is then on the insurer to establish its defenses as alleged.—*Sullivan v. Hartford Fire Ins. Co.*, 34 S. W. 999.

1005. There is no presumption that the owner of insured property burns or causes the property to be burned whenever it is lost by fire. The contrary presumption exists.—*Dwyer v. Continental Ins. Co.*, 57 Tex. 181.

surer is bound to establish that the insured set fire to the building by a preponderance of the evidence, but not beyond a reasonable doubt.⁹⁹⁶ The fact that an insured filed a waiver of service in foreclosure proceedings is not proof that he knew of the commencement of such proceedings.⁹⁹⁷ Under the statute, where the property is a total loss, no showing or proof of the amount of the loss is necessary.¹⁰⁰⁶ Where a policy provides for non-liability for fire caused by a hurricane and that the insurance shall cease if the building shall fall except as a result of a fire, the burden of proof is on the insured to show by a preponderance of the evidence that the fire was not caused by hurricane or by the fall of the building.⁹⁹⁸ In a case where the insurer admitted that the insured was entitled to recover unless the insurer established one or more of the defenses pleaded, one of which was a breach of the contract, the burden was on the insurer to establish a substantial breach by the insured.⁹⁹⁴

Admissibility of Evidence—(1) In General.—Evidence that another insurance company has paid its policy is not admissible.¹⁰³⁴ The question whether the insured had answered truthfully all questions asked him by the agent at the time the policy was written is irrelevant where there was no written contract.¹⁰³⁷ An offer of compromise, referring to a forfeiture by misrepresentations and the uncertainty of litigation as reasons therefor, is not admissible

1006. Under Vernon's Sayles' Ann. Civ. St. 1914, Art. 4874, where the insured premises are a total loss, no showing or proof of the amount, etc., of the loss is necessary.—*St. Paul Fire & Marine Ins. Co. v. Laster* 187 S. W. 969.

648—Admissibility of Evidence. (A)
In General. (See 28 Cent. Dig. Insurance §§ 1556, 1669, 1676, 1683-1706.)

1007. Where plaintiff, suing for the loss of wheat insured by a policy providing that it should be void if the wheat was or should become incumbered by a chattel mortgage, filed an unsworn plea that there was no consideration for a mortgage thereon, because the note which it purported to secure had not been delivered to the mortgagee, to which defendant made no exception, it was not error to allow plaintiff to introduce evidence showing that such note had not been delivered. Judgment (Civ. App. 1899) 54 S. W. 300, affirmed.—*Insurance Co. of North America v. Wicker*, 55 S. W. 740, 93 Tex. 390.

1008. In an action on a policy on furniture, providing that it should be void if the property was mortgaged, unless noticed in the policy, it appeared that, after the policy was issued, insured bought new furniture, on which

she gave a mortgage. She testified that she sent for the agent, showed him the furniture, and told him she wanted an additional \$100 on the furniture besides the \$600 she was carrying; that she told him because she "had bought this new furniture, and wanted to secure the \$100"; and that he advised her not to insure the furniture, and to carry only the \$600. Held admissible to show that the "new furniture" was not intended by the parties to be included with that insured.—*Phoenix Ins. Co. v. Dunn*, 41 S. W. 109.

1009. Where, on a sale of real estate, the vendor assigned an insurance policy to the purchaser, with the consent of the insurance company, evidence of the previous understanding and agreement and course of dealing between the insurance company and the vendor was inadmissible, in a subsequent action by the purchaser on the policy, to show what property was intended to be covered thereby, unless the vendee knew of the same when he took the transfer.—*Connecticut Fire Ins. Co. v. Hilbrant*, 73 S. W. 558.

1010. The question whether an agent of an insurer assented to the insurance of property while in a particular building must be determined from what he said and did in the negotiations, and not from any uncommunicated intentions.—*Aetna Ins. Co. v. Brannon*, 89 S. W. 1057.

under a claim of waiver of a failure to produce an inventory and of a breach of an iron-safe clause.¹⁰¹⁴ (The best evidence that the house burned (criminally) was insured is the policy and where it could not be produced, testimony that it was insured is objectionable as secondary.¹⁰²³) A letter by the insured's attorney to the insurer saying he knows no reason why the policy should not be paid in full is not objectionable as the expression of a legal opinion.¹⁰¹¹

(2) Policy or Other Contract.—The holder of a policy, claiming it under written transfers indorsed thereon, who makes such policy and transfers an exhibit in the petition, may read the same in evidence without proof when the genuineness of the transfers is not denied under oath.¹⁰⁴² A clause attached to a policy and mentioned therein is admissible in evidence.¹⁰⁴⁰ Evidence that an applicant for a policy had not received prior to a loss, any notice of the cancellation of his policy is not admissible.¹⁰⁴¹ Where the insurer claims that a policy has been canceled by mutual consent in a conversation between its agent and the insured, the latter's explanation that he understood the policy was void only during certain foreclosure proceedings is admissible where the conversation was somewhat ambiguous.¹⁰³⁹ The undisclosed intention of the insurer's general agent when the contract was made is not admissible under an issue whether the policy became effective before approval by such agent.¹⁰³⁸

(a) As to Fraud and Misrepresentations.—Conversations which are the basis of renewal policies are admissible on the issue of misrepresentations and concealment, although held years before the issuance of the policy.^{1037a}

(3) As to a Transfer of Policy.—A statement by an insured

^{1011.} In an action on an insurance policy, a letter written by plaintiff's attorney to the defendant company, saying he knows no reason why the policy should not be paid in full, is not objectionable in evidence as the expression of a legal opinion.—*Aetna Ins. Co. v. Fitze*, 78 S. W. 370, 34 Tex. Civ. App. 214.

^{1012.} The letter constituting one of a series of four bearing on the transaction, was not objectionable as irrelevant or immaterial.—*Aetna Ins. Co. v. Fitze*, 78 S. W. 370, 34 Tex. Civ. App. 214.

^{1013.} The agent with whom plaintiff attempted to effect additional insurance being a subagent of defendant acting under another agent at the same place, and there being an agreement between the agent and subagent that such additional insurance, when applied for, should be divided among defendant and two other companies, for which the principal agent was also acting, evidence offered by plaintiff tending to show why one of the other

companies was not given part of the insurance was properly excluded, as the defendants liability was not made to depend on the contract between the agents.—*Blake v. Hamburg-Bremen Fire Ins. Co.* (Tex. Sup.) 2 S. W. 368.

^{1014.} An offer of compromise of an insurance claim, referring to a forfeiture by misrepresentations and another undisclosed defense, and suggesting the uncertainty of litigation as a reason for compromise, is not admissible, under a claim of waiver of a failure to produce an inventory, and a breach of the iron-safe clause.—*Continental Ins. Co. v. Cummings*, 95 S. W. 48. See 28 Cent. Dig. Insurance, §§ 1632-1644.

^{1015.} Testimony that mortgagee, an insurance company, issued a policy and sent a bill for the premium held competent to show agreement by it to attend to the insurance on premises covered by another deed of trust executed at the same time.—*Commonwealth Fire Ins. Co. v. Obenchain*, 151 S. W. 611.

over a telephone to some one at the agent's office that there had been a transfer of a policy and that the agent would agree thereto is not hearsay but is a part of the *res gestae*.¹⁰¹⁸

(4) **What Property Included.**—Where a vendor of real estate assigned the policy to the vendee, with the consent of the insurer, evidence of the previous understanding and course of dealing between the insurer and vendor is not admissible in a subsequent action by the vendee on the policy, to show what property was intended to be covered, unless the vendee knew of the same when he took the transfer.¹⁰⁰⁹ (For evidence tending to show that certain "new furniture" was not intended to be covered with the furniture already insured, see Ann. 1008.)

(5) **As to Additional Insurance.**—Evidence that the insured notified the insurer, before issuance, of his intention to take out other insurance, is inadmissible as varying a written contract, where the latter stipulates against other insurance.¹⁰³¹ Parol evidence to show the execution but not the contents of other policies is admissible.¹⁰²⁰ An admission by the insured that he had obtained other insurance is competent as original evidence.¹⁰²¹ Where the insurer claimed other insurance the admission in evidence of the insured's affidavit appended to his proof of loss to another insurance company is proper.¹⁰²⁵ (For evidence tending to show why certain

1018. Statement by insured, after calling office of insurer's agent on the telephone and informing some one there of a transfer of the policy, that the policy was transferred, and that the agent would agree thereto, held not hearsay, but a part of the *res gestae*.—Northern Assur. Co., Limited, of London v. Morrison, 162 S. W. 411.

1017. Testimony by insured as to the purpose for which a room inside of another was built held admissible being a statement of fact.—Hanover Fire Ins. Co. of New York v. Huff, 175 S. W. 465.

1018. It is not competent to impeach a witness by proving that he has been indicted for a felony or other crime, but the inquiry should be confined to proof of general reputation for truth.—Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co., 167 S. W. 816.

1019. In an action on policy on stock of lumber which insurer claimed to be void for want of inventory required by policy, evidence that before its issuance insurer's agent told insured what inventory should contain, that he followed such instruction, and that his inventory was approved by agent held admissible.—Camden Fire Ins. Co. v. Yarborough, 182 S. W. 66.

1020. Where defendant pleaded avoidance of the policy sued on by breach of a provision against other insurance, parol evidence to show the execution, but not the contents of such other policies, was admissible.—Phil-

adelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Brown, 151 S. W. 899.

1021. An admission by plaintiff that he had obtained other insurance contrary to a provision in the policy sued on was competent as original evidence.—Philadelphia Underwriters Agency of Fire Ass'n of Philadelphia v. Brown, 151 S. W. 899.

1022. Where, in an action on a fire policy, a woman with whom plaintiff was cohabiting has testified for plaintiff, defendant may question her as to her relations with him and as to her reasons for going under an assumed name.—McCarty v. Hartford Fire Ins. Co., 75 S. W. 934.

1023. The best evidence that the house burned was insured is the policy, and, it not appearing that it could not be produced, testimony that it was insured is objectionable as secondary.—Crowder v. State, 177 S. W. 501.

1024. Evidence that other insurance policies require "itemized inventories" is not admissible to prove that the term "inventory," standing without qualification in a policy in suit, meant only a summary of an inventory.—Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co., 48 S. W. 559. 19 Tex. Civ. App. 338.

1025. Insurer pleaded as a defense to an action on a policy that F. claimed to own and had insured the same property in another company, and offered evidence that the property in-

companies were not given part of insurance according to the agreement not being admissible because the insurer's liability did not depend on the agent's contracts, see *Ann.* 1013.)

(6) **Interest or Title of Insured.**—General reputation as to the ownership of property is admissible on the issue of waiver of misrepresentations in relation thereto to prove the knowledge of the agent issuing the policy.^{1043 1044} Where the insurer alleges that the insured did not own the land on which the insured property was situated and that he had falsely stated that he was the owner, a witness may testify that, before he prepared the proofs of loss the insured had told him that he did not own the land.¹⁰⁴⁵ Evidence that an insured telephoned the office of the insurer's agent and told him of the transfer of the property is competent, even though the witness did not know to whom the insured was talking.¹⁰⁴⁶ An answer in another action by one not a party to the action on trial, not verified, and no connection as to parties being shown, is not admissible on behalf of the insurer to prove a transfer of the property insured.¹⁰⁴⁶ Evidence that the insured built a house on land exchanged for another tract, before the deeds had been exchanged

insured by both policies was the same. Held, that the admission in rebuttal of F's affidavit appended to her proof of loss to the other insurance company, was proper.—*Fire Ass'n of Philadelphia v. McHenney*, 54 S. W. 1053.

1026. Where, in an action on a fire policy, a woman with whom plaintiff was cohabiting has testified for plaintiff, the defendant may question him as to his relations with her.—*McCarty v. Hartford Fire Ins. Co.*, 75 S. W. 934.

1027. A deposition which had been quashed was not admissible in evidence, at the instance of the party procuring its suppression, to impeach the testimony of the witness as contained in depositions subsequently taken, where no foundation had been laid by asking the witness whether he had not said or done the things specified in the deposition, and as opportunity afforded him to explain.—*Joy v. Liverpool, London & Globe Ins. Co.*, 74 S. W. 822.

1028. Where, in an action on a fire policy on property, a woman with whom plaintiff was cohabiting, and who owned the property, had stated that the plaintiff was the exclusive owner, it was proper to show that shortly after the fire she told a third person that if the company would not prosecute her for arson she would give up the policy, and that plaintiff had nothing to do with it, as everything belonged to her.—*McCarty v. Hartford Fire Ins. Co.*, 75 S. W. 934.

1029. Where the defendant had introduced portions of a statement made by plaintiff on a certain occasion, the court properly permitted plaintiff to introduce other portions thereof, under

the rule that, when a portion of a conversation is admitted, so much of the remainder as is essential to a proper explanation of the part which has been offered is also admissible.—*Hartford Fire Ins. Co. v. Dorroh*, 133 S. W. 465.

1031. In an action on a policy stipulating against other insurance, evidence that insured notified insurer, before issuance, of intention to take out other insurance, is inadmissible, as varying a written contract.—*Orient Ins. Co. v. Prather*, 62 S. W. 89, 25 Tex. Civ. App. 446.

1032. A policy of insurance on lumber contained a clause that a clear space of 200 feet be maintained between the lumber and any woodworking establishment. Such policy was afterwards canceled, and insurance taken on a planing mill, which was erected within 128 feet of the lumber. When the change in insurance was effected, the manager of the mill stated that he told the agent he was contemplating reinsuring the lumber, and the agent stepped the distance between the lumber and the mill and stated that, as the lumber was then situated the rate would be 2½%, but that with a 200-foot clear space he would give a 1 per cent rate. Afterwards a policy was issued on the lumber at 2½ per cent, containing a 200-foot clear space clause, and was received and retained by assured without reading. Held, that such statement of the manager was inadmissible to contradict the terms of the written contract of insurance.—*Keller v. Liverpool & L. & G. Ins. Co.*, 65 S. W. 695, 27 Tex. Civ. App. 102.

is not inadmissible where the insured received his deed before the trial and the equitable title thereby ripened into a legal one.¹⁰⁴⁷

(7) **As to Incumbrances.**—Evidence of payments on a mortgage, made after the loss occurred and before the trial is admissible under proper pleadings where one of the plaintiffs has no interest in the policy except as mortgagee.¹⁰³³ The testimony that the mortgagee, an insurance company, issued a policy and sent a bill for the premium is competent to show agreement by it to attend to the insurance on premises covered by another deed of trust executed at the same time.¹⁰¹⁵ Where an insured filed an unsworn plea that there was no consideration for a mortgage on certain personal property because the note it purported to secure had not been delivered, to which the insurer made no exception, the insured may introduce evidence showing that such note had not been delivered.¹⁰⁰⁷

1033. Where one of the plaintiffs had no interest in the insurance policy sued on, except as mortgagee, evidence of payments on the mortgage, made after the loss occurred, and before the trial, was admissible under proper pleadings.—*Alamo Fire Ins. Co. v. Davis*, 60 S. W. 802.

1034. Evidence that another insurance company had paid its policy held inadmissible.—*Glen Falls Ins. Co. of Glen Falls, N. Y., v. Melott*, 174 S. W. 700.

1035. A statement by plaintiff's agent, not having been made in the presence of plaintiff, was hearsay as to defendant.—*Camden Fire Ins. Ass'n of Camden, N. J., v. Puett*, 164 S. W. 418.

1036. In an action on a fire policy, evidence of a telephone request upon the agent of the insurer to change the location of the policy held admissible.—*Delaware Ins. Co. v. Wallace*, 160 S. W. 1130.

1036a. Where the defense was that the loss on a tornado policy was occasioned by hail and not by wind, evidence of the surrounding circumstances held insufficient to render admissible testimony of the weather observer that six months prior to the storm causing the loss there had been a windstorm of equal velocity.—*Fidelity Phenix Fire Ins. Co. of New York v. Abilene Dry Goods Co.*, 159 S. W. 172.

1037. Where there was no written application for a fire policy, a question whether insured answered truthfully all questions asked him by the insurer's local agent at the time the policy was written was irrelevant.—*Mecca Fire Ins. Co. of Waco v. Moore*, 128 S. W. 441.

1037a. In action on indemnity policy conversations years before the date of the policy which were the basis of the renewal policies, held admissible on the issue of misrepresentation and con-

cealment.—*Liverpool & London & Globe Ins. Co. v. Lester*, 176 S. W. 602.

651—(B) Policy or Other Contract.
(See 28 Cent. Dig. Insurance, §§ 1673-1675.)

1038. Under an issue whether a fire insurance policy was intended to become effective before approval by the insurer's general agents, the undisclosed intention of the insurer's general agent when making the contract is inadmissible.—*Fire Ass'n of Philadelphia v. Powell*, 188 S. W. 47.

1039. Where defendant fire insurance company claimed that a policy had been canceled by mutual consent in a conversation between its agent and assured, the assured's explanation that he understood the policy was void only during certain foreclosure proceedings is admissible where the conversation was somewhat ambiguous.—*Glen Falls Ins. Co. v. Walker*, 187 S. W. 1036.

1040. In an action on a policy, a clause attached thereto and mentioned therein was improperly refused admission in evidence.—*Hartford Fire Ins. Co. v. Post*, 62 S. W. 140, 25 Tex. Civ. App. 428.

1041. Evidence that an applicant for a fire policy had not received, prior to a loss, any notice of the cancellation of his policy held inadmissible.—*Jefferson Fire Ins. Co. of Philadelphia v. Greenwood*, 141 S. W. 319. See 28 Cent. Dig. Insurance, §§ 1673-1675.

1042. Holder of policy of insurance, claiming it under written transfer indorsed thereon and who sues on same, making the policy and transfers an exhibit in the petition, may read the same in evidence without proof when the defendant has not denied the genuineness of the transfers under oath.—*Crescent Ins. Co. v. Camp et al.*, 64 Tex. 521.

(8) **As to Inventories.**—Evidence that other policies require itemized inventories is not admissible to prove that the term inventory standing without qualification in a policy, meant only a summary of an inventory.¹⁰²⁴ Evidence that the insured followed the agent's instruction in the manner of making up his inventory is admissible.¹⁰¹⁹

(9) **Miscellaneous.**—The question whether an agent consented to the insurance of property while in a particular building is determined from what he said and did in the negotiations and not from any uncommunicated intentions.¹⁰¹⁰ Evidence of a telephone request upon the agent of an insurer to change the location of a policy is admissible.¹⁰³⁶ An insurer may question the plaintiff as to his relations with a woman with whom he had been cohabiting and who had testified for him.^{1022 1026} Where such a woman, who owned the insured property, had stated that the plaintiff was the exclusive owner, it was proper to show that shortly after the fire she told a third person that if the company would not prosecute her for arson she would give up the policy, and that the plaintiff had nothing to do with it as everything belonged to her.¹⁰²⁸ (For statement of a manager of a mill inadmissible to contradict the terms of a written contract of insurance as to a clear-space clause,

653—(C) **Interest or Title of Insured.**
(See 28 Cent. Dig. Insurance, §§1678, 1679.)

1043. General reputation as to the ownership of property is admissible on the issue of waiver of misrepresentations in relation thereto, to prove the knowledge of the agent issuing the policy.—*Continental Ins. Co. v. Cummings*, 95 S. W. 48.

1044. Evidence of the general reputation in the community that certain property was partnership property is admissible on the issue as to the knowledge of an insurance agent of that fact at the time of issuing a policy to one partner. (Civ. App. 1903) *Continental Fire Ins. Co. v. Cummings*, 78 S. W. 378, judgment reversed *Continental Ins. Co. v. same* (1904), 81 S. W. 705, 98 Tex. 115.

1045. In action on assigned policy, evidence that insured telephoned office of insurer's agent and told some person there of the transfer held competent, though the witness did not know to whom insured was talking.—*Northern Assur. Co., Limited, of London v. Morrison*, 162 S. W. 411.

1046. In an action on a policy of insurance, the company offered in evidence an answer filed in another action by one not a party to the action on trial, and not verified by such a party, or one shown to be acting in the matter as the agent of, or answering on information furnished

by, such party. Held, that the answer is not admissible to prove a transfer of the property insured, or that it had been used for purposes of prostitution.—*London & L. Fire Ins. Co. v. Schwulst*, 46 S. W. 89.

1047. Plaintiff testified, on an issue of title, that he acquired the land on which the house was built from G., by exchanging for it a lot, and that immediately after the exchange, and before the deeds were executed, each went into possession of the property received by him in such exchange, and improved the same, plaintiff constructing the house insured. Held, that such evidence was not inadmissible because G. made plaintiff a deed before the trial, and the equitable title thereby ripened into a legal one.—*Fire Ass'n of Philadelphia v. Jones* (Tex. Civ. App.) 40 S. W. 44.

1048. Where insurer alleged that assured did not own the land on which the granary insured by it was erected, and that he had wilfully and falsely sworn that he was the owner of such granary, it was not error to allow a witness to testify that, before he prepared the proofs of the loss, assured had told him that he did not own the land, since such testimony tended to show that assured's statements were not wilful or false, though he was not the owner of the granary as a matter of law. Judgment (Civ. App. 1899) 54 S. W. 300, affirmed.—*Insurance Co. of North America v. Wicker*, 55 S. W. 740, 93 Tex. 390.

see Ann. 1032.) (For evidence held insufficient in an action on a tornado policy to render admissible testimony of a weather observer, see Ann. 1036a.)

(10) **Loss or Damage to Property, and Cause Thereof—(a) Arson.**—On the issue of arson involving as it does moral turpitude and criminal intent, every circumstance tending to prove the guilt of the party charged is admissible in evidence.¹⁰⁶³ Evidence which would be admissible against an insured is admissible against his assignee in an action on the policy.¹⁰⁶⁵ Every circumstance which throws light on the motives of the insured is admissible where the insurer charges arson, as by illustrating motive, over-insurance on property, proof of loss in excess of that actually sustained, assignment of policy in an unusual way or for an improper purpose, disposition of goods just before burning.¹⁰⁴⁹ Declarations of by-standers who have no interest in the matter are not admissible.¹⁰⁴⁹ Evidence that the insured on his trial for setting the fire did not attempt to explain its origin is not admissible in a suit on the policy.¹⁰⁵⁴ The existence of a mortgage is admissible to show motive.¹⁰⁵⁷ That the insured was at the time of loss in the last stages of consumption is admissible.¹⁰⁵² That the insured, by his strange conduct, impressed the community with the belief that he would set fire to the town is not admissible.¹⁰⁵³ Neither is the evidence

658—(D) **Loss or Damage to Property, and Cause Thereof. (See 28 Cent. Dig. Insurance, §§ 1689, 1690, 1694.)**

1049. Where defendant company charges arson, every circumstance which throws light on the motives of insured is admissible, as by illustrating motive, over-insurance on property, proof of loss in excess of that actually sustained, assignment of policy in an unusual way or for an improper purpose, disposition of goods just before burning, etc. Declarations of by-standers who had no interest in the matter, are not admissible.—*Dwyer v. Continental Ins. Co.*, 63 Tex. 354.

1050. Where, in an action on a fire policy, the defense was that insured had set the fire, it was not error to admit evidence as to fires caused by an arc lamp in the insured premises previous to the destruction thereof.—*Phoenix Assur. Co. v. Stenson*, 63 S. W. 542.

1051. Testimony that the insurer had employed detectives and prosecuted the insured criminally for arson, was admissible, inasmuch as, his case against the insurer depending upon his own testimony, the fact that the insurance company sought to fasten on him the crime would justify a theory that their purpose might have been to impair his credit as a witness.—*Phoenix Assur. Co. v. Stenson*, 63 S. W. 542.

1052. Where, in an action on a policy, it was charged that the insured had set fire to his property, it may

be shown that the insured was at the time in the last stages of consumption.—*Orient Ins. Co. v. Moffatt* (Tex. Civ. App.) 39 S. W. 1013.

1053. Evidence that the insured, by his strange conduct, impressed the community with the belief that he would set fire to the town, was inadmissible.—*Phoenix Ins. Co. v. Padgett*, 42 S. W. 800.

1054. Where the defense is that plaintiff set fire to the property, evidence that on his trial for setting such fire he did not attempt to explain its origin is inadmissible.—*Orient Ins. Co. v. Moffatt*, 39 S. W. 1013.

1055. In an action on a fire insurance policy, where defendant claims that plaintiff set fire to the insured premises, a witness may testify that plaintiff asked him to set fire to a building in which plaintiff had no interest; another witness testifying that plaintiff first asked him to set fire to such building, and then asked him to set fire to the insured premises.—*Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.* (Tex. Civ. App.) 28 S. W. 1027.

1056. A prohibition in a fire insurance policy of the use of gasoline, any custom "of trade or manufacture" to the contrary notwithstanding, does not preclude proof of a custom of using gasoline for domestic purposes to explain or avoid the prohibition.—*American Cent. Ins. Co. v. Green*, 41 S. W. 74, 16 Tex. Civ. App. 531.

that other sufferers by the fire in the same block were not adequately insured admissible.¹⁰⁵⁹ Evidence that a certain person feared the insured and appealed to the officers for protection, and believed he would burn the block is inadmissible.¹⁰⁶⁰ That the insurer had the insured discharged from various positions of employment is irrelevant.¹⁰⁶² The transfer of a policy after loss is not evidence that the fire was started by the insured.¹⁰⁶¹ Evidence that the insured objected to the local authorities investigating the fire is admissible.¹⁰⁶⁸ Evidence of the value of the lot alone is admissible to show that the insured considered the house of little value—where such insured had testified to the value of the whole property.¹⁰⁶⁹ Where the insurer claimed that the insured had hired a person to burn the house, evidence that no one had been indicted for the offense is not admissible.¹⁰⁵⁸ Testimony that the insurer had employed detectives and prosecuted the insured criminally for arson, is admissible.¹⁰⁵¹ A witness may testify that the insured asked him to set fire to a building in which such insured had no interest; another witness testifying that the insured first asked him to set fire to such building and then asked him to set fire to the insured premises.¹⁰⁵⁵ Letters written by an assured to his co-conspirator, after he knew the crime was known showing an anxiety that the conspirator should secretly leave his employment and come to the home of the insured and offering him a position, are admissible.¹⁰⁶⁴ Where the defense is that the insured set the fire, evidence

1057. Where the evidence tended to show that loss under a fire policy was occasioned by incendiarism, evidence as to the existence of a mortgage on the property was admissible as tending to show a motive.—*Philadelphia Underwriters Agency of Fire Ass'n of Philadelphia v. Brown*, 151 S. W. 899. See 28 Cent. Dig. Insurance, § 1678.

1058. In an action on a policy, where defendant claimed that plaintiff had hired a person to burn the insured house, evidence that no one had been indicted for burning the house was not admissible.—*Liverpool & L. & G. Ins. Co. v. Joy*, 62 S. W. 546, 26 Tex. Civ. App. 613. Rehearing denied *London & L. & G. Ins. Co. v. Same*, 64 S. W. 786.

1059. Evidence that other sufferers by the fire in the same block were not adequately insured was inadmissible.—*Phoenix Ins. Co. v. Padgett*, 42 S. W. 800.

1060. Evidence that a certain person feared the insured, and appealed to the officers for protection, and believed he would burn the block, was inadmissible.—*Phoenix Ins. Co. v. Padgett*, 42 S. W. 800.

1061. The transfer of a fire policy after loss is not evidence that the fire was started by the insured.—*Northern Assur. Co. v. Samuels* (Tex. Civ. App.) 33 S. W. 239, 11 Tex. Civ. App. 417.

1062. Where, in an action on a fire policy, the defense was that insured set the fire, evidence that the insurer had had insured discharged from various positions of employment was irrelevant.—*Phoenix Assur. Co. v. Stenson*, 63 S. W. 542.

1063. On the issue of arson in an action on a fire policy, involving as it does moral turpitude and criminal intent, every circumstance tending to prove the guilt of the party charged is admissible in evidence.—*Joy v. Liverpool, London & Globe Ins. Co.*, 74 S. W. 822.

1064. In an action on a fire policy, defended on the ground that assured had procured the burning of the property, there was evidence sufficient to establish a conspiracy between assured and two others to commit the offense. Assured denied such conspiracy, and burning in pursuance thereof. Held, that letters written by assured to his co-conspirator, after he knew that the crime was known, showing an anxiety on the part of the insured that the conspirator should secretly leave his employment and go to the home of the assured, and offering him a position, were admissible.—*Joy v. Liverpool, London & Globe Ins. Co.*, 74 S. W. 822.

as to fires caused by an arc lamp in the insured premises previous to the destruction thereof is admissible.¹⁰⁶⁵

(b) **As to Use of Gasoline.**—Proof of a custom of using gasoline for domestic purposes is admissible to explain or avoid a prohibition of the use in a policy.¹⁰⁸⁶

(c) **Condition of Insured Property.**—Evidence of the condition of insured property several months after the loss is not admissible without showing that the condition was the same then as immediately after the fire.¹⁰⁶⁶ Proof of the cost of repolishing a piano and repairing its internal mechanism is improperly received where there is no showing of that sort of damage.¹⁰⁶⁷

(11) **Valuation of Property.**—Evidence of the value of property destroyed at the time it was insured and before the fire, with proof that the actual value had undergone no change from the date of the policy until loss, is admissible to show its actual value at the time of loss and to rebut a claim of fraudulent over-valuation.¹⁰⁷⁰ An insurer may show that the property insured is fraudulently over-valued in an action on a valued policy.¹⁰⁷¹ Ordinarily market value is the correct measure of the liability of the insurer and it is not permissible to prove extrinsic value without first showing that the property had no market value.¹⁰⁷² The intrinsic value of personal property can be shown where it has no market value.¹⁰⁷⁴ Evidence of the value of the goods destroyed is admis-

^{1065.} Evidence which would be admissible against the assured in an action by him on his fire policy is admissible in an action by his assignee. —*Joy v. Liverpool, London & Globe Ins. Co.*, 74 S. W. 322.

^{1066.} Testimony as to the condition of the insured property more than 8½ months after the fire is inadmissible, in an action on a fire policy, without a showing that the condition was the same then as immediately after the fire. —*Occident Fire Ins. Co. v. Linn*, 179 S. W. 523.

^{1067.} Where a piano was insured against fire, evidence in an action on the policy as to the cost of repolishing the piano which was damaged and repairing its internal mechanism was improperly received, where there was no showing of that sort of damage.—*Id.*

^{1068.} In an action on a fire policy, evidence that plaintiff objected to the local authorities investigating the fire was admissible on the issue whether the fire had been started by him.—*Mott v. Spring Garden Ins. Co.*, 154 S. W. 658. See 28 Cent. Dig. Insurance, §§ 1689-1694.

^{1069.} Where plaintiff testified to the value of the property, including the house on which he sought to recover insurance, evidence of the value of the lot alone was properly admitted as

tending to show that plaintiff considered the house of little value, and thus show a motive for burning it.—*Id.*

^{660—(E) Valuation of Property.} (See 28 Cent. Dig. Insurance, § 1695.)

^{1070.} Evidence as to the value of the property destroyed at the time it was insured and before the fire, in connection with evidence that the actual value had undergone no change from the date of the policy to the time the property was destroyed, was admissible to show its actual value at the time of loss and to rebut a claim of fraudulent overvaluation.—*Delaware Ins. Co. of Philadelphia v. Hill*, 127 S. W. 283. See 28 Cent. Dig. Insurance, § 1695.

^{1071.} In an action on a valued policy of fire insurance, evidence is admissible on the part of the insurer to show that the property insured was fraudulently overvalued.—*Sullivan v. Hartford Fire Ins. Co.*, 34 S. W. 999.

^{1072.} Ordinarily the market value of the property destroyed by fire is the correct measure of the liability of insurer thereof, and it is not permissible to prove extrinsic value without first showing that the property had no market value.—*State Mut. Fire Ins. Co. v. Cathey*, 153 S. W. 935. See 28 Cent. Dig. Insurance, § 1695.

sible where appraisement is waived by the insurer.¹⁰⁷³ Under a provision of the policy that the loss shall be estimated according to the value of the property at the time of the fire, evidence as to the value of the property, fixed by the agent when the policy was issued and as to the value as stated in the policy, is inadmissible, in the absence of evidence that such values and the cash value at the date of the sale were the same.¹⁰⁷⁵

(12) Amount of Loss.—An invoice taken by a sheriff under an attachment process after a fire is admissible to show the amount of goods on hand after a fire and their value.¹⁰⁷⁶ An adjustment is evidence of the value of the goods destroyed.¹⁰⁷⁸ A witness may testify that a carbon copy of the list attached to the proof of loss is a correct list of the property in the building burned.¹⁰⁷⁹ It is error to admit in evidence a list of the insured property attached to the petition.¹⁰⁸¹ A trial balance taken by the bookkeeper shortly before the fire is admissible to show the date from which the proofs of loss were made.¹⁰⁸⁶ The inventory and books required under a policy may be looked to in determining the amount of the loss.¹⁰⁸²

1073. Where appraisement is waived by an insurance company, evidence of the value of the goods destroyed is admissible in an action for a loss under the policy.—*Springfield Fire & Marine Ins. Co. v. Cannon*, 46 S. W. 375.

1074. Where personal property covered by a fire policy had no market value at the time of a loss, the intrinsic value could be shown.—*State Mut. Fire Ins. Co. of Texas v. Cathey*, 172 S. W. 187.

1075. Where a policy provides that the loss shall be estimated according to the value of the property at the time of the fire, evidence as to the value of the property, fixed by the agent at the time of the issuance of the policy, and as to the value as stated in the policy, was inadmissible, in the absence of evidence that such values and the cash value at the date of the sale were the same.—*German Ins. Co. v. Everett*, 36 S. W. 125.

681—(F) Amount of Loss. (See 28 Cent. Dig. Insurance, § 1696.)

1076. An invoice taken by a sheriff under an attachment process after a fire is admissible to show the amount of goods on hand after the fire, and their value.—*Orient Ins. Co. v. Moffat*, 39 S. W. 1013.

1077. An inventory taken several months after the issuance of a policy, being shown to be correct, in connection with other evidence, was admissible to show the property on hand at the time of the fire, especially where bad faith was charged against assured, in that he fraudulently presented a fictitious inventory as to items and value as a basis of settlement after
13—Ins.

loss.—*Delaware Ins. Co. of Philadelphia v. Hill*, 127 S. W. 283. See 28 Cent. Dig. Insurance, § 1696.

1078. In an action on a fire policy after an adjustment, the adjustment was evidence of the value of the goods destroyed.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 760. See 28 Cent. Dig. Insurance, § 1696.

1079. A witness testifying as to property destroyed by fire may testify that a carbon copy of the list attached to the proof of loss was a correct list of the property in the building burned.—*Hanover Fire Ins. Co. of New York v. Huff*, 175 S. W. 465.

1080. Rev. St. 1895, Art. 3089 (2971), providing that a policy, in case of a total loss by fire, shall be considered a liquidated demand for the full amount except in case of personal property, does not affect the character of evidence admissible on the issue as to whether a loss was total, but merely affects the rights of the parties in case of a total loss.—*Royal Ins. Co. v. McIntyre* (Sup.) 37 S. W. 1068, 35 L. R. A. 672.

1081. In an action on a fire policy, it was error to admit in evidence a list of the insured property attached to the petition.—*Mecca Fire Ins. Co. of Waco v. Stricker*, 136 S. W. 599. See 28 Cent. Dig. Insurance, §§ 1689, 1690, 1694.

1082. Where a policy provides that the insured will make a complete inventory once a year, and will keep a set of books which will present a complete record of all purchases and sales, the inventory, as well as the books, may be looked to in determining the amount of the loss.—*Phoenix Ins. Co. v. Padgett*, 42 S. W. 800.

An inventory taken several months after the issuance of the policy, being shown to be correct, in connection with other evidence, is admissible to show the property on hand at the time of loss.¹⁰⁷⁷ An insurer who has not required an appraisal and award cannot complain of the admission of other evidence to establish the amount of loss.¹⁰⁸⁴ The statutory provision that a policy shall be a liquidated demand in case of a total loss does not affect the character of the evidence admissible on the issue as to whether a loss was total, but merely affects the rights of the parties in case of a total loss.¹⁰⁸⁰ On the question of whether a loss is total or partial, it is error to exclude evidence of the insurer to show the cost of restoring the building burned and that by replacing the damaged portions the building would be as good as new.¹⁰⁸⁵ Evidence of drunkenness and idleness on the part of the insured after the fire is inadmissible to show that he misrepresented the amount of goods saved from the fire.¹⁰⁸³

(13) Notice and Proof and Adjustment of Loss.—Where proofs of loss show additional insurance in a given amount but are defective in that they do not contain full information about same, and the record does not show that such failure injured the insurer, or that it objected to the proofs, and the objection to their admission is general, they may be admitted in evidence.¹⁰⁸⁹ It is error to admit evidence that an adjuster did not notify the insured's attorney before investigating a loss where there is no proof of a custom to so notify the insured after a fire and the policy does not require it.¹⁰⁸⁷ The admission of the power of attorney of the insured's agent, who made proof of loss, if erroneous, is harmless.¹⁰⁸⁸

1083. In an action on a fire insurance policy, evidence of drunkenness and idleness on the part of insured after the fire is inadmissible to show that he misrepresented the amount of goods saved from the fire.—*Phoenix Ins. Co. v. Padgett*, 42 S. W. 800.

1084. An insurer who has not required an appraisal and award on a disputed loss, under a policy which provided therefor, cannot complain of the admission of evidence other than an award to establish the amount of loss.—*Virginia Fire & Marine Ins. Co. v. Cannon*, 45 S. W. 945, 18 Tex. Civ. App. 588.

1085. On the question whether the loss on a building by fire is total or partial, it is error to exclude evidence offered by the insurance company to show the cost of restoring the building, that about 90 per cent. of the material still in the house was uninjured, that only about 20 per cent. of the building had been destroyed, and that by replacing the damaged portions the building would be as good as new. 34 S. W. 669 (Civ. App. 1896) reversed.—*Royal Ins Co. v. Mc-*

Intyre, 37 S. W. 1068, 35 L. R. A. 672.

1086. A trial balance taken by the bookkeeper of insured shortly before the fire is admissible to show the data on which insured made up his proofs of loss.—*Orient Ins. Co. v. Moffat* (Tex. Civ. App.) 39 S. W. 1013.

662—(G) Notice and Proof and Adjustment of Loss. (See 28 Cent. Dig. Insurance, §§ 1697, 1698, 1700-1705.)

1087. Where, in an action on a fire policy, there was no proof of a custom by the company's adjuster to notify insured before examining the property after the fire, and the policy did not require such notice, it was error to admit evidence that the adjuster did not notify plaintiff's attorney before investigating the loss.—(Civ. App.) *Hartford Fire Ins Co. v. Becton*, 124 S. W. 474, writ of error denied 125 S. W. 883. See 28 Cent. Dig. Insurance, §§ 1697, 1698, 1700-1706.

1088. The admission of the power of attorney of insured's agent, who

(14) **Persons Entitled to Proceeds.**—Where the plaintiff claims that the insured took out a policy under an agreement to keep his stock insured, with a loss payable clause to plaintiff to secure his debt and that after the loss the insured recognized his right to the proceeds and directed him to collect the policy, it is proper to admit evidence that shortly after the fire insured and plaintiff discussed the loss and that the former recognized it as payable to plaintiff and directed him to collect the amount, such evidence tending to prove an oral assignment after loss.¹⁰⁹⁰

(15) **Estoppel or Waiver.**—It is admissible to show that agents are responsible for an omission or improper statement in an application, made warranties in the policy, when such warranties are relied on as defenses and to show that the insured is not responsible for the mistakes, but relied on the agent to prepare the application, and did not know of the mistake or omission, and that the agent knew the facts as they existed, thus creating an estoppel.¹⁰⁹⁴ Where the insurer claims that local agents had no authority to write certain risks but were required to submit them to the general agents, evidence that previously this had been done but that such general agents had returned the applications with instructions to issue the policies themselves and that afterwards such local agents had written such risks and daily reported them to the general agents, is admissible to show the local agent's authority.¹⁰⁹¹ In a case where the plaintiff relied on an agreement on the part of the agent to the effect that certain invoices would be accepted by

made proof of loss, if erroneous, held harmless.—*Hanover Fire Ins. Co. of New York v. Huff*, 175 S. W. 465.

1089. Where proofs of loss show an additional insurance in a given amount, but are defective, in that they do not contain a schedule of such insurance, with name of company, date and expiration of policy, all indorsements thereon, and assignments thereof, and the record does not show that such failure injured the company, or that it objected to the proofs, and the objection to their admission is general, they may be admitted in evidence.—*London & L. Fire Ins. Co. v. Schwulst*, 46 S. W. 89.

663—(H) Persons Entitled to Proceeds.

1090. In an action on a fire policy, plaintiff claimed that insured "took out the policy under an agreement to keep his stock insured, with clauses in the policy making the loss payable to plaintiff to secure insured's debt to him, and that after the loss insured recognized plaintiff's right to the proceeds and directed him to collect the policy. Held, that it was proper to admit evidence that shortly after the fire insured and plaintiff

discussed the loss, and that insured recognized it as payable to plaintiff, and directed him to collect the amount, as such evidence tended to prove an oral assignment after loss.—(Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied 96 S. W. 760.

664—(I) Estoppel or Waiver. (See 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.)

1091. Where, in an action on a policy on certain gin property, written by defendant's local agents, defendant claimed that the local agents had no authority to write such risks, but were required to submit them to defendant's general agents, evidence that on a previous occasion the local agents had forwarded an application for a gin risk to the general agents, which was returned with instructions to issue the policy themselves, and that thereafter, shortly before and after writing the policy in question, such local agents wrote gin risks and daily reported the same to the general agents, was admissible to show the local agents' authority.—*St. Paul Fire & Marine Ins. Co. v. Stogner*, 98 S. W. 218. See 28 Cent. Dig. Insurance, §§ 1687-1688.

the insurer in lieu of an inventory required under the policy, it is not error to refuse to admit testimony to prove a limitation on the authority of the agent precluding him from making any valid waiver of such character, in the absence of any showing that the insured had knowledge of such limitation.¹⁰⁹² It is proper to show that after the issuance of a policy and before the loss the insurer knew the true state of the title to the insured property, in an action defended on the ground of misrepresentation as to such title.¹⁰⁹² An opinion by the insurer's employee in charge that property was a co-insurance risk is material as showing waiver of written notice as to additional insurance.^{1094a}

1092. In an action on an insurance policy, defended on the ground of misrepresentation as to title to the property, it is proper to show that after the issuance of the policy, and before the fire, the company knew the true state of the title.—(Civ. App. 1903) *Continental Fire Ins. Co. v. Cummings*, 78 S. W. 378, judgment reversed *Continental Ins. Co. v. Same* (1904) 81 S. W. 705, 98 Tex. 115.

1093. In an action on a fire policy plaintiff relied on an agreement on the part of insurer's agent who wrote the policy to the effect that certain invoices would be accepted by the company in lieu of an inventory of the insured stock required by the policy. Held, that there was no error in refusing to admit the testimony of a witness to prove a limitation on the authority of the agent precluding him from making any valid waiver of such character, in the absence of any showing that insured had any knowledge of such limitation.—*Fire Ass'n of Philadelphia v. Masterson*, 83 S. W. 49.

1094. It is admissible to show that agents are responsible for an omission or improper statement of matters in application, made warranties in the policy, when such warranties are relied on to defeat an action on the policy and to show that insured is in no way responsible for the mistake but relied on agent to prepare application and policy and did not know of the mistake or omission and that agent knew the facts as they existed when the policy was issued and so is estopped from setting up the breach of the warranty as a defense. *Texas Banking and Ins. Co. v. Stone*, 49 Tex. 4.

1094a. In action on fire insurance policy, defended on ground of concurrent insurance not indorsed on the policy, as required thereby, evidence as to the opinion given by insurer's employee in charge that property was a co-insurance risk was material as showing employee's waiver of written notice as to additional insurance.—*Mechanics' & Traders' Ins. Co. v. Dalton*, 189 S. W. 771.

665—Weight and Sufficiency of Evidence. (See 28 Cent. Dig. Insurance §§ 1555, 1707-1728.)

1095.—In an action on a fire policy after the adjustment, the adjustment was prima facie proof of the amount due under the policy. (Civ. App.) *German Ins. Co. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, rehearing denied. 96 S. W. 760. See 28 Cent. Dig. Insurance, §§ 1707-1728.

1096. Under Rev. St. 1895, Art. 3089, providing that a fire insurance policy, on total loss, shall be considered a liquidated demand for the full amount of the policy, but that the statute shall not apply to personality where the petition alleged and the evidence showed that a building was totally destroyed, and that it was attached to the soil, there was a sufficient prima facie showing that the property was realty.—*Co-operative Ins. Ass'n v. Hubbs*, 115 S. W. 670. See 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.

1097. Evidence held to sustain a finding that statements as to threats to burn a sanitarium which was insured had not been communicated to the insured when he applied for the policy.—*Washington Fire Ins. Co. v. Cobb*, 163 S. W. 608. 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.

1098. In an action on a policy insuring against the loss of rents on property for the period reasonably necessary to restore the property, evidence held to sustain a finding that the time consumed was reasonably necessary to restore the building.—*Hartford Fire Ins. Co. v. Pires*, 165 S. W. 555. 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.

1099. In an action upon an automobile insurance policy, evidence held to warrant the jury in finding that misrepresentations as to the cost and length of service of the automobile were not material to the risk.—*St. Paul Fire & Marine Ins. Co. v. Huff*, 172 S. W. 755.

1100. Evidence in an action on a policy of fire insurance, providing that a change in the interest, title, or possession of the subject of insur-

Weight and Sufficiency of Evidence—(1) As to the Policy.—A judgment for the insured cannot be sustained where the policy sued on is not offered in evidence or proof of its contents.¹¹⁰³ In an action to reform a policy, the evidence must be clear and convincing to overcome the presumption that the policy embodies the real intention of the parties.^{1125 1124} (For evidence sustaining a verdict that a policy was intended to become effective without waiting for its approval by the general agents, see Ann. 1119. For evidence showing delivery of policy, see Ann. 1118. For insufficient evidence to warrant a finding that the insurer issued a policy without notice that the broker was insured's agent, see Ann. 1107, 1106. For evidence showing that the minds of the parties had not met on cancellation, see Ann. 1104. For evidence of mailing letter by assignee to insurer's agent telling him of assignment, sufficient to justify admission in evidence of copy of letter, see Ann. 1105.)

ance should avoid the policy, held to show that the insured had made a conditional sale of the premises.—*Fire Ass'n of Philadelphia v. Perry*, 185 S. W. 374.

1101. Evidence held to show a waiver by defendant's general agent of a private garage warranty in a policy insuring plaintiff's automobile.—*Commercial Union Assur. Co. of London v. Hill*, 167 S. W. 1095.

1102. In an action on a fire policy, evidence held to show that the condition that the policy should be void if the building should be vacant or unoccupied for ten days was not broken.—*Home Ins. Co. v. Peterman*, 165 S. W. 103. See 28 Cent. Dig. Insurance, §§ 1555-1707.

1103. In an action on a fire insurance policy, where the policy was not offered in evidence, and there was no proof of its contents, a judgment for plaintiff could not be sustained.—*Fidelity Phenix Fire Ins. Co. v. Sadau*, 159 S. W. 137. See 28 Cent. Dig. Insurance, §§ 1555-1707.

1104. In an action on an insurance policy, finding of the court that the minds of the parties had not met on cancellation held supported by the evidence.—*National Union Fire Ins. Co. v. Akin*, 160 S. W. 669. See 28 Cent. Dig. Insurance, § 1555.

1105. In an action on an assigned insurance policy, evidence as to the mailing of a letter by the assignee to the insurer's agent, telling him of the assignment held sufficient to justify the admission in evidence of a copy of the letter.—*Northern Assur. Co., Limited, of London v. Morrison*, 162 S. W. 411.

1106. In an action on a fire insurance policy, evidence held sufficient to warrant a finding that the insurer was bound by an agreement its agent made with an insurance broker acting for plaintiff.—*Hanover Fire Ins. Co. v.*

Turner, 147 S. W. 625. See 28 Cent. Dig. Insurance, § 1555.

1107. In an action on a fire insurance policy issued by an insurance broker with the assistance of a special agent of the insurer, evidence held insufficient to warrant a finding that the insurer issued the policy without notice that the broker was acting as agent for the insured.—*Id.*

1108. In an action on a fire policy, evidence held not to show that insured, on procuring permission to move a building, secured a waiver of a condition avoiding the policy if the premises remained vacant for over 10 days.—*Fireman's Fund Ins. Co. v. Lyon*, 171 S. W. 801.

1109. Evidence in an action on an insurance policy held to support a finding that the company waived the production of insured's books and inventories as required by the iron-safe clause.—(*Civ. App.* 1903) *Continental Fire Ins. Co. v. Cummings*, 78 S. W. 378, judgment reversed *Continental Ins. Co. v. Same* (1904) 81 S. W. 705, 98 Tex. 115.

1110. Evidence reviewed, and held insufficient to show that an insurance agent, in issuing a policy to plaintiff, had knowledge at that time that the property insured belonged to a firm of which plaintiff was a member, and not to plaintiff, to whom the policy was issued, so as to estop the insurer from enforcing a provision requiring plaintiff to state his interest in the policy, if other than sole and unconditional ownership.—*Virginia Fire & Marine Ins. Co. v. Cummings*, 78 S. W. 716.

1111. In an action on a fire policy, a book introduced in evidence after destruction of most of assured's books by fire, held to show a substantial compliance with the provision in the policy that insured should keep books.—*Fire Ass'n of Philadelphia v. Master-son*, 83 S. W. 49.

(2) **As to Additional Insurance.**—(For evidence showing that the insurer was advised by the agent of the full amount of concurrent insurance carried, which exceeded that permitted by the policy, see Ann. 1131. For evidence held insufficient to show intermingling of goods so as to avoid a policy in case of other insurance, see Ann. 1128. For facts showing that insured had contracted no additional insurance, see Ann. 1127.) In a case where the insured made contradictory statements in two separate trials of the case as to notifying the insurer of other insurance, a verdict in his favor was set aside where he had admitted to a third party that he had not notified the agent and the agent denied having received notice and where the policy contained no endorsement of additional insurance.¹¹¹⁶ (For evidence sustaining findings for insured on issues of waiver and estoppel as against defense of concurrent insurance without endorsement on policy, see Ann. 1138a.)

(3) **As to Ownership.**—Testimony of the insured that the property sued on was in his private dwelling occupied by his family when destroyed, is *prima facie* proof of ownership.¹¹¹⁷ And in

1112. The court was authorized to conclude that proofs of loss had been rendered on testimony that plaintiff swore to such proofs under the direction of defendant's agents, and that they were delivered within the required time to said agents, one of said agents testifying merely that he did not recollect receiving them.—*Oakland Home Ins. Co. v. Davis*, 33 S. W. 587.

1113. Introduction of an abstract of judgment against the insured is not sufficient proof of a judgment lien on insured property, which will render the insurance void.—*North British & Mercantile Ins. Co. v. Gunter*, 35 S. W. 715, 12 Tex. Civ. App. 598.

1114. A policy of insurance on lumber at a rate of $2\frac{3}{4}$ per cent. contained a clause that a clear space of 200 feet should be maintained between the lumber and any woodworking establishment. Subsequently a planing mill was erected within 128 feet of the lumber, and the insurance company was notified that the assured wished to cancel the lumber policy and insure the mill, which was done. The only time the company's agent saw the lumber was when this change of insurance was effected, and he testified that he paid no attention to the amount of clear space. The manager of the mill testified that he told the agent he was contemplating reinsuring the lumber, whereon the agent stepped the distance, and said that, as the lumber was then situated, the rate would be $2\frac{3}{4}$ per cent., but that with a 200-foot clear space he could give a 1 per cent. rate. About three weeks after the change a policy was issued on the lumber for $2\frac{3}{4}$ per cent., containing in the body of

the policy a 200-foot clear space clause, and was received and retained by the assured without reading. Held, that the evidence failed to show fraud or mistake on the part of the agent in inserting such clause.—*Keller v. Liverpool & L. & G. Ins. Co.*, 65 S. W. 695, 27 Tex. Civ. App. 102.

1115. Evidence in an action on a fire policy examined, and held sufficient to justify the finding that the fire was negligently set by a third party, which had been impleaded as a defendant by the insurance company.—*Philadelphia Underwriters v. Ft. Worth & D. C. Ry. Co.*, 71 S. W. 419.

1116. In an action on a fire policy, providing against additional insurance, plaintiff testified that after he procured the additional insurance he notified defendant's agent. On a former trial he had testified that he had had no conversation with the agent after obtaining the additional insurance and before the fire, and his explanation of the contradictory statements was unsatisfactory. He had admitted to a third party after the fire that he had not notified the agent. The agent denied having received notice. No indorsement of the additional insurance appeared on the policy as required. Held, that a verdict for the plaintiff would be set aside.—*Aetna Ins. Co. v. Eastman*, 72 S. W. 431.

1117. Testimony of the insured that the property described in the policy sued on was in his private dwelling occupied by him and his family, when destroyed by fire, was *prima facie* proof of ownership.—*American Cent. Ins. Co. v. White*, 73 S. W. 827.

general, possession of the property described in the policy is prima facie evidence of ownership.¹¹¹⁸ (For evidence held insufficient to show that an agent at the time of issuance of the policy had knowledge that the property belonged to a firm of which the plaintiff was a member and not to the plaintiff, see Ann. 1110. For evidence showing that the mistake of the insurer was not due to negligence in the supposition as to ownership, see Ann. 1137, 1138.)

(4) **Miscellaneous.**—For sufficient or insufficient evidence on the following points see annotations as follows: Adjustment, Ann.

1118. Evidence held to sustain a verdict that a fire insurance policy was delivered to assured.—*Glens Falls Ins. Co. v. Walker*, 187 S. W. 1036.

1119. Evidence held to sustain a verdict that a fire insurance policy was intended to become effective without waiting for its approval by the insurance company's general agent.—*Fire Assn. of Philadelphia v. Powell*, 188 S. W. 47.

1120. Where judgment on a fire policy was only for \$500, the fact that a finding that the property destroyed was worth \$1,000 was not warranted by the evidence was harmless.—*Hanover Fire Ins. Co. of New York v. Huff*, 175 S. W. 465.

1121. Where a fire company denied all liability under a policy, error in a finding that there was no disagreement between it and the insured as to the amount of loss was not material.—*Id.*

1122. Evidence held insufficient to establish a conspiracy between an insurance company and B. to terminate plaintiff's employment by the insurance company and to charge him with improper conduct in the padding of his expense account.—*Oklahoma Fire Ins. Co. v. Ross*, 170 S. W. 1062.

1123. In an action on a fire policy, wherein it was contended that a settlement was obtained by duress, evidence held sufficient to sustain the plea thereof.—*Fire Ass'n of Philadelphia v. Richards*, 179 S. W. 926.

1124. Evidence in an action for the reformation of an insurance policy naming L. as the insured and K. as mortgagee and payee in case of loss, held sufficient to support a judgment reforming the policy by inserting plaintiff's name in the mortgage clause, on the ground of mistake.—*Western Assur. Co. v. Hillyer-Deutsch-Jarrett Co.*, 167 S. W. 816.

1125. In an action to reform an insurance policy, the evidence must be clear and convincing to overcome the presumption that the policy embodies the real intention of the parties.—*Id.*

1126. In an action on fire insurance policies, evidence as to the defense of fraud on the part of insured in shipping away part of the insured goods before the fire held to sustain

a verdict for plaintiff.—*Home Ins. Co. v. Rogers*, 128 S. W. 625. See 28 Cent. Dig. Insurance, §§ 1555-1707-1728.

1127. In an action on an insurance policy, evidence held to show that plaintiff had contracted no insurance upon the property except that represented by the policy of defendant.—*Allemania Fire Ins. Co. v. Fordtran*, 128 S. W. 692.

1128. Evidence held insufficient to show that insured goods from one stable were so intermingled with insured goods in another stable as to become one entire stock and lose their separate identity, so as to avoid a policy providing for its avoidance in case insured obtained other insurance.—*Norwich Union Fire Ins. Society v. Cheaney Bros.*, 128 S. W. 1163.

1129. Evidence held insufficient to show that insured fraudulently caused a fire.—*Milwaukee Mechanics' Ins. Co. v. Frosch*, 130 S. W. 600.

1130. Proof of the value of insured gifts at the time of destruction is sufficient, in the absence of a showing that such value exceeded their value when presented to insured.—*Id.*

1131. In an action on a fire policy, evidence held to sustain a finding that the insurer was advised by its agent of the full amount of concurrent insurance carried, which exceeded that permitted by the policy.—*St. Paul Fire & Marine Ins. Co. v. Cronin*, 131 S. W. 649.

1132. In an action on a fire policy, evidence as to occupancy of the premises at the time of the fire held not contradictory, so as to raise an issue of the breach of a warranty relating thereto.—*Agricultural Ins. Co. of Watertown, N. Y., v. Owens*, 132 S. W. 828.

1133. In a suit to recover on a policy of fire insurance, where the insurer impleaded its agent and asked a judgment over against him 'in the event of a recovery by the insured, on the ground that he had not reported to the insurer his knowledge of facts, relating to the property insured, evidence held to warrant a verdict in favor of the agent.—*Shawnee Fire Ins. Co. v. Chapman*, 132 S. W. 854.

1095, 1123; Increase of Hazard, Ann. 1097, 1135; Change of Title, Ann. 1100; Incumbrance, Ann. 1113; Waiver, Ann. 1101, 1138a; Vacancy, Ann. 1102, 1108; Occupancy, Ann. 1132; Iron-Safe Clause, Ann. 1109, 1110; Proof of Loss, Ann. 1112; Fraud, Ann. 1114, 1126, 1129; Value, Ann. 1120, 1121, 1130; Partial Loss, Ann. 1134; Character of Property, Ann. 1096; Rents, Ann. 1098; Misrepresentations, Ann. 1099; Fire Set by Third Party, Ann. 1115; Conspiracy of Agent, Ann. 1122; Judgment Over Against Agent, Ann. 1133.

Amount of Recovery.—In general, the measure of damages under an insurance contract, where the loss is not total, is the difference between the value of the property whole and damaged, within the amount of the policy.¹¹⁴¹ However, the amount of the policy is not even prima facie evidence of the loss where it provides that in no event shall the claim be greater than the actual damage to or cash value of the property at the time of loss.¹¹³⁹ Where certain

1134. After a fire, a portion of the lot on which the building consumed had stood was sold to a banking company which have formerly occupied part of it as a tenant. The bank rebuilt on the same lot, and in doing so used part of the foundation of the old building and a part of the old bank vault. The extent and value of the parts used was not shown, nor was there any evidence as to the kind and character of the structure called the "bank vault," and whether it was part of the building. Held insufficient to show that the loss was only partial.—*Hartford Fire Ins. Co. v. Dorroh*, 133 S. W. 465.

1135. In an action on a fire insurance policy, evidence held to show that plaintiff increased the risk, in violation of the provisions of the policy, by dividing the house into three distinct parts after the policy was issued, and having each part occupied as apartments.—*Simpson v. Mecca Fire Ins. Co. of Waco*, 133 S. W. 491.

1136. Possession of property covered by an insurance policy is prima facie evidence of ownership thereof in an action on such policy.—*Liverpool & L. & G. Ins. Co. v. Nations*, 59 S. W. 817.

1137. Evidence examined, and held to show that the alleged mistake of the company in supposing that the property belonged to the woman with whom plaintiff was living when it was insured, and not to plaintiff, was not due to negligence on its part.—*McCarty v. Hartford Fire Ins. Co.*, 75 S. W. 934.

1138. In an action on a fire policy the evidence examined, and held to sustain the finding of the trial judge that the property insured was in fact owned by the woman with whom the plaintiff, at the time the policy was issued, was living in adultery, and that plaintiff had no interest therein.

—*McCarty v. Hartford Fire Ins. Co.*, 75 S. W. 934.

1138a. In action on policy of fire insurance findings facts found by jury, and the evidence also held sufficient to sustain findings for plaintiff on issues of waiver and estoppel as against defense of concurrent insurance without insurer's indorsement on policy.—*Mechanics' & Traders' Ins. Co. v. Dalton*, 189 S. W. 771.

686—**Amount of Recovery.** (See 28 Cent. Dig. Insurance, § 1791.)

1139. Where a policy provides that in no event shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire, the amount of the policy is not even prima facie evidence of the loss.—*Lion Fire Ins. Co. v. Starr*, (Tex.) 12 S. W. 45.

1140. Cotton bagging was insured with a provision that loss was to be estimated according to the actual cash value of the goods, but in no case to exceed the cost to insured to replace it. Its value at the jobbing price at the time of loss, could purchasers have been found, was less than the face of the insurance, but at the ordinary price exceeded it. There was evidence of the cost of manufacturing it, with freight and added expenses, and also that replacement was impossible. Held that neither the jobbing, nor the ordinary price, nor the cost of manufacturing with added expenses, alone furnished the measure of damages, but all were proper to be considered in connection with other competent facts, and that a verdict for the full amount of the policy would not be disturbed.—*Virginia Fire & Marine Ins. Co. v. Cannon*, 45 S. W. 945, 18 Tex. Civ. App. 588.

goods were insured with a provision that the loss was to be estimated according to the actual cash value of the goods, but in no case to exceed the cost to insured to replace it, it was held that neither the jobbing nor the ordinary price, nor the cost of manufacturing with added expenses, alone furnished the measure of damages, but all were proper to be considered in connection with other competent facts and that a verdict for the full amount of the policy would not be disturbed.¹¹⁴⁰ In an action on an indemnity policy against loss of stock dividends by fire the judgment for the insured properly deducted his proportion of accrued earnings from the whole earnings, less expenses from the face of the policy.^{1141a}

Questions for the Court.—The construction of a written provision as to the extent of the insurers liability is for the court.¹¹⁴² A requested instruction defining the term "attached additions," used in describing the property was properly refused, as not involving a question of law.¹¹⁴⁷ The question whether a vessel is in Gulf waters when it was lost in a river in which the tide from the Mexican Gulf ebbed and flowed, is for the court.¹¹⁴⁵ A letter of insured directing the cancellation of a policy cannot operate as a cancellation where the insured replied that it could only be canceled under certain conditions.¹¹⁴⁴

Questions for the Jury—(1) As to Cancellation.—The question

1141. The measure of damages under an insurance contract, where loss is not total, is the difference between the value of the property whole and damaged, within the amount of the policy.—*German Ins. Co. v. Everett*, 46 S. W. 95, 18 Tex. Civ. App. 514.

1141a. In action on indemnity policy against loss of stock dividends by fire, judgment for plaintiff deducted his proportion of accrued earnings from the whole earnings, less expenses from the face of the policy, held proper.—*Liverpool & London & Globe Ins. Co. v. Lester*, 176 S. W. 602.

668—**Questions for the Jury.** (See 28 Cent. Dig. Insurance, §§ 1556, 1732-1770.)

1142. When there was evidence that a letter was mailed, whether it was received by the addressee, since deceased, was a question for the jury, though it could not be found among the addressee's papers.—*Northern Assur. Co., Limited, of London v. Morrison*, 162 S. W. 411.

1143. Where plaintiff sued for breach of contract, and pleaded certain slanderous charges to show malice only, and the court did not submit the issue of slander to the jury

as a ground for recovery, the overruling of exceptions for misjoinder of causes of action was not ground for reversal of a judgment for plaintiff.—*Oklahoma Fire Ins. Co. v. Ross*, 170 S. W. 1062.

1144. Where insured directed the cancellation of a policy containing cancellation clause, and the agents wrote that the policy would be canceled if he would send certain increased premium but not otherwise, it cannot be held, as a matter of law, that insured's letter operated as a cancellation.—*National Union Fire Ins. Co. v. Akin*, 160 S. W. 669. See 28 Cent. Dig. Insurance, §§ 1556-1732.

1145. In an action on a policy of marine insurance, where the undisputed evidence showed that the vessel was lost in a river in which the tide from the Mexican gulf ebbed and flowed, the question whether the vessel was in gulf waters was one of law for the court.—*Mannheim Ins. Co. v. Charles Clarke & Co.*, 157 S. W. 291. See 28 Cent. Dig. Insurance, §§ 1556-1732.

1146. Whether insured, after a fire, altered his books and records so as to show a greater loss than he had in fact suffered, was for the jury.—*Hartford Fire Ins. Co. v. Walker*, 153 S. W. 398. See 28 Cent. Dig. Insurance §§ 1556-1732.

of mutual cancellation of a policy before loss is for the jury.¹¹⁵²
¹¹⁷¹ And in this connection the authority of the insured's attorney to accept notice of cancellation and substitution of another policy is for the jury.¹¹⁶⁸

(2) **As to Incumbrances.**—The question whether the insurer waived the conditions of the policy regarding incumbrances is not for the jury where the insurer has not alleged such waiver in his pleadings.¹¹⁵⁵ It is a question for a jury whether a mortgage had been executed and delivered as to the husband or whether it had been left with the mortgagee for convenience and was not to take effect until signed by the wife.¹¹⁵²

(3) **As to Additional Insurance.**—Whether the insurer consented to additional insurance is for the jury.¹¹⁶⁹

(4) **As to Increased Hazard.**—Whether a number of bales of hay thrown on the gallery of the insured building increased the hazard is for the jury.¹¹⁶³ The question whether a single effort of an unknown person to burn the property should cause the insured to consider it likely to be repeated, making it his duty to report

1147. On the evidence, held, that whether insured took a purported inventory prior to the dates of the policies sued on was for the jury.—*Id.*

1148. Allegations in the petition to the effect that proofs of loss were made immediately after the fire under the supervision of the company's adjusters, that after the adjustment the adjusters informed the insured that the company would not pay the loss, that the company never made any objection to the proof of loss until it filed its answer, and that the company thereby waived the filing of proof, are sufficient to justify submitting to the jury the question whether the company waived proof of loss, as provided for in the policy.—*East Texas Fire Ins. Co. v. Brown*, (Tex. Sup.) 18 S. W. 713.

1149. In a suit on a policy on household goods, whether insured filed the proof of loss required by the policy, and whether, if not, the default was waived by insurer, held for the jury.—*Fidelity Phenix Fire Ins. Co. v. Sadau*, 178 S. W. 559.

1149a. In an action on an indemnity policy where plaintiff testified to telephone conversation with insurer's agent, which was denied by defendant, the question of the identity of the party with whom plaintiff conversed was for jury.—*Liverpool & London & Globe Ins. Co. v. Lester*, 176 S. W. 602.

1152. In an action on a fire policy defendant pleaded breach of condition in that the assured had mortgaged the premises. It was shown that he had signed a mortgage to a bank, and had left the instrument with its president, to await the sig-

nature of the mortgagor's wife, so as to waive her dower. Held, that it was a question for the jury whether the mortgage had been executed and delivered as to the husband, or whether it had been left with the bank president for convenience, and was not to take effect at all until signed by the wife.—*East Tex. Fire Ins. Co. v. Clarke* (Tex.) 15 S. W. 166.

1153. The court cannot know as a matter of law that 10 or 15 bundles of baled hay left on the gallery of a house increases the hazard of fire insured against in a policy stipulating that it shall be void if the hazard is increased, where the evidence only showed that the hay was left on the gallery by being thrown off a wagon, because storage room was lacking at a mill, and that it was left there until the wagons could return from the mill; but the question is for the jury.—*Hamburg-Bremen Fire Ins. Co. v. Swift*, 130 S. W. 670.

1154. In an action on a policy providing in its iron-safe clause that the "last preceding inventory" of the stock should be preserved so that the amount of loss in case of fire might be determined, it was, under the evidence, a question for the jury whether the inventory of stock that was made just prior to the assured's alleged acceptance of the policy, or whether the inventory taken prior to the date on which the policy was received by assured was the "last preceding inventory," the former inventory being the preceding one if the policy was not accepted until when alleged, otherwise the latter was the last preceding inventory.—*Queen City Ins. Co. v. Long*, 132 S. W. 82. See 28 Cent. Dig. Insurance, §§ 1556, 1732.

it to the company is for the jury.¹¹⁷² It is for the jury whether the agent knew that gasoline was used on the insured property so as to operate as a waiver of the condition in the policy.¹¹⁷⁴

(5) **As to the Iron-Safe Clause.**—The question of substantial compliance with the provisions of the iron-safe clause is for the jury.¹¹⁶⁰ Also, whether the insurer waived a forfeiture for non-compliance with such clause is for the jury.¹¹⁵⁸

(6) **As to the Inventory.**—It was for the jury to determine whether the insured took a purported inventory prior to the date of the policy sued on.¹¹⁴⁷ And whether such inventory was a substantial compliance with insured's contract obligation to furnish an inventory was for the jury.¹¹⁶⁸ As to which of two inventories was the "last preceding inventory" was a question for the jury.¹¹⁵⁴

(7) **As to Proofs of Loss.**—Whether the insured filed the proof of loss required by the policy, and whether, if not, the default was waived by the insurer, held, for the jury.^{1149 1148}

(8) **Miscellaneous.**—The questions of waiver and estoppel may be submitted to the jury.^{1170 1159} Whether the insured, after loss, altered his books and records so as to show a greater loss than he had in fact sustained, is for the jury.¹¹⁴⁶ Whether a material or substantial part of a building fell, thus avoiding the policy, is for the determination of the jury.¹¹⁵⁶ Where a policy provided that a transfer by the owner should not invalidate the policy, as against the interest of the mortgagee, provided he notified the insurer of such transfer, and there was evidence that at the time the owner conveyed the property he was the agent of the mortgagee, it was

1155. It is error to submit to the jury the question whether the insurance company waived the conditions of the policy regarding incumbrances, where the plaintiff has not alleged such waiver in his pleadings.—*East Texas Fire Ins. Co. v. Brown*, (Tex. Sup.) 18 S. W. 713.

1156. Where an insurance policy provides that if the building or any part thereof fall, except as the result of fire, the insurance shall cease, the falling must be of some material or substantial part of the building; and in an action to recover on such policy the question whether such part of the building had fallen is for the determination of the jury.—*Home Mut. Ins. Co. v. Tomkies*, 71 S. W. 812.

1157. In an action on a policy, a requested instruction defining the term "attached addition," used in describing the property, was properly refused, as not involving a question of law.—*Connecticut Fire Ins. Co. v. Hilbrant*, 73 S. W. 558.

1158. Where, in an action to recover on an insurance policy, it was

shown that, though the company's adjuster and local agents were informed by plaintiffs that they had not complied with an iron-safe clause, neither of them declared a forfeiture of the policy; that the adjuster afterwards required one of plaintiffs to make a statement of the loss under oath, and stated that the company would settle for the loss; and that plaintiffs had no notice of any limitation on the adjuster's authority—it was a question for the jury whether defendant had waived the forfeiture of the policy.—*Couch & Gilliland v. Home Protection Fire Ins. Co.*, 73 S. W. 1077.

1159. In action on fire policy, the court did not err in refusing peremptory instruction for defendant ignoring waiver and estoppel.—*Mechanics' & Traders' Ins. Co. v. Dalton*, 189 S. W. 771.

In action on fire policy, court did not err in refusing a peremptory instruction for defendant assuming, as a matter of law, that the evidence was not sufficient to raise the issues of waiver and estoppel.—*Id.*

error to fail to submit the issue of notice to the jury.¹¹⁶¹ The insurer cannot complain, where by agreement certain issues of fact are submitted to the jury as the only issues to be determined, that the evidence was not sufficient to support a finding that the property destroyed was not worth the sum alleged in the petition, as the agreement was an admission that the property destroyed was worth the sum alleged in such petition.¹¹⁷⁸ (As to withdrawal from the jury of the acts done by a co-conspirator in an attempt to de-

1160. Whether there has been a substantial compliance with a condition requiring the insured to keep his inventory and books in a fireproof safe is a question of fact for the jury, where there is evidence from which the jury might have found, that the omission to place the inventory in the safe on the night of the fire was inadvertent or an accident, and that the condition had been substantially complied with, in good faith.—*Kemendo v. Western Assur. Co. of Toronto, Canada*, 57 S. W. 293, reversed 60 S. W. 661.

1161. An insurance policy contained a stipulation against alienation of the property, but provided that a transfer by the owner should not invalidate the policy, as against the interest of the mortgagee, provided that he notified the insurer of such transfer if he had knowledge thereof. At the time an owner conveyed the property there was evidence that he was an agent and representative of the mortgagee in such a capacity that his knowledge of the transfer was imputable to the mortgagee. Held, it was error to fail to submit the issue of notice to the jury instead of directing a verdict in favor of mortgagee.—*Alamo Fire Ins. Co. v. Davis*, 60 S. W. 802.

1162. Evidence held sufficient to require the submission to the jury of the issue whether there was a mutual cancellation of a fire insurance policy before the fire.—*Westchester Fire Ins. Co. v. McMinn*, 188 S. W. 25.

1163. In action on fire insurance policy, where defendant claimed that the original policy had been canceled and a smaller policy substituted, held on the evidence that the authority of insureds attorney to accept notice of cancellation and substitution was for jury.—*Glasscock v. Liverpool, London & Globe Ins. Co.*, 188 S. W. 281.

1164. Where, as a defense to an action to recover on an insurance policy, defendant charged a conspiracy on the part of plaintiff and F. to defraud it, withdrawal from the jury of the acts done by F. in furtherance of such conspiracy, subsequent to the destruction of such property, was reversible error.—*Fire Ass'n of Philadelphia v. McNerney*, 54 S. W. 1053.

1165. The construction of a written provision as to the extent of the insurers liability was a question for the court and not for the jury.—*Fireman's Ins. Co. v. Jesse French Piano & Organ Co.*, 187 S. W. 691.

1166. Whether such inventory was a substantial compliance with insureds contract obligation to furnish an inventory, held, for the jury.—Id.

1169. In an action on a fire insurance policy, void if other insurance is procured without consent, evidence held sufficient to justify the submission to the jury of the question of consent.—*Reliance Ins. Co. of Philadelphia v. Dalton*, 178 S. W. 966.

1170. Evidence held to justify the submission to the jury of the issues of waiver and estoppel.—Id.

1171. Whether an insurance policy was canceled by mutual consent without the return of the unearned premium held to be a question for the jury, though insured did not ask for the return of the premium and may have thought the policy was fully canceled without such return.—*Polemanakos v. Austin Fire Ins. Co.*, 160 S. W. 1134. See 28 Cent. Dig. Insurance, §§ 1556, 1732-1770.

1172. Whether a single effort of an unknown person to burn the property should cause insured to consider it likely to be repeated, making it the duty of insured to report same to the company, within a provision that the policy shall be void if the hazard be increased by any means within the knowledge of insured, is a question for the jury.—*Scottish Union & National Ins. Co. v. Weeks Drug Co.*, 118 S. W. 1086. See 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.

1173. In an action on an insurance policy for \$500, where certain issues of fact, not including the value of the property, were submitted to the jury by agreement made in open court as the only issues of fact to be determined, defendant cannot complain that the evidence was not sufficient to support a finding that the property destroyed was not worth the sum alleged in the petition, as the agreement that the issues submitted were the only ones was an admission that the property destroyed was worth the sum alleged in the petition.—*Mecca Fire Ins. Co. of Waco v. Wilderspin*, 118 S. W. 1131.

fraud the insurer, see Ann. 1164.) (As to failure of court to submit the issue of slander in a case for breach of contract, see Ann. 1143.)

Instructions—(1) In General.—Where an insurer interposed four different defenses, an instruction that the burden rested on it to establish some one of its defenses, and if it failed to establish any of them, the verdict should be for the insured, is erroneous, because leading the jury to believe that the insured was entitled to recover unless the insurer established all of its defenses.¹¹⁹⁷ Such an instruction should be modified to state that the verdict should be for the insured if the insurer fails to establish at least one of its defenses.¹¹⁹⁸ An instruction which indicates that an insurer was not bound by the re-delivery of the policy unless the agent was

1174. Whether an agent of an insurer, procuring a policy stipulating that it should be void on insured keeping, using, or allowing gasoline on the premises, knew that gasoline was kept on the premises for the needs of the business carried on so as to operate as a waiver of the condition of the policy, held, under the evidence, for the jury.—*American Cent. Ins. Co. v. Chancey*, 127 S. W. 577. See 28 Cent. Dig. Insurance, §§ 1556, 1732-1770.

600—**Instructions.** (See 28 Cent. Dig. Insurance, §§ 1556, 1771-1784.)

1175. In a suit on fire policies, an instruction that a compromise relied upon by insured had not been shown to have been made by insurer's authority, and should not be considered by the jury, was properly refused, where it was a question of fact whether the agent who agreed upon the compromise acted within his authority, or scope of apparent authority.—*Milwaukee Mechanics' Ins. Co. v. Froesch*, 130 S. W. 600.

1176. In an action on a \$350 fire policy, stipulating that insurer should not be liable for more than three-fourths of the value of the property, an instruction that the measure of damages was the value of the property not exceeding \$350 was erroneous as allowing a recovery of \$350, though in excess of three-fourths of the value.—*State Mut. Fire Ins. Co. v. Cathey*, 153 S. W. 935. See 28 Cent. Dig. Insurance, §§ 1556, 1771-1784.

1177. In an action on a policy indemnifying against the loss of rents for such period as was reasonably necessary to restore the premises, the evidence being undisputed that from the date of the fire to the restoration of the building the rents were \$175, the insurance company contesting alone the amount of recovery, the court properly charged that if the time actually spent was no more than was reasonably necessary, they should find

for the insured for the sum of \$175.—*Hartford Fire Ins. Co. v. Pires*, 165 S. W. 565. See 28 Cent. Dig. Insurance, §§ 1556, 1771-1784.

1178. In an action on a fire policy, an instruction defining total loss held sufficiently favorable to insurer.—*Fire Ass'n of Philadelphia v. Strayhorn*, 165 S. W. 901. See 28 Cent. Dig. Insurance, §§ 1556, 1771-1784.

1179. An instruction, not specifically requiring the jury to base its belief on the evidence, is not bad, where they have been told that plaintiff must prove his case by a preponderance of the evidence.—*Austin Fire Ins. Co. v. Sayles*, 157 S. W. 272.

1180. A requested charge that, the market value after the fire of the piano insured not having been shown, no recovery could be had, held properly refused, under the evidence.—*Occident Fire Ins. Co. v. Linn*, 179 S. W. 523.

1181. Where the president of an insurance company, also named as the trustee in a deed of trust given to the company, in negotiating the loan, insisted that the insurance should be carried in his company, the court did not err in treating it as undisputed that the company selected itself to carry the insurance.—*Commonwealth Fire Ins. Co. v. Obenchain*, 151 S. W. 611.

1182. In an action on a fire policy, defendant's request for an instructed verdict on the ground that the evidence did not show the delivery of the policy, the premium, or the rate of premium, held properly refused, as being inapplicable to the evidence.—*State Mut. Fire Ins. Co. v. Taylor*, 157 S. W. 950.

1183. In an action on a fire policy covering household goods, charge directing the jury to ascertain the value of the goods, instead of the actual cash value, as provided in the policy, was not error, in the absence of a request for a special charge.—*Commonwealth Ins. Co. of New York v. Finegold*, 183 S. W. 833.

expressly authorized, is misleading.¹¹²² The request of the insurer for an instructed verdict on the ground that the evidence did not show the delivery of the policy, the premium, or the rate of premium, was properly refused where it was inapplicable to the evidence.¹¹⁸² An instruction, not specifically requiring the jury to base its belief on the evidence, is not bad, where they have been told that the insured must prove his case by a preponderance of the evidence.¹¹⁷⁹

(2) **As to Incumbrance.**—Where the application was oral, an instruction that, if the insured truthfully answered the question

1184. In an action on policy prohibiting assignment, unless otherwise provided by agreement, instruction that notification to the insurer was not sufficient, that assent by the insurer was also required, and that, if notification was given, its assent would be presumed, unless it declined to accept the transfer, held proper and not erroneous, as placing the burden on insurer to prove nonconsent.—*Northern Assur. Co., Limited, of London vs. Morrison*, 162 S. W. 411. See 28 Cent. Dig. Insurance, §§ 1556-1771.

1185. In an action on a fire policy, error in a charge on the measure of damages held not harmless in view of the evidence.—*State Mut. Fire Ins. Co. v. Cathey*, 153 S. W. 935.

1186. Where suit is brought on a policy of fire insurance which stipulates that the company will not be liable for a greater proportion of any loss than the sum thereby insured bears to the whole amount of insurance, and there is some evidence that the loss was less than the whole amount of insurance, it is reversible error to refuse to instruct the jury as to the pro rata liability of the defendant, though such limitation of liability was not pleaded by the defendant.—*Hibernia Ins. Co. v. Starr*, (Tex.) 13 S. W. 1017.

1187. The following charge held to state the law correctly: If you believe from the evidence before you that the building described in the policy sued on was not destroyed by fire, you will find for the defendant. In this case you are instructed that before the plaintiff can recover, it must appear from the evidence to your satisfaction, that the fire caused the destruction of the building. If the building fell down before it was burned, and the fire occurred after the building fell down, and if you so believe from the evidence before you, you will find for the defendant. If the evidence satisfies you that the building was on fire before it fell, and that such fire caused the fall of the building, then you should find for plaintiff as previously explained in the first paragraph of these instructions.—*Liverpool and L. and G. Ins. Co. v. Ende*, 65 Tex. 118.

1188. It is error to charge as a matter of law that an insurance company through the information given its secretary by an agent that a certain factory was using a cotton gin in its building, thereby, according to insurer's contention, increasing the risk, had notice, the company claiming the policy avoided by reason of such fact. It was also held error for the court to charge that if they believed in effect that cotton gins are embraced in the term "cotton-seed-oil factory" and that it was usual to run them in connection with such factories they should find for the plaintiff, as the evidence did not justify such a charge.—*Texas Banking & Ins. Co. v. Hutchins*, 53 Tex. 61.

1189. A charge that the insurance company will be regarded as waiving a misdescription of the property insured in the application because the president of the company had learned of it but had done nothing, is error, in the absence of facts showing the president had authority to bind the company in contracts of insurance.—*Home Ins. & Banking Co. v. Lewis*, 48 Tex. 622.

1190. Policy contained the clause: "Or if the above mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain for more than thirty days, without notice to or consent of this company, in writing, * * * then and in every such case this policy shall be void." The evidence showed that the premises had become vacant. It was held to be error to instruct the jury: "If you believe from the evidence that the house was vacant or unoccupied for a period of thirty days before the fire and if you further believe from the evidence that the risk was thereby increased, then your verdict should be for the defendant." It was also error to refuse a charge in effect that the vacancy for over thirty days, at the time of the fire, without notice to or consent of the company, defeated the right to recover unless the company waived the condition.—*Galveston Ins. Co. v. Long*, 51 Tex. 89.

asked him by the agent, then, if there was a lien on the property insured, it would not affect the validity of the policy, was erroneous, the agent not being required to inquire as to an incumbrance and the fact that the insured truthfully answered the questions did not constitute a waiver of the incumbrance provision in the policy.¹²¹⁸

(3) **As to Ownership.**—It is not error to charge that it was essential for the insurer to prove that it would not have accepted the risk had it known the true facts as to ownership.¹²¹⁵ An instruction that the insured, in order to recover, must show exclusive ownership, without specifying the time of the issuance of the policy or the time of the loss, is not reversible error, as the omission could have been supplied by a requested charge.¹²²¹ A charge based on the hypothesis that the jury was satisfied that the purchase money had not been paid and there was an outstanding vendor's lien, was properly refused where the purchase money had been paid with the exception of an outstanding vendor's lien.¹¹⁹⁸

(4) **As to Additional Insurance.**—An instruction as to what constituted notice of an intention to take out additional insurance and waiver was erroneously refused.¹¹⁹⁵ (For an instruction as to what constituted waiver of consent to take out additional insurance being misleading, see Ann. 1194.)

(5) **As to Increase of Hazard.**—Where the evidence is suffi-

1191. A charge is erroneous which deprives a company from all contributions from another company carrying insurance on the same property and imposes on the first company a liability as great as if there had been no other insurance.—*East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287.

1192. Where defendant pleaded that the fire was caused by the insured it was held error to charge the jury that the burden of proof was on the plaintiff to show "that the loss was an honest one; that is, it was owing to causes not traceable to the insured or his agency."—*Dwyer v. Continental Ins. Co.* 57 Tex. 181.

1193. Where the purchase money on property offered for insurance had been paid with the exception of an outstanding vendor's lien, a charge based on the hypothesis that the jury was satisfied "that the purchase money had not been paid, and there was an outstanding unsatisfied vendor's lien," was properly refused.—*East Texas Fire Ins. Co. v. Dyches*, 56 Tex. 565.

1194. In an action on a fire insurance policy, void if additional insurance was taken out without consent, an instruction as to what constituted waiver of consent held misleading.—*Reliance Ins. Co. of Philadelphia v. Dalton*, 178 S. W. 966.

1195. An instruction as to what constituted notice of an intention to take out additional insurance, and waiver, held erroneously refused.—*Id.*

1196. In an action on a fire insurance policy, an instruction ignoring the defense of settlement held erroneous, notwithstanding other instructions.—*Fire Ass'n of Philadelphia v. Richards*, 179 S. W. 926.

1197. Where an insurance company interposed four different defenses to an action on a policy, an instruction that the burden rested on the defendant to establish some one of its defenses, and if it "failed to establish any of them" the verdict should be for the plaintiff was erroneous, because leading the jury to believe that plaintiff was entitled to recover unless defendant established all of its defenses.—*Liverpool & L. & G. Ins. Co. v. Joy*, 62 S. W. 546, 26 Tex. Civ. App. 613, rehearing denied *London & L. & G. Ins. Co. v. Same*, 64 S. W. 786, 26 Tex. Civ. App. 613.

1198. An instruction, in an action in which four separate defenses are interposed, that the burden is on defendant to establish one of its defenses, and, if it fails to establish any one of them, the verdict should be for the plaintiff, should be modified to state that the verdict should be for the plaintiff if defendant fails to establish at least one of its defenses. Rehearing, *Liverpool & L. & G. Ins. Co. v. Joy*, 62 S. W. 546, 26 Tex. Civ. App. 613, denied. *London & L. & G. Ins. Co. v. Joy*, 64 S. W. 786, 26 Tex. Civ. App. 613.

cient to submit the question whether the hazard had been increased, an instruction that, if the risk had been increased by using the house as a laundry, but not within the insured's knowledge or control, the policy would not be rendered void, is proper.¹²⁰⁶ An instruction that if there was an increase of hazard by the conducting of a gambling establishment on the premises, it would avoid the policy, unless waived, was sufficient where the general charge had fully instructed the jury as to waiver.^{1205 1204} It is error to charge that an insurer, through information given its secretary by an agent that a certain factory was using a cotton gin in its building, thereby, according to the insurer's contention, increasing the risk, had notice, the insurer claiming the policy avoided by reason of such fact.¹¹⁸⁸ (For evidence not justifying a charge that if the jury believed in effect that cotton gins are embraced in the term "cotton-

1199. In a suit on fire policies, an instruction that insured could not recover for articles stolen or not in the house at the time of the fire was properly refused, where an instruction given required the jury to find that all the property described in the proof of loss was in the house at the time of the fire and was destroyed.—*Milwaukee Mechanics' Ins. Co. v. Froesch*, 130 S. W. 600.

1200. In an action on a policy of fire insurance which provided that the company should not be liable beyond "the actual cash value" of the property destroyed, an instruction that the jury might find for the plaintiff the "fair market value" of the property destroyed is not error; the expression "fair market value" being equivalent to "actual cash value."—*Manchester Fire Ins. Co. v. Simmons*, 35 S. W. 722.

1201. Where the policy calls for payment 60 days after proofs of loss, and the jury has been charged not to find for the plaintiff unless there had been a waiver of proof by the company, a subsequent instruction that, if the jury find for the plaintiff, they should calculate interest from 60 days after loss by fire, is not erroneous, as assuming the existence of the waiver, since the jury could not award interest under the instructions unless there had been such waiver.—*East Texas Fire Ins. Co. v. Brown*, 18 S. W. 713.

1202. But such instruction is erroneous in failing to state that a cause of action would not accrue under the terms of the policy until after 60 days from the date of the waiver, and that interest would not begin until the accrual of a cause of action.—*East Texas Fire Ins. Co. v. Brown*, 18 S. W. 713.

1203. Where a policy provides that a sale of the insured property shall avoid the policy, and the issue is whether a forfeiture by a sale has been waived by the adjuster, and in-

struction that such forfeiture prevents a recovery by the insured, unless the agent who issued the policy knew of the sale, and agreed to and signed the transfer, is misleading, notwithstanding that, in the general charge, the court fully instructs on the question of waiver, no reference thereto being made in the special charge.—*Moriarty v. United States Fire Ins. Co.*, 49 S. W. 132, 19 Tex. Civ. App. 669.

1204. An instruction, "If you find from the evidence that the conduct of a gambling establishment in said insured premises was an increase of hazard, you will find for defendant, unless from the charge you find such forfeiture was waived," does not assume that the gambling establishment increased the hazard.—*Moriarty v. United States Fire Ins. Co.*, 49 S. W. 132, 19 Tex. Civ. App. 669.

1205. Where in the general charge the court had fully instructed the jury as to waiver, an instruction that if there was an increase of hazard by the conducting of a gambling establishment on the premises, it would avoid the policy unless waived, was sufficient, in the absence of a request, without a statement of what acts of defendant would constitute a waiver.—*Moriarty v. United States Fire Ins. Co.*, 49 S. W. 132, 19 Tex. Civ. App. 669.

1206. In a suit on a fire policy providing that it shall be void if the hazard be increased by any means within the control or knowledge of the insured, where the evidence is sufficient to submit the question whether the hazard had been increased in the jury, an instruction that, if the risk had been increased by using the house as a laundry, but not within plaintiff's knowledge or control, the policy would not be rendered void, is proper.—*Northern Assur. Co. of London, England, v. Crawford*, 59 S. W. 916.

seed oil factory" and that it was usual to run them in connection with such factories they should find for the insured, see *Ann.* 1188.)

(6) **As to Waiver of Transfer of Property.**—Where the issue whether a forfeiture by a sale has been waived by the adjuster, an instruction that such forfeiture prevents a recovery by the insured, unless the agent who issued the policy knew of the sale, and agreed to and signed the transfer, is misleading, although the court fully instructed the jury as to waiver in the general charge, no reference thereto being made in the special charge.¹²⁰⁸

(7) **As to Vacancy.**—Where the policy provided that if the premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied and so remain for more than thirty days, without notice to the insurer, the policy should be void, and the evidence showed the premises had become vacant, it is error to instruct the jury that if they believed that the house was vacant and unoccupied for a period of thirty days before the fire and if they further believed that the risk was thereby increased, they should find for the defendant.¹¹⁸⁰ In such a case it would have been proper to charge that the vacancy for over thirty days, at the time of the fire, without notice or consent of the insurer, defeated the right to recover unless the insurer waived the condition.¹¹⁸⁰ Where the policy provided that it should be void if the building became vacant, and the evidence showed it was vacant at the time of loss, the jury should be instructed to find for the defendant, unless the condition was waived.¹²¹⁸

(8) **As to Value of Insured Property.**—Where a policy provides that the insurer shall not be liable beyond the actual cash value of the property insured, it is error to instruct the jury to find for the insured in the amount of the policy.¹²¹¹ The expression "fair market value" used in a charge is equivalent to "actual cash value."¹²⁰⁰ A charge directing the jury to ascertain the "value" instead of the actual cash value is not error in the absence of a

1207. Where the evidence as to the value of a stock of goods at the time it was burned was positive and uncontradicted in an action against an insurance company to recover for the loss, and showed the loss to be more than the face of the policy, an instruction that the jury should determine from all the evidence the actual cash value of the property covered by the policy, estimating the same according to the actual cash value at the time of the fire, with any deduction for depreciation, however caused, if the jury believed such deduction should be made, if not technically correct, did not contain error sufficient to reverse the judgment.—*Lion Fire Ins. Co. v. Heath*, 68 S. W. 305.

14—Ins.

1208. A fire policy provided that it should be void if the property were not owned in fee by the insured, or in case of any fraud or false swearing by insured; and in an action on the policy it appeared that a deed of the property had been made to the insured, but all the vendor's lien notes, though due, had not been paid, which was known to the member of insured firm who secured the insurance, and who stated all the facts to the insurance agent. Held, that an instruction to find for defendant if insured made false statements concerning the subject of the insurance was properly modified by the qualification "known to be false at the time."—*Underwriters' Fire Ass'n v. Palmer & Co.*, 74 S. W. 603.

request for a special charge.¹¹⁸³ Where the loss was more than the face of the policy, an instruction that the jury should determine from all the evidence the actual cash value, estimating the same as of the time of the loss, with any deduction for depreciation, however caused, if they believed such deduction should be made, if not technically correct, would not reverse the judgment.¹²⁰⁷ (For charge refused under the evidence that the market value after the fire of the personal property insured not having been shown, no recovery could be had, see Ann. 1180.)

(9) **As to Total Loss.**—It was proper, in case of a total loss, under the statute, to refuse to charge with reference to an offer by the company to repair the property, though the policy provided that this might be done.^{1209 1210} (For an instruction defining total loss held sufficiently favorable to the insurer, see Ann. 1178.)

(10) **As to Compromise and Settlement.**—An instruction ignoring the defense of settlement was held erroneous, notwithstanding other instructions.¹¹⁹⁶ An instruction that a compromise relied upon by the insured had not been shown to have been made by the insurer's authority, and should not be considered by the jury, was properly refused where it was a question of fact whether the agent who agreed upon the compromise acted within his authority, or scope of apparent authority.¹¹⁷⁵

(11) **As to Fraud.**—An instruction to find for the insurer if the insured made false statements concerning the ownership of the insured property was properly modified by the qualification "known to be false at the time" where a deed to the property had been made to the insured but certain vendors' lien notes were outstanding.¹²⁰⁸ Where, after a fire, the insured presented the insurer the books kept by him which did not mention goods recently shipped

^{1209.} Since by Rev. St. Art. 2971, an insurance policy is a liquidated demand against the company for the amount of the policy, in case of a total loss, it was proper, where total loss was shown, to refuse to charge with reference to an offer by the company to repair the property, though the policy provided that this might be done.—*Commercial Union Assur. Co. of London v. Meyer*, 29 S. W. 93.

^{1210.} Where the jury found that the building was so injured by fire as to constitute a total loss, the refusal of the court to charge on the question of fixing a partial loss was not reversible error.—*Commercial Union Assur. Co. of London v. Meyer*, 29 S. W. 93.

^{1211.} In an action on a fire insurance policy, providing that the company shall not be liable beyond the actual cash value of the property insured, it was error to instruct the jury to find for plaintiff in the amount of the policy.—*Westchester Fire Ins. Co. v. Wagner*, 30 S. W. 959.

^{1212.} Instructions which indicate

that an insurance company was not bound by the redelivery of its policy unless the agent is expressly authorized are properly refused as misleading.—*Austin Fire Ins. Co. v. Sayles*, 157 S. W. 272. See 28 Cent. Dig. Insurance, §§ 1556, 1771.

^{1213.} Where there was no written application, but whatever questions were asked the insured and the answers thereto were oral, an instruction that, if insured truthfully answered the questions asked him by the agent, then, if there was a lien on the property insured, it would not affect the validity of the policy, was erroneous, the agent not being required to inquire whether the subject of insurance was incumbered; and the fact that insured truthfully answered the questions propounded to him did not constitute a waiver of the provision avoiding the policy if the property was incumbered by an undisclosed lien.—*Mecca Fire Ins. Co. of Waco v. Moore*, 128 S. W. 441. See 28 Cent. Dig. Insurance, §§ 1556, 1771.

and that were a part of the stock insured and told the agent that shipments had been made but gave no further information, later telling another agent of the character of the shipments after learning the latter had information of the same, the court should have submitted the issue of fraud on the part of the insured in his dealings with the agents and adjusters and it was not sufficient to submit the issue of fraud in the shipments of the goods.¹²¹⁴ (For an instruction presenting the issue of fraud by excessive demand in the proof of loss, see Ann. 1217.) .

(12) **As to Proofs of Loss.**—Where, after application, the insurer did not furnish blank proofs of loss for fear of losing some of its legal rights, and the adjuster did not say whether it would be necessary to prepare them, there was no evidence warranting a submission to the jury of the question whether the insurer had

1214. In an action on fire insurance policies there was evidence that after the fire insured presented to the agent of the insurance company inventories taken by him and books kept by him, which contained no mention of goods that had recently been shipped and that were a part of the stock insured, and insured testified that he stated to the agent that shipments had been made but gave no further information, and afterwards, to another agent, he disclosed the character of the shipments, but this was done after he had discovered that the agent had information as to the shipments. Held, that the court should have submitted the issue of fraud on the part of insured in his dealings with the agent and adjusters of the company in regard to the loss, and it was not sufficient to submit the issue of fraud in the shipments of the goods.—*Home Ins. Co. v. Rogers*, 128 S. W. 625.

1215. Though the chief examiner of a fire insurance company testified directly that the risk covered by the policy would not have been accepted by the company had the true facts as to ownership been known to it, but there was other testimony tending to discredit him, the jury was not bound to believe him; and hence there was no error in charging that it was essential for the insurer to prove that it would not have accepted the risk had it known the true facts as to ownership.—*Shawnee Fire Ins. Co. v. Chapman*, 132 S. W. 854.

1216. In a suit on a fire policy on household goods, instruction held to present fairly the issue of the effect of noncompliance with the policy as to proof of loss.—*Fidelity Phenix Fire Ins. Co. v. Sadau*, 178 S. W. 559.

1217. Instruction held to present fairly the issue of fraud under the policy by excessive demand in proof of loss.—*Id.*

1218. Where the policy contains a condition making the policy void if the insured building becomes vacant, and the evidence shows that the building was vacant when the fire occurred, it is error to refuse to instruct the jury to find for the defendant, unless said condition was waived by the defendant or by some authorized agent.—*Commercial Union Assur. Co. v. Dunbar*, 26 S. W. 628.

1219. Where the loss was by fire, there was no error in failing to submit to the jury the excepted causes,—"Invasion, Insurrection," etc.—*Knoxville Fire Ins. Co. v. Hird*, 23 S. W. 393, 4 Tex. Civ. App. 82.

1220. In a suit to recover for a loss under a fire insurance policy, where it was not disputed that plaintiff had made a written application in which he warranted the truth of certain representations, but there was a question whether the policy was issued solely on such written application, it was not error to charge that if plaintiff made such application, and any of the representations were false, and defendant was thereby induced to issue the policy, the jury should find for defendant; and the jury could not be misled by the fact that it was left to them to determine whether the representations were in the application which was before them, and on its face furnished the information.—*Georgia Home Ins. Co. v. Brady*, 41 S. W. 513.

1221. An instruction charging that plaintiff, in order to recover on an insurance policy, must show exclusive ownership, without specifying whether such ownership should be shown to have existed at the time of issuing the policy or at the time of the fire, is not reversible error, since the omission could have been supplied by a requested charge if insurer conceived injury therefrom.—*Fire Ass'n of Philadelphia v. McNerney*, 54 S. W. 1058.

waived any conditions of the policy.¹²²² (For instruction presenting the issue of the effect of non-compliance with the policy as to proof of loss, see Ann. 1216.)

(13) **As to Contribution.**—A charge is erroneous which deprives one insurer from all contribution from another carrying insurance on the same property and imposes on the first a liability as great as if there had been no other insurance.^{1191 1186}

(14) **As to Arson.**—It is error to charge that the burden of proof is on the insured to show that the loss was an honest one, that is, that it was owing to causes not traceable to the insured or his agency, where the defense is arson.¹¹⁹²

(15) **As to Assignment.**—An instruction that notification of insurer as to assignment was not sufficient, that assent by the insurer was also required, and that, if notification were given, its assent would be presumed, unless it declined to accept the transfer, is proper.¹¹⁸⁴ An instruction on the theory that an assignment was made through mistake was warranted where an endorsement of assignment on the policy was made subject to the consent of the insurer, without knowledge or consent of assignees, without consideration, was not delivered and was brought about by the insurer's agent who advised it and the insured being ignorant, followed the advice.¹²²³

(16) **Miscellaneous.**—For instructions on the following issues: Co-Insurance, see Ann. 1176; Pro Rata Liability, see Ann. 1186; Rents, see Ann. 1177; Excepted Causes, see Ann. 1219; Measure of Damages, see Ann. 1185; Fall of Building, see Ann. 1187; Misdescription of Property, see Ann. 1189; Loss of Personal Property, see Ann. 1199; Representations, see Ann. 1220; Interest, see Ann. 1201, 1202; Insurer Selecting Itself to Carry Insurance, see Ann. 1181.

Argument of Counsel.—Where the insurer admitted that the insured had a good cause of action except as defeated by the insurer's

1222. Insured in a fire policy, having suffered a loss, wrote the general agents of the company, asking for blanks on which to prepare proofs of loss; and the agents answered that if they were to furnish proofs of loss, and there should be any litigation, such action might be held a waiver of a defense under the policy, and that insured could doubtless procure a blank proof of loss at any book store. Subsequently the adjuster arrived and examined insured's books, but the adjuster did not state whether it would be necessary for insured to get up proofs of loss or not. Held, in an action on the policy, that there was no evidence warranting a submission to the jury of the question whether the insurer had waived any conditions of the policy.—*Fire Ass'n of Philadelphia v. Masterson*, 61 S. W. 962, 25 Tex. Civ. 518.

1223. In an action on a policy con-

taining the clause that the policy should be void if an assignment thereof was made before loss, the evidence showed that on the back of the policy was indorsed an assignment, subject to the consent of the insurance company, that it was executed without the knowledge or consent of the assignees; that the insured never received any consideration for the assignment, and neither it nor the policy was ever delivered to the assignees; that the making of the indorsement was brought about by an insurance agent, who advised the insured to have the assignment made, and insured, being ignorant, followed the advice and executed the assignment accordingly. Held, the evidence was sufficient to warrant an instruction on the theory that the assignment was made through mistake.—*Pennsylvania Fire Ins. Co. v. Waggener*, 97 S. W. 541. See 28 Cent. Dig. Insurance, §§ 1771-1784.

defense of arson the burden of proving such defense being on the insurer, it had the right to open and close.¹²²⁴ In a case where there was evidence tending to show a prosecution for arson, but no evidence showing an acquittal on such prosecution, it was error for counsel to state to the jury that the insured had been tried and acquitted.¹²²⁵

Verdict and Findings.—The submission of fifty questions to a jury is an abuse of the statute.¹²²⁷ A verdict against two companies on policies covering the same loss and for equal amounts and of even dates, implies an equal award against each company.¹²²⁹ A finding that the goods destroyed were, at the time of the fire, worth a certain amount, is equivalent to a finding that such amount was their actual cash value.¹²²⁸ A verdict may be amended by the trial judge so as to show the specific sums awarded, including interest.¹²²⁸

Judgment.—Under the statute, when the facts alleged and proved authorize a judgment on a policy without reformation, the fact that the petition sought to reform the contract, does not deprive the insured of the judgment to which they are entitled under the pleadings and proof.¹²³⁰ A judgment cannot be founded on evi-

Argument of Counsel.

1224. In an action on a fire policy, where defendant admitted, in the language of rule 31, that plaintiff had a good cause of action as set forth in his petition, except as defeated by facts of the answer constituting a good defense, which defense was that insured induced the burning of the property, the burden of proving such defense being on defendant, it was, under the express provisions of that rule, properly accorded the right to open and close.—*Joy v. Liverpool & London & Globe Ins. Co.*, 74 S. W. 822.

1225. Where, in an action on a fire policy, the defense was the insured had set the fire, and there was evidence tending to connect him with the fire, and some evidence tending to show a prosecution for arson, but no evidence showing an acquittal on such prosecution, it was error for counsel to state to the jury that the insured had been tried and acquitted.—*Phoenix Assur. Co. v. Stenson*, 63 S. W. 542.

670—Verdict and Findings. (See 28 Cent. Dig. Insurance, §§ 1785-1787.)

1226. A finding in an action on an insurance policy that the goods destroyed were, at the time of the fire, worth a certain amount, is equivalent to a finding that such amount was their actual cash value.—*German Ins. Co. v. Norris*, 32 S. W. 727, 11 Tex. Civ. App. 250.

1227. The submission of 50 questions to the jury is an abuse of the

special statute authorizing the submission of special issues.—*Hartford Fire Ins. Co. v. Post*, 62 S. W. 140, 25 Tex. Civ. App. 428.

1228. Where a verdict on fire policies awarded a lump sum to plaintiff and intervenor, apportioning a specific sum to plaintiff "which will be the amount of judgment obtained by him, with interest thereon at whatever per cent. it bears up to this date," and apportioning the remaining sum to intervenor with 6 per cent. interest from date of proof of loss to the date of verdict, the verdict was properly amended at the trial judge's direction so as to award 6 per cent. interest on the lump sum and on the apportioned sums from a specified date after the fire to the date of the verdict, and so as to show the total sums, including interest.—*Milwaukee Mechanics' Ins. Co. v. Frosch*, 130 S. W. 600.

1229. A verdict against two insurance companies on policies covering the same loss and for equal amounts, and of even dates, implies an equal award against each company.—*Milwaukee Mechanics' Ins. Co. v. Frosch*, 130 S. W. 600. See 28 Cent. Dig. Insurance, §§ 1785-1787.

672—Judgment. (See 28 Cent. Dig. Insurance, §§ 1789, 1790, 1792-1794.)

1230. Under Rev. St. Art. 1335, providing that the judgment of the court shall conform to the pleadings, the nature of the case proved, the verdict, if any, and shall be so framed as to give the party all the relief to

dence showing breach or a waiver of a breach of a policy where it is not pleaded.^{1231 1232} Under the statute an insurer is not entitled to judgment on a special verdict that misrepresentations by the insured were not material to the risk.¹²³³ Where the insurer asked for judgment over against the agent who issued the policy with knowledge of facts not stated in the application, it is not error to fail to give such judgment where the insurer does not show that the policy would not have been granted if the agent had communicated such facts to it.¹²³⁵ In a case where one holding a life estate sued on the policy, payable to her, and remaindermen intervened, but submitted no evidence by which the amount of the excess over the value of the life estate could be determined, a judgment in favor of the holder of the life estate alone was proper.¹²³⁴

Appeal and Error—(1) As to Reformation of the Policy.—A verdict for plaintiff, in an action to reform the policy by inserting his name as mortgagee and payee, brought on the ground of mistake in writing the policy, in which the evidence was required to be clear and convincing, will not be rejected on appeal, merely because the reviewing court would have found otherwise on the question of the credibility of the witnesses.¹²⁴⁰

(2) As to Ownership.—The Supreme Court will not reverse a finding of the Court of Civil Appeals that the insured was the unconditional owner of the building erected on another's land, where the circumstances warranted a finding that the land owner consented to the insured placing the building on the land during his occupancy.¹²³⁶ The error is harmless in the admission of oral evi-

which he may be entitled, either in law or equity, when the facts alleged and proved authorize a judgment on a policy of insurance without reformation, the fact that the petition sought to reform the contract does not deprive plaintiffs of the judgment to which they are entitled under the pleadings and proof. Judgment (Civ. App. 1898) 48 S. W. 49, reversed.—*Wagner v. Westchester Fire Ins. Co.*, 50 S. W. 569, 92 Tex. 549.

1231. Where waiver of a breach of a policy condition was not pleaded, evidence admitted to show such waiver furnishes no basis for a judgment.—*Mecca Fire Ins. Co. of Waço v. Moore*, 128 S. W. 441.

1232. A judgment for defendant in an action on an insurance policy based on evidence of a breach of stipulation against other insurance without defendant's consent is void where defendant failed to plead such breach.—*Glinners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House*, 147 S. W. 629.

1233. Under Rev. St. Art. 4947, an insurer is not entitled to judgment upon a special verdict that misrepresentations by the insured were not material to the risk.—*St. Paul Fire &*

Marine Ins. Co. v. Huff, 172 S. W. 755.

1234. Where a fire policy was payable to one having only a life estate in the property insured, and, in an action by her on the policy, the remaindermen intervened, but submitted no evidence by which the amount of excess over the value of the life estate could be determined, a judgment in favor of plaintiff alone was proper.—*Grant v. Buchanan*, 81 S. W. 820, 36 Tex. Civ. App. 334.

1235. In an action on a fire policy, the company having sought a judgment by cross-action against the local agent, who issued the policy with knowledge of facts not stated in the application, it was not error to fail to give such judgment, in the absence of any showing by the company that the policy would not have been granted if the agent had communicated such facts to it.—*Continental Fire Ass'n v. Norris*, 70 S. W. 769.

Appeal and Error.

1236. A finding by the court of civil appeals, in an action on a policy, that plaintiff was the unconditional owner of a building erected on another's land, will not be reversed, as a matter of

dence that a certain person burned property and at the same time exclude the policy, in showing ownership, where other evidence showed ownership.¹²³⁵

(3) **As to Payment of Premiums.**—A verdict on conflicting evidence that a premium had been paid to the insurer, will not be disturbed.¹²³⁷

(4) **As to the Value of the Property.**—Where the value is competently proven it is harmless to refuse an instruction that proofs of loss under a policy are not evidence of the value of the property destroyed.¹²³⁸ In a case where the jury found according to the prices of the goods where such goods were destroyed, evidence that the brand of goods is preferred in other places does not injure the insurer.¹²³⁹ The court's action in excluding testimony of the insured's manager as to value of personal property and as to the insured's profit in selling same, was not reviewable error, where the bill of exceptions showed that the manager did not know what the insured gave for the property and did not show that he could or would have stated the profit.¹²³⁵ In the case of an inquiry by a jury as to whether they were instructed to calculate the loss according to an inventory, an answer that they were to consider it together with all the other evidence, is not objectionable as laying too much stress on the inventory.¹²³³

(5) **As to Arbitration and Total Loss.**—Testimony of arbitrators, as to a building totally destroyed, that they did not estimate the value of the one story part of the building, no valid award being made, did not injure the insurer as to the building, as the loss on it was a liquidated demand and arbitration did not apply, and as to the personal property, it was admissible, under allegations of mistake of the arbitrators.¹²⁴⁰

(6) **As to the Iron-Safe Clause.**—Where the evidence shows a

law, on appeal to the Supreme Court, where the circumstances warranted a finding that the landowner consented to assured placing the building on the land during his occupancy.—*Judgment Lion Ins. Co. of London v. Wicker*, 55 S. W. 741, 93 Tex. 397.

¹²³⁷. In an action on an insurance policy, a verdict, on conflicting evidence, that the premium had been paid to defendant or its agent, will not be disturbed.—*Hartford Fire Ins. Co. v. Cameron*, 45 S. W. 158, 18 Tex. Civ. App. 237.

¹²³⁸. It is harmless to refuse an instruction that proofs of loss under an insurance policy are not evidence of the value of the property destroyed where the value is competently proved.—*Virginia Fire & Marine Ins. Co. v. Cannon*, 45 S. W. 945, 18 Tex. Civ. App. 588.

¹²³⁹. Evidence that the brand of goods destroyed is preferred in places

other than the one in which the goods were held does not injure the interests of an insurance company in an action against it to recover for the loss of the goods, where the jury found according to the prices where the goods were destroyed. *Hartford Fire Ins. Co. v. Cannon*, 46 S. W. 851, 19 Tex. Civ. App. 305.

¹²⁴⁰. In an action against an insurance company, arbitrators appointed to assess the damages were permitted to testify that they did not estimate the value of a part of the building that was only one story high. No valid award was made. The building was totally destroyed. Held, the testimony did not injure the company, as to the building, since the loss on it was a liquidated demand, and arbitration did not apply, and as to the personal property it was admissible, under allegations of mistake of the arbitrators.—*Phoenix Ins. Co. v. Moore*, 46 S. W. 1131.

substantial compliance with the iron-safe clause and that the agent authorized additional insurance or knew thereof before the loss, error in overruling special demurrers to those parts of the insured's petition relating to what the insurer's agent told him about taking an inventory and as to additional insurance is harmless.¹²⁵⁶ It is prejudicial error to in effect strike from the answer allegations of the insured's breach of the provision requiring an annual inventory and record of the business, where the insurer's defense of forfeiture is left without legal basis or pleading.¹²⁶³

1241. Plaintiff in error's objection that he did not obtain a fair statement of facts could not be considered when presented by a bill of exceptions, which was refused by the trial court.—*Austin Fire Ins. Co. v. Brown*, 160 S. W. 973.

1242. A statement of facts prepared by the trial judge, upon a disagreement between counsel in reference thereto, need not be prepared in duplicate but need only be filed with the clerk of the court, where the case was tried, as part of the record of the cause.—*Austin Fire Ins. Co. v. Brown*, 160 S. W. 973.

1243. An error of omission in a charge of the court furnishes no ground for a reversal, in the absence of a request for a correct charge on the subject.—*State Mut. Fire Ins. Co. v. Taylor*, 157 S. W. 950.

1244. Assignment of error not referring to the part of the motion for new trial wherein the error assigned is complained of, as required by rule 25 (142 S. W. xii), cannot be considered.—*J. F. Siensheimer & Co. v. Maryland Motor Car Ins. Co.*, 157 S. W. 228.

1245. It is not necessary that the action or ruling of the court in the giving and refusing of charges be included in the motion for a new trial.—*State Mut. Fire Ins. Co. v. Taylor*, 157 S. W. 950.

1246. Assignments of error, based on the exclusion of testimony, will not be considered where the testimony was as to an issue not in the case.—*Austin Fire Ins. Co. v. Sayles*, 157 S. W. 272.

1247. Where the trial court found a fact was provided by undisputed evidence, and so instructed, and the party to whom the finding was addressed did not except or assign error, the Court of Appeals cannot look into the statement of facts to ascertain what facts were brought forward upon the issue.—*Commonwealth Ins. Co. of New York v. Finegold*, 183 S. W. 833.

1248. Where not presented by bill of exceptions, as required by rule 70 (142 S. W. xxii) for the county and district courts, the question of the denial of a continuance cannot be reviewed.—*Hanover Fire Ins. Co. of New York v. Huff*, 175 S. W. 465.

1249. Verdict for plaintiff, in an action to reform a policy by inserting his name as mortgagee and payee, brought on the ground of mistake in writing the policy, in which the evidence was required to be clear and convincing, will not be rejected on appeal merely because the reviewing court would have found otherwise on the question of the credibility of the witnesses.—*Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.*, 167 S. W. 816.

1250. Error in permitting a party to introduce in evidence the affidavit of his attorney, forming a part of a motion for continuance, held not reversible within Courts of Civil Appeals rule 62a (149 S. W. x).—*State Mut. Fire Ins. Co. of Texas v. Cathey*, 172 S. W. 187.

1251. In an appellate court the amount in controversy determining its jurisdiction is the amount for which judgement could have been rendered in the judgment appealed from.—*J. F. Siensheimer & Co. v. Maryland Motor Car Ins. Co.*, 157 S. W. 228.

1252. The erroneous admission of testimony is harmless, where the fact testified to was established by other evidence.—*Hanover Fire Ins. Co. of New York v. Huff*, 175 S. W. 465.

1253. Although it is error to admit oral evidence that a certain person insured burned property, and at the same time excluded the policy of insurance, in showing ownership, the error is harmless, where other evidence showed ownership.—*Tinker v. State*, 179 S. W. 572.

1254. A judgment on a general verdict for plaintiff will be reversed, the case remanded for new trial, the custom which could make the insurance valid not having been pleaded or considered at the trial; the testimony having been an irresponsible answer.—*Norwich Union Fire Ins. Society v. Dalton*, 175 S. W. 469.

1255. In the absence of statements to the contrary in the bill of exceptions, it will be presumed that the court by proper inquiries satisfied itself as to the competency of witnesses before allowing them to give expert testimony.—*Hanover Fire Ins. Co. of New York v. Huff*, 175 S. W. 465.

REINSURANCE

Reinsurance—(1) Statutory Regulation.—A fire insurance company must confine its insurance on any one risk to ten per cent of its paid-up capital stock except in insuring cotton in bales and grain, unless the excess is insured in some other solvent company. A fire or marine insurance company may reinsure the whole or any part of its policy obligation in any other company legally authorized to do business in this state. Any fire or marine company which fails to comply with the article shall forfeit its authority to do such business for one year. The Commissioner of Insurance and Banking, upon payment of the proper fee, may issue to a regularly authorized agent of one or more fire or marine companies authorized to do business in this state, a certificate of authority to place excess lines of insurance in companies not authorized to do business in this state, providing the party who desires such excess insurance shall file an affidavit with the commissioner that he has exhausted all the insurance obtainable from companies authorized to do business in this state. Such agent must also first file a bond in the sum of a thousand dollars for the faithful observance of the

1286. Error in overruling special demurrers to those parts of plaintiff's petition relating to what insurer's agent told him about taking an inventory, and as to additional insurance, was harmless, in view of evidence showing a substantial compliance with the iron safe clause, and that the agent authorized additional insurance, or knew thereof before the loss.—*American Cent. Ins. Co. v. Hardin*, 151 S. W. 1152.

1287. Where the copies of appellants' brief were in typewriting, single spaced, and with the exception of one copy, so blurred as to make it very difficult to read portions thereof, but appellee did not complain of the non-compliance with the rules, the court on its own motion would direct the clerk to prepare copies of the brief for its use, and tax the costs thereof against appellant.—*State Mut. Fire Ins. Co. v. Cathey*, 153 S. W. 935.

1288. Assignments of error, not followed by a statement showing the objections sustained to excluded testimony, will be overruled.—*Austin Fire Ins. Co. v. Sayles*, 157 S. W. 272.

1289. In an action on a marine insurance policy, assignments of error on the part of the insurer held not to present the question whether it was improperly denied compensation for money expended in salvage.—*Mannheim Ins. Co. v. Charles Clarke & Co.*, 157 S. W. 291.

1290. Where an insurer desires to complain of the judgment which denied it relief on its cross-action, by which it claimed compensation for

money expended in salvage, it must raise the point either by an assignment of error, or by a proposition under an assignment in which the point is sufficiently made.—*Id.*

1291. Under rules for the Courts of Civil Appeals 29, 30, 31 (142 S. W. xii, xiii), providing that each point under each assignment shall be stated as a proposition, and that to each of these propositions there shall be subjoined a brief statement of the proceedings, an assignment or proposition not followed by a statement of the evidence will not be regarded.—*Id.*

1292. An order sustaining a demurrer to the answer which in effect strikes from the answer allegations of the insured's breach of a provision of policy, requiring annual inventory and keeping record of the business, is prejudicial error where defendant's defense of forfeiture was left without legal basis or pleading.—*Westchester Fire Ins. Co. v. McMinn*, 188 S. W. 25.

1293. Where the jury in fire insurance case inquired whether they were instructed to calculate the loss according to an inventory, an answer that they were to consider the inventory, together with all the other evidence, held unobjectionable as laying too much stress upon the inventory.—*Fire Ass'n of Philadelphia v. Powell*, 188 S. W. 47.

1294. It is proper to refuse to submit to the jury issues as to which on the evidence only one conclusion is possible.—*St. Paul Fire & Marine Ins. Co. v. Laster*, 187 S. W. 969.

provisions of this article. This agent must in addition make a report under oath twice a year of the gross premiums so collected and must pay the commissioner a tax of five per cent thereon. (Art. 4875, Rev. St. 1914.)

(2) **Knowledge of Agent.**—Where an agent, who had previously insured the plaintiff's stock, applied to other agents for reinsurance, these agents having full authority to issue policies for the defendant insurer, and who did issue the same and divided the commission with the first agent, such first agent was the agent of the reinsurer in the issuance of the policy, and his knowledge of any fact that would estop the defendant insurer from setting up a defense thereto was binding on the defendant insurer.¹²⁶⁵

(3) **Extent of Liability of Reinsurer.**—Where an insurance company by contract assumed the "trade, contingent liabilities and good will" of another company going out of business and agreed to pay the losses and reap the advantages which were to accrue from its assumption of the losses of the other company, the company going out of business agreeing to discharge its "outstanding obligations," the latter company was held liable for losses through fires before the contract was made.¹²⁶⁹

1265. Error, if any, in excluding testimony of plaintiff's manager as to value of piano covered by policy and as to plaintiff's profit, held not reviewable error, where bill of exceptions showed that manager did not know what plaintiff gave for piano, and did not show that he could or would have stated the profit.—*Fireman's Ins. Co. v. Jesse French Piano & Organ Co.*, 187 S. W. 691.

1266. Under the express provisions of Vernon's Sayles' Ann. Civ. St. 1914, Art. 1971, assignments of error in the Court's charge could not be considered, where the record did not show either objections or exception in the court below.—*Fireman's Ins. Co. v. Jesse French Piano & Organ Co.*, 187 S. W. 691.

1267. Declarations of one party that he is the agent of another are not ordinarily admissible to prove agency. However, where objection was not made in the lower court to this evidence, it could not be raised for the first time in the supreme court.—*St. Paul Fire & M. Ins. Co. v. McGregor*, 63 Tex. 399.

REINSURANCE. (See 19 CYC. 638).

Knowledge of Agent.

1268. Where S., who had previously insured plaintiff's stock, on being unable to reinsure the stock in any

company which he represented, applied to other insurance agents for such insurance, who had authority to fill out, countersign, and issue policies for defendant already in their possession, and such agents, at the request of S., issued the policy sued on to plaintiff, and divided the commission with S., the latter was the agent of defendant in the issuance of the policy, and his knowledge of any fact that would estop the defendant from setting up a defense thereto was binding on defendant.—*Virginia Fire & Marine Ins. Co. v. Cummings*, 78 S. W. 716. See Cent. Dig. vol. 28, cols. 2949-2954, §§ 1811, 1812; cols. 2960, 2961, §§ 1818, 1819.

684—Extent of Liability of Reinsurer. (See 28 Cent. Dig. Insurance, §1817).

1269. An insurance company, on another one going out of business, by contract assumed its "trade, contingent liabilities and good will," and agreed to pay the losses and reap the advantages which were "to accrue" from its assumption of the losses of the other company. The company going out of business agreed to discharge its "outstanding obligations" held, that it was liable for losses through fires before the contract was made.—*Olsen v. California Ins. Co. (Tex. Civ. App.)* 32 S. W. 446, 11 Tex. Civ. App. 371.

STATUTORY LAW

CHAPTER I

COMMISSIONER OF INSURANCE AND BANKING

Appointment of.

Section 1. The Governor shall appoint, by and with the advice and consent of the Senate, a Commissioner of Insurance and Banking, who shall be a citizen of the State and experienced in matters of insurance. (R. S., Art. 4485.)

Term of Office.

2. The Commissioner of Insurance and Banking shall hold his office for the term of two years, and until the appointment and qualification of his successor. (R. S., Art. 4486.)

Vacancies in Office, How Filled.

3. The Governor may fill any vacancy occurring in the office of Commissioner of Insurance and Banking, and report the name of the person so appointed to the Senate, if in session, or at the next succeeding session of the Legislature. Should the Senate fail to confirm the appointment made by the Governor within ten days after being advised thereof, then the said office shall be deemed vacant and a new appointment shall be made until the office is filled. (R. S., Art. 4487.)

Oath and Bond.

4. Within fifteen days after notice of his appointment, and before entering upon the duties of his office, he shall take the oath of office prescribed by the Constitution, and shall give a bond to the State of Texas in the sum of five thousand dollars, with two or more good and sufficient sureties, to be approved by the Governor, and conditioned for the faithful discharge of the duties of his office, which oath and bond shall be filed in the office of the Secretary of State. (R. S., Art. 4488.)

Clerks, May Appoint.

5. Said Commissioner may appoint a competent chief clerk and such other clerks as the labors of his office may require; and all clerks shall be removable at the pleasure of the Commissioner. (R. S., Art. 4489.)

Chief Clerk, Duties of.

6. The chief clerk shall possess all the power and perform all the duties attached by law to the office of Commissioner during the

necessary or unavoidable absence of the Commissioner, or his inability to act from any cause. The Commissioner shall be responsible for the acts of his chief clerk, who shall, before entering upon the duties of his position, take the oath required of the Commissioner; he may also be required by the Commissioner to enter into bond with security, payable to said Commissioner for the faithful performance of the duties of his position. (R. S., Art. 4490.)

Shall Be Styled Commissioner of Insurance and Banking, and Have a Seal.

7. The said Commissioner shall be styled the Commissioner of Insurance and Banking and shall have a seal of office, the design of which shall consist of a star with five points with letters composing the word "Texas" arranged between the respective points thereof; said seal to be not less than one and a half and not more than two inches in diameter, and on the margin "Department of Insurance and Banking," or an intelligible abbreviation thereof. Such seal thus formed and impressed shall be the seal of office of the Department of Insurance and Banking. (R. S., Art. 4491.)

Ineligibility of Certain Persons.

8. No person who is a director, officer or agent of, or directly or indirectly interested in, any insurance company, except as insured, shall be a commissioner or clerk; and it shall be unlawful for such commissioner, or any person employed by him, or in any way connected with his office, to purchase all or any part of any mine or mineral land, or be in any manner interested in such purchase, during the term of his office or employment. (R. S., Art. 4492.)

CHAPTER II

DUTIES OF THE COMMISSIONER

9. In addition to the duties required of the Commissioner of Insurance and Banking, by this Act, he shall perform other duties as follows: (R. S., Art. 4493.)

Shall Execute the Laws.

10. (1) To see that all laws respecting insurance and insurance companies are faithfully executed. (R. S., Art. 4493, Subdivision 1.)

File Articles of Incorporation and Other Papers.

11. (2) To file and preserve in his office all acts or articles of incorporation of insurance companies and all other papers required by law to be deposited with him, and, upon application of any party interested therein to furnish certified copies thereof upon payment of the fees prescribed by law. (R. S., Art. 4493, Subdivision 2.)

Shall Calculate Net Value of Policies.

12. (3) He shall, as soon as practicable, in each year, calculate or cause to be calculated in his office, by an officer or employe of his department, the net value on the 31st day of December of the previous year of all the policies in force on that day in each life or health insurance company doing business in this State, upon the basis and in the manner prescribed by law. (R. S., Art. 4493, Subdivision 3.)

Shall See That Company Has Net Value of Policies on Hand.

13. (4) Having determined the net value of all the policies in force, it shall be his duty to see that the company has in safe securities of the class and character required by the laws of this State the amount of said net value of all its policies, after all its debts and claims against it and at least one hundred thousand dollars of surplus to policyholders have been provided for. (R. S., Art. 4493, Subdivision 4.)

May Accept the Valuation of Commissioners of Other States.

14. (5) He may accept the valuation made by the Insurance Commissioner of the State under whose authority a life insurance company was organized when such valuation has been properly made on sound and recognized principles, as a legal basis as above; provided, the company shall furnish to him a certificate of the Insurance Commissioner of such States, setting forth the value calculated on the data designated above of all the policies in force in the company on the previous 31st day of December, and stating that after all other debts of the company and claims against it at that time, and one hundred thousand dollars surplus to policyholders, were provided for, the company had, in safe securities of the character required by the laws of this State, an amount equal to the net value of all its policies in force, and that said company is entitled to do business in its own State. (R. S., Art. 4493, Subdivision 5.)

Shall See That Companies Furnish Certificate.

15. (6) Every life insurance company doing business in this State during the year for which the statement is made that fails promptly to furnish the certificate aforesaid, shall be required to make full detailed lists of policies and securities to the Insurance Commissioner, and shall be liable for all charges and expenses consequent upon not having furnished said certificate. (R. S., Art. 4493, Subdivision 6.)

Shall Calculate the Reserve on Fire Insurance.

16. (7) For every company doing fire insurance business in this State he shall calculate the reinsurance reserve for unexpired

fire risks by taking 50 per cent of the premiums received on all unexpired risks that have less than one year to run, and a pro rata of all premiums received on risks that have more than one year to run; provided, that, when the reinsurance reserve, calculated as above, is less than 40 per cent of all the premiums received during the year, the reinsurance reserve in this case shall be the whole of the premiums received on all of its unexpired risks. For every company transacting any kind of insurance business in this State for which no basis is prescribed by law, he shall calculate the reinsurance reserve upon the same basis prescribed in this section as to companies transacting fire insurance business. (R. S., Art. 4493, Subdivision 7.)

Note.—A title and guaranty company insuring titles to real estate, issuing contracts for a specified number of years, for which it collects a single premium at once (not annually) must set aside as a reserve 50 per cent of such single premium and maintain the same during the entire life of the contract. (Opinion of Attorney General, February 27, 1912.)

Shall Charge Premiums in Marine and Inland Insurance.

17. (8) In marine and inland insurance he shall charge all the premiums received on unexpired risks as a reinsurance reserve. (R. S., Art. 4493, Subdivision 8.)

Duties When Company's Capital is Impaired.

18. (9) Having charged against a company other than life, the reinsurance reserve, as prescribed by the laws of this State and adding thereto all other debts and claims against the company, he shall, in case he finds the capital stock of the company impaired to the extent of 20 per cent, give notice to the company to make good its whole capital stock within sixty days, and if this is not done he shall require the company to cease to do business within this State, and shall thereupon, in case the company is organized under authority of the State, immediately institute legal proceedings to determine what further shall be done in the case. (R. S., Art. 4493, Subdivision 9.)

Shall Publish Result of Examinations.

19. (10) The Commissioner shall publish the result of his examination of the affairs of any company whenever he deems it for the interest of the public. (R. S., Art. 4493, Subdivision 10.)

Shall Suspend or Revoke Certificate of Authority.

20. (11) He shall suspend the entire business of any company of this State and the business within this State of any other company during its non-compliance with any provision of the laws relative to insurance or when its business is being fraudulently conducted, by suspending or revoking the certificate granted to him; and he shall give notice thereof to the Insurance Commissioner or

other similar officer of every State and shall publish notice thereof; provided, that he shall give such company at least ten days notice in writing of his intention to suspend its right to do business or revoke the certificate of authority granted by him, stating specifically the reason why he intends to so suspend, or revoke such certificate of authority. (R. S., Art. 4493, Subdivision 11.)

Shall Report to Attorney General.

21. (12) He shall report promptly and in detail to the Attorney General any violation of law relative to insurance companies or the business of insurance. (R. S., Art. 4493, Subdivision 12.)

Shall Furnish Blanks.

22. (13) He shall furnish to the companies required to report to him the necessary blank forms for the statements required. (R. S., Art. 4493, Subdivision 13.)

Shall Keep Records.

23. (14) He shall preserve in a permanent form a full record of his proceedings and a concise statement of the condition of each company or agency visited or examined. (R. S., Art. 4493, Subdivision 14.)

Shall Give Certified Copies.

24. (15) At the request of any person, and on the payment of the legal fee, he shall give certified copies of any record or papers in his office when he deems it not prejudicial to public interest, and shall give such other certificates as are provided for by law. (R. S., Art. 4493, Subdivision 15.)

Shall Report Annually to Governor.

25. (16) He shall report annually to the Governor the names and compensations of his clerks, the receipts and expenses of his department for the year, his official acts, the conditions of companies doing business in this State, and such other information as will exhibit the affairs of said department. (R. S., Art. 4493, Subdivision 16.)

Shall Send Copy of Reports to.

26. (17) He shall send a copy of such annual report to the insurance commissioner or other similar officer of every State, and to each company doing business in the State. (R. S., Art. 4493, Subdivision 17.)

Shall Report Laws to Commissioners of Other States, When.

27. (18) On request he shall communicate to the insurance commissioner or other similar officer of any other State, in which the substantial provisions of the law of this State relative to insurance

have been or shall be enacted, any facts which by law it is his duty to ascertain respecting the companies of this State doing business within such other State. (R. S., Art. 4493, Subdivision 18.)

Shall See That No Company Does Life Business, When.

28. (19) He shall see that no company is permitted to transact the business of life insurance in this State whose charter authorizes it to do a fire, marine, lightning, tornado or inland insurance business, and that no company authorized to do a life or health insurance business in this State be permitted to take fire, marine or inland risks. (R. S., Art. 4493, Subdivision 19.)

Shall Admit Mutual Companies, When.

29. (20) The Commissioner of Insurance and Banking shall admit into this State mutual insurance companies organized under the laws of other States and who have \$200,000 assets in excess of liabilities engaged in cyclone, tornado, hail and storm insurance. (R. S., Art. 4493, Subdivision 20.)

May Change Form of Annual Statement.

30. The Commissioner of Insurance and Banking may from time to time make such changes in the forms of the annual statements required of insurance companies of any kind as shall seem to him best adapted to elicit a true exhibit of their condition and methods of transacting business; provided, that such terms and requirements shall elicit only such information as shall pertain to the business of the company. (R. S., Art. 4494.)

Duties When Parties Refuse to Appear and Testify.

31. Whenever any person shall refuse to appear and testify, or to give information authorized by this chapter to be demanded by the Commissioner of Insurance, such Commissioner may file his application under oath with any district judge or district court within this State where said witness is summoned to appear, and it shall be the duty of said judge to summon said witness, administer oaths as required by law and require answers to such questions, and such judge or court shall have power to punish for contempt as now provided by law. (R. S., Art. 4495.)

Sheriff and Other Peace Officers Shall Execute Service.

32. Sheriffs and other peace officers of this State shall execute process directed to them by the Commissioner of Insurance and make return thereof to him as in the case of process issued from any of the courts. (R. S., Art. 4496.)

Shall Issue Certificate of Authority, When—Shall Revoke Certificate When Suit Removed to Federal Court.

33. Should the Commissioner of Insurance and Banking be satisfied that any company applying for a certificate of authority has

in all respects fully complied with the law, and that, if a stock company, its capital stock has been fully paid up; that it has the required amount of capital or surplus to policyholders, it shall be his duty to issue to such company a certificate of authority under the seal of his office, authorizing such company to transact insurance business, naming therein the particular kind of insurance, for the period of not less than three months nor extending beyond the last day of February next following the date of such certificate. And if any such insurance company organized under the laws of any State, or country, after having obtained a certificate of authority from the Commissioner of Insurance and Banking, or other officer authorized to issue such permit to do business in this State, shall bring in any Federal court any suit or action against any citizen of this State, or shall remove any suit or action heretofore or hereafter commenced in any court of this State, to which it is a party, to any Federal court, the Commissioner of Insurance and Banking shall forthwith revoke and recall the certificate of authority of such insurance company to do and transact business in this State, and no renewal of authority shall be granted to such insurance company to do business in this State for a period of three years after such revocation, and such insurance company shall thereafter be prohibited from transacting any business in this State until again duly authorized by law. (R. S., Art. 4497.)

Note.—(1) Fidelity, guaranty and surety companies and insurance companies are subject to the provisions in regard to removal or bringing of suits in Federal court. (Opinion of Attorney General, April 15, 1909.)

(2) A foreign life insurance company must have all its capital stock, authorized by its charter, fully paid up, before it can obtain a license to do business in Texas. (Opinion of Attorney General, August 27, 1913.)

(3) The statute authorizing revocation of license for filing suit in, or removing suit to, a Federal court, does not apply to fraternal beneficiary societies. Such statute, however, is not unconstitutional. (Opinion of Attorney General, May 5, 1915.)

(4) A company which does only a fidelity guaranty and surety business is not required to have its entire authorized capital paid up in order to obtain a certificate of authority to do business in Texas. (Opinion of Attorney General, June 1, 1915.)

Shall Compute Reserve Liability of Companies.

34. It shall be the duty of the Commissioner of Insurance and Banking, as soon as practicable, in each year, to compute the reserve liability on the 31st day of December of the preceding year of every company organized under the laws of this State or authorized to transact business in this State, which has outstanding policies of insurance on the lives of citizens of this State in accordance with the following rules:

1. The net value on the last day of December of the preceding year of all outstanding policies of life insurance in the company issued prior to the first day of January, 1910, shall be computed

according to the terms of said policies on the basis of the American Experience Table of Mortality and $4\frac{1}{2}$ per cent interest per annum.

2. The net value on the last day of December of the preceding year of all policies of life insurance issued after the 31st day of December, 1909, upon the basis of the Actuaries' or Combined Experience Table of Mortality, with 4 per cent interest per annum; provided, that the policies of any such life insurance company thereafter issued upon the reserve basis of an interest rate lower than 4 per cent shall be computed upon the basis of the American Experience Table of Mortality with interest at such lower rate per annum: provided, that any company which on January 1, 1909, was writing policies on the basis of $4\frac{1}{2}$ per cent may continue on that basis until January 1, 1912, and its policies shall be so valued.

3. In every case in which the actual premium charged for an insurance is less than the net premium for such insurance computed according to its respective tables of mortality and rate of interest aforesaid, the company shall also be charged with the value of annuity, the amount of which shall equal the difference between the premium charged and that required by the rules above stated and the term of which in years shall equal the number of future annual payments, due on the insurance at the date of the valuation. (R. S., Art. 4498.)

Note.—A life insurance company has outstanding contracts containing the following provisions:

"On the first day of August of each year, during the continuance of this contract, the company shall compute the number of thousands of insurance in force written for a period of ten years from and after August 1, 1906, in the State of Texas, upon which there shall have been paid in cash during the preceding year, one full annual premium, two semi-annual or four quarter-annual premiums.

"The company further agrees on the dates aforesaid to credit said member with such a sum of money from the expense element of premiums paid on insurance written in said State, during said period, after said date, as shall be obtained by dividing an amount of money equal to one dollar for each one thousand dollars of insurance in force at said dates, written during said period, after August 1, 1906, by the number of said members' contracts in force at the time of such distribution.

"The amount so credited to said member shall each year, on the anniversary of the date of this contract, or within sixty days thereafter, provided this contract be then in force, be paid to him by said ——— company, subject to the agreement of said member in his application herefor."

The amount which may be properly charged on December 31st any year against the company as a liability on account of the issuance of such contracts is the amount of money credited to the various special contract holders on August 1st of any such year—the last distribution period. The money paid in after that date and which is being held in a general fund for coming distribution dates, should not be charged as a liability. (Opinion of Attorney General, January 30, 1912.)

Shall Calculate Reinsurance Reserve.

35. On the 31st day of December of each and every year, or as soon thereafter as may be practicable, the Commissioner of Insurance and Banking shall have calculated in his office the reinsurance reserve for all unexpired risks of all insurance companies organized under the laws of this State, or transacting business in this State, transacting any kind of insurance other than life, fire, marine, inland, lightning or tornado insurance, by taking 50 per cent of the gross premiums on all unexpired risks that have less than one year to run and a pro rata of all premiums received on risks that have more than one year to run. (R. S., Art. 4499.)

Shall Examine Companies—Have Free Access to Books—May Revoke or Modify Certificate—Expenses for Examinations.

36. The Commissioner of Insurance and Banking shall, at the end of each two years, or oftener if he deems necessary, in person or by one or more examiners commissioned in writing, visit each company organized under the laws of this State and examine its financial condition and its ability to meet its liabilities. He shall have free access to all the books and papers of the company or agents thereof relating to the business and affairs of such company, and shall have power to summon and examine under oath the officers, agents and employes of such company and any other person within the State relative to the affairs of such insurance company. He may revoke or modify any certificate of authority issued by him when any conditions or requirements prescribed by law for granting it no longer exist; provided, that he shall give such company at least ten days' notice in writing of his intention to revoke or modify such certificate of authority issued by him, stating specifically the reasons why he intends to revoke or modify such certificate. The expense of every such examination shall be paid by the company so examined, but the Commissioner shall not make any charge for services except for traveling or other actual expenses and shall furnish the company with an itemized statement of such expenses. (R. S., Art. 4500.)

Powers and Duties of Commissioner in Case of Examination.

37. The Commissioner of Insurance and Banking, for the purpose of examination authorized by law, has power, either in person or by one or more examiners by him commissioned in writing:

1. To require free access to all books and papers within this State of any insurance companies or the agents thereof doing business within this State.

2. To summon and examine any person within this State, under oath, which he or any examiner may administer, relative to the affairs and conditions of any insurance company.

3. To visit at its principal office, wherever situated, any insur-

ance company doing business in this State, for the purpose of investigating its affairs and conditions, and shall revoke the certificate of authority of any such company in this State refusing to permit such examination. The reasonable expenses of all such examinations shall be paid by the company examined.

4. He may revoke or modify any certificate of authority issued by him when any condition prescribed by law for granting it no longer exists.

5. He shall also have power to institute suits and prosecutions either by the Attorney General or such other attorney as the Attorney General may designate, for any violations of the law of this State relating to insurance, and no action shall be brought or maintained by any person other than the Commissioner of Insurance and Banking for closing up the affairs or to enjoin, restrain or interfere with the prosecution of the business of any such insurance company organized under the laws of this State. (R. S., Art. 4501.)

Transfer of Securities, Must Be Countersigned.

38. No transfer by the Commissioner of Insurance of securities of any kind, in any way held by him in his official capacity, shall be valid unless countersigned by the Treasurer of the State. (R. S., Art. 4502.)

State Treasurer, Duty in Regard to Transfers.

39. It is the duty of the State Treasurer—

(1) To countersign any such transfer presented to him by the Commissioner.

(2) To keep a record of all transfers, stating the name of the transferee, unless transferred in blank, and a description of the security.

(3) Upon countersigning, to advise by mail the company concerned the particulars of the transaction.

(4) In his annual report to the Legislature, to state the transfers and the amount thereof countersigned by him. (R. S., Art. 4503.)

Free Access to Records, Books, Etc., Given to Commissioner and State Treasurer.

40. For the purpose of verifying the correctness of records, the Commissioner of Insurance shall be entitled to free access to the Treasurers records required by the preceding article, and the Treasurer shall be entitled to free access to the books and other documents of the Insurance Department relating to securities held by the Commissioner. (R. S., Art. 4504.)

Instruments Executed and Copies of Papers Made Evidence.

41. Every instrument executed by the Commissioner of Insurance of this State, or any other State in which the substantial provisions of the laws of this State relating to insurance have been

or shall be enacted, pursuant to authority conferred by law, and authenticated by his seal of office, shall be received as evidence, and copies of papers and records in his office certified by him and so authenticated shall be received as evidence with the same effect as the originals. (R. S., Art. 4505.)

Commissioner Authorized to Make Inquiries of Companies.

42. The Commissioner of Insurance is authorized to address any inquiries to any insurance company in relation to its business and condition, or any matter connected with its transaction, which he may deem necessary for the public good, or for a proper discharge of his duty and it shall be the duty of the company so addressed to promptly answer such inquiries in writing. (R. S., Art. 4506.)

Commissioner's Report.

43. It shall be the duty of the Commissioner to cause the information contained in the annual statements of companies to be arranged in tabular form, and prepare the same in a single document for printing and submit the same to the Legislature as a portion of his regular report to that body. (R. S., Art. 4507.)

Valid Final Judgment—Insurance Company's Certificate of Authority Revoked, When.

44. Should any insurance company fail or neglect to pay off and discharge any execution, issued upon a valid final judgment against said company, within thirty days after the notice of the issuance thereof, then in that event the certificate of authority of said company to transact business of insurance shall be revoked, canceled or annulled, and said company shall be prohibited from transacting business of insurance in this State until said execution shall be satisfied. (R. S., Art. 4508.)

Note.—Commissioner cannot revoke permit for failure to pay judgment unless it be a final and also a valid judgment. As long as there is pending an independent original suit to determine the validity of a default judgment, it is not final and Commissioner cannot revoke permit. Commissioner cannot determine validity of judgment while suit is pending to set it aside, nor pass upon the jurisdiction of the courts with reference to such suit. (Opinion of Attorney General, September 30, 1915.)

Commissioners to Give Certificates, Attested by Seal.

45. It shall be the duty of the Secretary of State, Commissioner of the General Land Office, Comptroller, Treasurer, Commissioner of Insurance and Banking, Adjutant General and Attorney General to furnish any person who may apply for the same, with a copy of any paper, document or record in their respective offices, and also to give certificates, attested by the seals of their respective offices, certifying to any fact or facts contained in the papers, documents or records of their offices to any person applying for the same. (R. S., Art. 3833.)

Fees.

46. It shall be lawful for the officers named in the preceding article to demand and receive the following fees for the services mentioned therein:

For copies of any paper, document or record in their offices in the English language, including certificate and seal, and for each hundred words	\$ 0 15
For copies of any paper, document or record in their offices, in any other language than the English, including certificate and seal, for each hundred words	25
For each translated copy of any paper, document or record in their office, including certificate and seal, for each hundred words	30
For the copy of any plat or map in their offices, such fee as may be established by the officer in whose office the same is made, to be determined with reference to the amount of labor required.	
For each certificate not otherwise provided for.....	50
(R. S., Art. 3834.)	

47. The Commissioner of Insurance and Banking shall charge and receive for the use of the State the following fees, to-wit:

For filing each declaration or certified copy of charter of insurance company	\$ 25.00
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Note.—Companies must pay \$25 filing fee for each amended declaration or certified copy. (Attorney General's opinion, November 4, 1901.)

For filing the annual statement of an insurance company, or certificate in lieu thereof	20.00
For certificate of authority and certified copy thereof.....	1 00
For every copy of any paper filed in his department, for each folio	20
For affixing his official seal and certifying to the same.....	1 00
For valuing policies of life insurance companies, for each one million of insurance or fraction thereof.....	10 00
For official examinations of companies under the law, the actual expense incurred, and ten dollars a day, not to exceed	250 00
(R. S., Art. 3844.)	

Note.—Filing fees should be returned to an insurance company if license is not granted. (Opinion of Attorney General, April 14, 1908.)

Shall Keep Fee Book and Render Account of Fees Quarterly.

48. It shall be the duty of the Secretary of State, Commissioner of General Land Office, Comptroller, Treasurer, Commissioner of

Agriculture, Commissioner of Insurance and Banking, State Librarian, Adjutant General and Attorney General, respectively, to keep fee books in their several offices, in which they shall enter all the fees received for any of the services named in this chapter, and they shall quarterly file with the Comptroller an account of all fees so received by them, respectively; which accounts shall be verified by the affidavit of the officer rendering the same, and such officer shall, also at the end of each quarter, pay over to the Treasurer of the State all moneys received by them respectively, under the provisions of this chapter. (R. S., Art. 3836.)

CHAPTER III

INCORPORATION OF INSURANCE COMPANIES—HOME COMPANIES

Formation of Company.

49. Any number of persons desiring to form a company for the purpose of transacting insurance business shall adopt and sign articles of incorporation, and submit the same to the Attorney General, and if said articles shall be found by him to be in accordance with the laws of this State, and of the United States, he shall attach thereto his certificate to that effect, whereupon such articles shall be deposited with the Commissioner of Insurance and Banking. (R. S., Art. 4705.)

Note.—The business of guaranteeing titles to land is insurance business, and a corporation organized and chartered under this statute for such purpose, must conduct its business under the supervision of the Insurance Department. (Opinion of Attorney General, May 1, 1913.)

Articles of Incorporation Shall Contain.

50. Such articles shall contain—

(1) The name of the company, and the name selected shall not be so similar to that of any other insurance company as to be likely to mislead the public.

Note.—Courts must pass upon question of similarity of names. (Attorney General's opinion, July 1, 1902.)

(2) The locality of the principal business office of such company.

(3) The kind of insurance business which the company proposes to engage in.

(4) The amount of its capital stock, which shall in no case be less than one hundred thousand dollars. (R. S., Art. 4706.)

Note.—A corporation issuing certificates guaranteeing and warranting titles to real estate is an insurance company and its charter should be filed with Commissioner of Insurance and Banking. (Opinion of Attorney General, January 29, 1910.)

Duty of Commissioner of Insurance When Articles Are Deposited With Him.

51. When the said articles of incorporation have been deposited with the Commissioner of Insurance and Banking, and the law in all other respects has been complied with by the company, the Commissioner shall make an examination, or cause one to be made by some competent and disinterested person appointed by him for that purpose; and if it shall be found that the capital stock of the company, to the amount required by law, has been paid in, and is possessed by it, in money or in such stock, notes, bonds or mortgages as are required by law, and that the same is the bona fide property of such company, and that such company has in all respects complied with the law relating to insurance, then the Commissioner of Insurance and Banking shall issue to such company a certificate of authority to commence business as proposed in their articles of incorporation. (R. S., Art. 4707.)

Note.—Certificates of stock issued by a fire insurance company, which stock was not paid for in cash, but in a certificate of deposit of a bank due at a future time, were unlawfully issued and should be canceled. (Opinion of Attorney General, November 13, 1912.)

Company Shall Certify Under Oath That the Capital is Bona Fide Its Property.

52. The corporators or officers of any such company shall be required to certify under oath to the Commissioner of Insurance and Banking that the capital exhibited to the person making the examination is the bona fide property of the company so examined, which certificate shall be filed and recorded in the office of the Commissioner of Insurance and Banking. (R. S., Art. 4708.)

Where Examination is Made by Other Than Commissioner.

53. If the examination be made by any other person than the Commissioner of Insurance and Banking, the finding shall be certified under the oath of the person making such examination, and such finding and certificate shall be filed and recorded in the office of the Commissioner of Insurance and Banking. (R. S., Art. 4709.)

Stock Divided Into Shares.

54. The stock of any company organized under the laws of this State shall be divided into shares of one hundred dollars each. (R. S., Art. 4710.)

Capital Stock Shall Consist of What.

55. The capital stock of a company shall consist:

- (1) In lawful money of the United States; or
- (2) In the bonds of this State or any county or incorporated town or city thereof, or the stock of any national bank; or

Real Estate Must Be Worth Double Amount Loaned on It.

(3) In first mortgages upon unincumbered real estate in this State, the title to which is valid and the market value of which is double the amount loaned thereon, exclusive of buildings, unless such buildings are insured in some responsible company and the policy or policies transferred to the company taking such mortgage. (R. S., Art. 4711.)

Surplus Money May Be Invested, How—Current Value of Investment.

56. The surplus money of a company over and above its paid-up capital stock may be invested in or loaned upon the pledge of public stocks or bonds of the United States, or any of the States, or stocks, bonds, or other evidences of indebtedness of any solvent dividend-paying corporation, or in bills of exchange or other commercial notes or bills, except its own stock; provided always, that the current market value of such stocks, bonds, notes, bills, or other evidences of indebtedness shall be at all times during the continuance of such loans at least 20 per cent more than the sum loaned thereon. (R. S., Art. 4712.)

Note.—The title guaranty companies are insurance companies and are subject to the insurance laws. A title guaranty company may invest part of its capital in an abstract plant to be used as incident to its business. It cannot sell abstracts to the public. It cannot invest any part of its capital in stock of an abstract company, but may invest its surplus in such stock as an investment, but not for the purpose of conducting the business of an abstract company. (Opinion of Attorney General, June 11, 1913.)

Company May Change and Reinvest Stock.

57. A company may change and reinvest its capital stock in like securities as occasion may from time to time require. (R. S., Art. 4713.)

Number and Qualification of Directors.

58. The affairs of any company organized under the laws of this State shall be managed not by more than thirteen nor fewer than seven directors, all of whom shall be stockholders in the company. (R. S., Art. 4714.)

Election of Directors.

59. Within thirty days after the subscription books of the company have been filed, a majority of the stockholders shall hold a meeting for the election of directors, each share entitling the holder thereof to one vote; and the directors then in office shall continue in office until their successors have been duly chosen and have accepted the trust. (R. S., Art. 4715.)

Annual Meeting for Election of.

60. The annual meeting for the election of directors of a company shall be held during the month of January, as the by-laws of the company may direct. (R. S., Art. 4716.)

Special Meetings for Election of.

61. If from any cause the stockholders should fail to elect directors at an annual meeting, they may hold a special meeting for that purpose, by giving thirty days' notice thereof in some newspaper in general circulation in the county in which the principal office of the company is located, and the directors chosen at such special meeting shall continue in office until their successors are duly elected and have accepted. (R. S., Art. 4717.)

Quorum of Stockholders.

62. No meeting of stockholders shall elect directors or transact such other business of the company unless there shall be present at such meeting, in person or by proxy, a majority in value of the stockholders equal to two-thirds of the stock of such company. (R. S., Art. 4718.)

Directors Shall Choose President and Other Officers.

63. The directors shall choose by ballot from their own number a president and such other officers as the by-laws of the company may designate, who shall perform such duties, receive such compensation and give such security as the by-laws of such company may require. (R. S., Art. 4719.)

Directors to Make By-Laws.

64. The directors may ordain and establish such by-laws and regulations, not inconsistent with law, as shall appear to them necessary for regulating and conducting the business of the company. (R. S., Art. 4720.)

Shall Keep a Record of Transactions.

65. It shall be the duty of the directors to keep a full and correct record of their transactions, which shall at all times during business hours be open to the inspection of the stockholders and other persons interested therein. (R. S., Art. 4721.)

Shall Fill Vacancies—What Shall Constitute a Quorum.

66. The directors shall fill all vacancies which shall occur in the board or in any of the offices of the company, and a majority of the board shall constitute a quorum for the transaction of business. (R. S., Art. 4722.)

General Incorporation Law Shall Apply.

67. The laws relating to and governing corporations in general shall apply to and govern insurance companies incorporated in this State in so far as the same may not be inconsistent with the provisions of this title. (R. S., Art. 4723.)

CHAPTER IV

GENERAL PROVISIONS—APPLIES TO VARIOUS COMPANIES

Must Publish Certificate of Commissioner.

68. It shall be the duty of every insurance company doing business in this State, whether life, health, fire, marine or inland, to publish annually, within thirty days after the issuance thereof, a certificate from the Commissioner of Insurance and Banking that such company has in all respects complied with the laws in relation to insurance. (R. S., Art. 4939.)

Companies Organized in This State—Unlawful Dividends.

69. It shall not be lawful for any life, health, marine or inland insurance company organized under the laws of this State to make any dividend except from the surplus arising from its business; and in estimating such profits there shall be reserved therefrom a sum equal to 40 per cent of the amount received as premiums on unexpired fire risks and policies, and 100 per cent of the premiums received on unexpired life, health, marine or inland transportation risks and policies; which amount so reserved is hereby declared to be unearned premiums; and there shall also be reserved the amount of all unpaid losses, whether adjusted or unadjusted; all sums due the company on bonds, mortgages, stock and book accounts, of which no part of the principal or interest thereon has been paid during the year preceeding such estimate of profit, and upon which suit for foreclosures or collections has not been commenced, or which, after judgment has been obtained thereon, shall have remained more than two years unsatisfied, and upon which interest shall not have been paid; and in case of any such judgment, the interest due or accrued thereon and remaining unpaid shall also be reserved. (R. S., Arts. 4867 and 4944.)

Penalty for Making Unlawful Dividends.

70. Any dividend made contrary to the provisions of the preceding article shall subject the company making it to a forfeiture of its charter, and the Commissioner of Insurance and Banking shall forthwith revoke its certificate of authority. (R. S., Art. 4868.)

Association of Companies Not Permitted to Do Business Until.

71. In the event that any number of insurance companies, whether life, health, fire, marine or inland, should associate themselves together for the purpose of issuing or vending policies or joint policies of insurance, such association shall not be permitted to do business in this State until the taxes and fees due from each

of said companies shall have been paid and all the conditions of the law fully complied with by each company; and any company failing or refusing to pay such taxes and fees, and to fully comply with the requirements of law, shall be refused permission by the Commissioner of Insurance to do business in this State. (R. S., Art. 4945.)

Notices Shall Be Published Three Successive Weeks in Two Papers.

72. Whenever by any provision of this title any notice or other matter is required to be published, it shall, unless otherwise provided, be published for three successive weeks in two newspapers printed in the State and which have a general circulation in the State. (R. S., Art. 4946.)

Occupation Taxes of All Companies, Except Life.

73. An act to amend Section 8 of Chapter 18 of the General Laws of the First Called Session of the Thirtieth Legislature, and imposing an occupation tax upon fire, fire and marine, marine inland and tornado insurance companies, transacting business in this State; prescribing the rate of tax and methods of its measurements; and amending Section 28 of the State Insurance Board Law, passed by the Fourth Called Session of the Thirty-first Legislature, and declaring an emergency. (Acts 32nd Leg., Chap. 108, Caption.)

Amendment to Previous Tax Law.

74. Section 8 of Chapter 18 of the General Laws of the First Called Session of the Thirtieth Legislature of the State of Texas is hereby amended so as to read hereafter as follows: (Acts 32nd Leg., Chap. 108, Sec. 1):

Annual Tax, and Defining Gross Premiums.

75. "Section 8. Every insurance company transacting the business of fire, marine, marine inland, accident, credit, title, live stock, fidelity, guaranty, surety, casualty or any other kind or character of insurance business other than the business of life insurance, within this State, and other than Fraternal Benefit Associations, at the time of filing its annual statement, shall report to the Commissioner of Insurance and Banking the gross amount of premiums received in the State upon property, and from persons residing in this State during the preceding year, and each of such companies shall pay an annual tax upon such gross premium receipts as follows: Shall pay a tax of two and six-tenths per cent, provided, that any company doing two or more kinds of insurance business herein referred to, shall pay the tax herein levied upon its gross premiums received from each of said kinds of business; and the gross premiums receipts where referred to in this act are understood to be the premium receipts reported to the Commissioner of Insurance and Banking by the insurance companies upon the sworn statement of

two principal officers of such companies, less return premiums paid policyholders, and to the premiums paid for reinsurance in companies authorized to do business in this State. (Acts 32nd Leg., Chap. 108, Sec. 1.)

Note.—Casualty companies, home companies organized in Texas, are not exempt from payment of the taxes on their gross premium receipts. (Opinion of Attorney General, January 18, 1915.)

Manner of Collecting Taxes.

76. Upon receipt by him of sworn statements, showing the gross premium receipts by such companies, the Commissioner shall certify to the State Treasurer the amount of taxes due (by) each company, which tax shall be paid to the State Treasurer for the use of the State on or before the first of March following, and the receipt of the Treasurer shall be evidence of the payment of such taxes. No such insurance company shall receive a permit to do business in this State until such taxes are paid. (Acts 32nd Leg., Chap. 108, Sec. 1.)

Certain Investments Will Reduce Taxes—Municipal and County Occupation Taxes Prohibited—Fraternal Beneficiary Associations Exempt.

77. If any such insurance company shall have as much as one-fourth of its entire assets, as shown by said sworn statement, invested in any or all of the following securities: Real estate in the State of Texas, bonds of this State or of any county, incorporated city or town of this State, or other property in this State in which by law such companies may invest their funds, then the annual tax of any such companies shall be one per cent of its said gross premium receipts; and if any such company shall invest as aforesaid as much as one-half of its assets, then the annual tax of such company shall be one-half of one per cent of its gross premium receipts, as above defined; and provided, further, that no occupation tax shall be levied on insurance companies herein subjected to a gross premium receipt tax by any county, city or town; provided, also, that all mutual fraternal benevolent associations, now or hereafter doing business in this State under the lodge system and on the assessment plan, whether organized under the laws of this State or a foreign State or country, are exempt from the provisions of this section. (Acts 32nd Leg., Chap. 108, Sec. 1.)

No Other Taxes Can Be Levied or Collected, But Fire Insurance Companies Must Pay Expenses of State Insurance Board—Purely Co-Operative or Mutual Fire Insurance Companies Are Exempt From Provisions of This Act.

78. The tax aforesaid shall constitute all taxes and license fees collectible under the laws of this State against any such insurance companies, and no other occupation or other taxes shall be levied on or collected from any insurance company by any county, city

or town, but this act shall not be construed to prohibit the levy and collection of State, county and municipal taxes upon the real and personal property of such companies; provided, that purely co-operative or mutual fire insurance companies carried on by the members thereof solely for the protection of their own property, and not for profits, shall be exempt from the provisions of this bill; provided, that in addition to the tax above prescribed, each company doing the business herein referred to and affected by the provisions of the act of the Fourth Called Session of the Thirty-first Legislature, approved September 6, 1910, and published as Chapter 8, General Laws of said session, shall pay its pro rata share of the charge or cost of maintaining the State Insurance Board as provided by Section 28 of said act, approved September 6, 1910, and published as Chapter 8 of the General Laws of the Fourth Called Session of the Thirty-first Legislature; and provided further, that portion of Section 28 of the State Insurance Board Law which reads as follows: "Provided that the collections from insurance companies provided for in this section shall not be made for any year during which any such company shall be liable under the laws of this State to the payment of an occupation tax at a rate of two and one-half per cent or more of the gross premiums canceled policies, be and the same is hereby repealed." (Acts 32nd Leg., Chap. 108, Sec. 1.)

Note.—(1) A surety company, making bonds required by the United States government under a license granted under an Act of Congress, does not thereby become a Federal agency, and the premiums collected on such bonds are not exempt from taxation. (Opinion of Attorney General, March 1, 1910.)

(2) A company, licensed to do a life insurance business and an accident insurance business, and which withdraws from the State as to its life business, is not required to pay taxes on premiums on renewals on its life business in order to obtain a license to continue its accident business. (Opinion of Attorney General, September 29, 1910.)

Repealing Clause.

79. All laws and parts of laws in conflict herewith are hereby repealed. (Acts 32nd Leg., Chap. 108, Sec. 2.)

Misrepresentation Must Be Material to Avoid Contract on That Ground.

80. Any provision in any contract or policy of insurance issued or contracted for in this State, which provides that the answers or statements made in the application of such contract, or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether

it was material or so contributed in any case, shall be a question of fact to be determined by the court or jury trying such case. (R. S., Art. 4947.)

No Defense Based Upon Misrepresentation Valid Unless Defendant Shall Within Reasonable Time After Discovering the Falsity Give Notice.

81. That in all suits brought upon insurance contracts or policies hereafter issued or contracted for in this State, no defense based upon misrepresentations made in the application for or in obtaining or securing the said contract shall be valid, unless the defendant shall show on the trial that within a reasonable time after discovering the falsity of the misrepresentations so made it gave notice to the assured, if living, or, if dead, to the owners or beneficiaries of said contract, that it refused to be bound by the contract, or policy; provided, that ninety days shall be a reasonable time; provided also, that this article shall not be construed as to render available as a defense any immaterial misrepresentation, nor to in any wise modify or affect Article 3096aa (4947). (R. S., Art. 4948.)

Shall Not Constitute Defense Unless Shown That False Statement Made Was Fraudulently Made and Material.

82. That any provision in any contract or policy of insurance issued or contracted for in this State, which provides that the same shall be void, or voidable, if any misrepresentations or false statements be made in proofs of loss or of death, as the case may be, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract or policy, unless it be shown upon the trial of such suit that the false statement made in such proofs of loss or death was fraudulently made, and misrepresented a fact material to the question of the liability of the insurance company upon the contract of insurance sued on, and that the insurance company was thereby misled, and caused to waive or lose some valid defense to the policy. (R. S., Art. 4949.)

The Insurance Contract Governed By Laws of Texas Notwithstanding Stipulations to the Contrary.

83. That any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance and governed thereby, notwithstanding that such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand), should be payable without this State, or at the home office of the company or corporation issuing the same. (R. S., Art. 4950.)

Photographic Copy of Contracts—Act Does Not Apply in Which There Is a Clause in Policy Making It Indisputable After Two Years or Less, Provided, Etc.

84. Every contract or policy of insurance issued or contracted for in this State shall be accompanied by a written, photographic or printed copy of the application for such insurance policy or contract, as well as a copy of all questions asked and answers given thereto. The provisions of the foregoing articles shall not apply to policies of life insurance in which there is a clause making such policy indisputable after two years or less, provided premiums are duly paid; provided further, that no defense based upon misrepresentations made in the application for or in obtaining or securing any contract of insurance upon the life of any person being or residing in this State shall be valid or enforceable in any suit brought upon such contract two years or more after the date of its issuance when premiums due on such contract for the said term of two years have been paid to and received by the company issuing such contract without notice to the assured by the company so issuing such contract of its intention to rescind the same on account of misrepresentations so made, unless it shall be shown on the trial that such misrepresentation was material to the risk and intentionally made. (R. S., Art. 4951.)

Level Premium Policy Shall Not Be Issued Providing for More Than One Year Preliminary Term.

85. No level premium policy of life insurance shall be issued or sold by any company in this State after December 31, 1909, which provides for more than one year preliminary term insurance. (R. S., Art. 4952.)

Policies Shall Contain Entire Contract.

86. Every policy of insurance issued or delivered within this State on or after the first day of January, 1910, by any life insurance company doing business within this State, shall contain the entire contract between the parties and the application, therefore, may be made a part thereof. (R. S., Art. 4953.)

Note.—This section repeals Section 83 *supra*. (Department ruling.)

Companies Shall Not Permit Distinctions.

87. No insurance company doing business in this State shall make or permit any distinction or discrimination in favor of individuals between insurants (the insured) of the same class and of equal expectation of life in the amount of or payment of premiums or rates charged for policies of life endowment insurance or in the dividends or other benefits payable thereon; nor shall any such company or agent thereof make any contract of insurance or agree-

ment as to such contract other than as expressed in the policy issued thereon, nor shall any such company or any officer, agent, solicitor or representative thereof pay, allow or give, or offer to pay, allow or give directly or indirectly as an inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon or any paid employment or contract for service of any kind, or any valuable consideration or inducement whatever not specified in the policy contract of insurance; or give, sell or purchase, or offer to give, sell or purchase, as an inducement to insurance, or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership of any dividends or profits to accrue thereon or anything of value whatsoever not specified in the policy, or issue any policy containing any special or board contract or similar provision, by the terms of which said policy will share or participate in any special fund derived from a tax or a charge against any portion of the premium on any other policy. Any company or agent violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, and the said company shall as an additional penalty forfeit its certificate of authority to do business in this State, and the said agent shall as an additional penalty forfeit his license to do business in this State for one year; provided, the company shall not be held liable under this section for any act of its agent unless such act was authorized by its president, one of its vice-presidents, its secretary or assistant secretary, or by its board of directors. (R. S., Art. 4954.)

Note.—(1) Policies of accident insurance, which promises to pay the holder, if he renews the policy for a second year, a benefit greater by 10 per cent than the benefit given the first year, and if renewed the third year, a benefit of 20 per cent greater, and so on, increasing the benefit 10 per cent on each annual renewal for five years, at the same annual premium rate, should not be permitted to issue in this State because forbidden by the law prohibiting rebates and discrimination. Contracts already in existence, however, under which such accumulations have accrued or will accrue may be carried out according to their terms; but no new contract promising such accumulations can be lawfully made. (Opinions of Attorney General, July 21, and September 21, 1911.)

(2) Accumulations on accident policies mentioned in opinions of Attorney General above noted are forbidden and prohibited on and after October 1, 1911. (Department ruling.)

(3) It is no violation of the law, for a company to collect a policy fee, in excess of the usual premium, when for the first time it issues a policy on the industrial or weekly or monthly premium plan. (Opinion of Attorney General, November 21, 1911.)

(4) Survivorship fund contracts are prohibited by the provision of this act. (Opinion of Attorney General, May 23, 1913.)

(5) Survivorship fund contracts and all similar contracts written by life insurance companies are illegal and should be forbidden. Such contracts,

however, as have already been issued are valid and binding. Opinion of Attorney General, July 10, 1913.)

(6) Acceptance of note without interest in payment of premiums is discrimination and a rebate. When a note is taken by a company or any of its agents, the interest rate on every such note must be the same. (Department ruling, December 9, 1913. Opinion of Attorney General, December 20, 1913.)

Shall Apply to All Companies.

88. All the provisions of the laws of this State applicable to the life, fire, marine, inland, lightning or tornado insurance companies shall, so far as the same are applicable, govern and apply to all companies transacting any other kind of insurance business in this State so far as they are not in conflict with provisions of law made specially applicable thereto. (R. S., Art. 4955.)

Corporations May Be Incorporated to Transact One or More Kinds of Insurance Business.

89. Corporations may be incorporated under the laws of this State to transact any one or more kinds of insurance business other than life, fire, marine, inland, lightning or tornado insurance business in the same manner and by complying with the same requirements as prescribed by law for the incorporation of life insurance companies; provided, that no such company shall be incorporated having the power to do a fidelity and surety business or a liability insurance business with a paid-up capital stock of less than \$200,000.00. (R. S., Art. 4956.)

Shall Not Apply to Fraternal Beneficiary Associations.

90. None of the terms or provisions of this chapter shall apply to nor in anywise affect fraternal beneficiary associations as defined by the laws of this State, nor apply to companies carrying on the business of life or casualty insurance, on the assessment or annual premium plan, under the provisions of this title. (R. S., Art. 4957.)

Shall Not Misrepresent Policies.

91. No life insurance company doing business in this State, and no officer, director or agent thereof shall issue or circulate or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort misrepresenting the terms of any policy issued by it or benefits or advantages to be promised thereby or the dividends or share of surplus to be received thereon. (R. S., Art. 4958.)

Policy Shall Not Be Defeated.

92. No recovery upon any life, accident or health insurance policy shall ever be defeated because of any misrepresentation in the application which is of an immaterial fact and which does not affect the risks assumed. (R. S., Art. 4959.)

As Conditions Precedent, Foreign Corporation Shall Be Held to Have Assented to These Provisions.

93. That the provisions of this title are conditions upon which foreign insurance corporations shall be permitted to do business within this State, and any such foreign corporations engaged in issuing insurance contracts or policies within this State shall be held to have assented thereto as a condition precedent to its rights to engage in such business within this State. (R. S., Art. 4972.)

FUNDS THAT MAY BE INVESTED IN BONDS ISSUED UNDER FEDERAL FARM LOAN ACT

An act declaring that all bonds issued under and by virtue of the Federal Farm Loan Act approved by the President of the United States, July 17, 1916, shall be lawful investment for all fiduciary and trust funds and may be accepted as security for all public deposits where deposits of bonds or mortgages are authorized by law to be accepted; declaring such bonds lawful investment for all funds which may be lawfully invested by guardians, administrators, trustees and receivers, for savings departments of State banks, for banks, savings banks, and trust companies chartered under the laws of Texas; for all insurance companies chartered or transacting business under the laws of Texas where investments are required or permitted, and providing that where such bonds are secured by notes or other obligations the payment of which is secured by mortgage, deed or trust or other valid lien upon real estate situated in this State, then that such bond or bonds shall be regarded for investment purposes by insurance companies as Texas securities, and declaring an emergency. (Caption, Chapter 63, General Laws of 35th Leg., Reg. Ses.)

Section 1. That hereafter all bonds issued under and by virtue of the Federal Farm Loan Act, approved by the President of the United States, July 17, 1916, which is "An act to provide capital for agricultural development, to create standard forms of investments based upon farm mortgages; to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositories and financial agents for the United States, and for other purposes," shall hereafter be lawful investment for all fiduciary and trust funds in this State and may be accepted as security for all public deposits where deposits of bonds or mortgages are authorized by law to be accepted; such bonds shall be lawful investment for all funds which may be lawfully invested by guardians, administrators, trustees and receivers, for savings departments of banks incorporated under the laws of Texas, for banks, savings banks and trust companies chartered under the laws of

Texas, and for all insurance companies of every kind and character chartered or transacting business under the laws of Texas, where investments are required or permitted by the laws of this State; provided, further, that where such bonds are issued against and secured by promissory notes or other obligations, the payment of which is secured by mortgage, deed or trust or other valid lien upon unencumbered real estate situated in this State, then such bond or bonds so issued and so secured shall be regarded for investment purposes by insurance companies as "Texas securities," within the meaning of the laws of this State governing such investments. (Chap. 63, Gen. Laws 35th Leg., Reg. Ses. Approved March 8, 1917. Takes effect immediately.)

CHAPTER V

AGENTS—DEFINITIONS OF—LICENSE—POWERS— RESTRICTIONS—PENALTIES

Must Have Certificate of Authority.

94. It shall not be lawful for any person to act within this State as agent or otherwise in soliciting or receiving applications for insurance of any kind whatever, or in any manner to aid in the transaction of the business of any insurance company incorporated in this State or out of it, without first procuring a certificate of authority from the Commissioner of Insurance and Banking. (R. S., Art. 4960.)

Penalty for Agent Doing Business Without Authority.

95. If any person shall transact the business of life, fire or marine insurance in this State, either as agent, solicitor or broker, without he or the company or association which he represents, first obtaining a certificate of authority therefor from the Commissioner of Insurance and Banking, he shall be punished by fine not less than five hundred nor more than one thousand dollars, and by imprisonment in the county jail not less than three nor more than six months. (P. C., Art. 642.)

Penalty for Any Violation of Insurance Laws.

96. If any person shall violate any provision of the laws of this State regulating the business of life, fire or marine insurance, he shall be punished by fine not less than five hundred nor more than one thousand dollars. (P. C., Art. 643.)

Who Are Insurance Agents.

97. Any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other State or foreign government, or who takes or transmits other

than for himself any application for insurance, or any policy of insurance, to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive or collect or transmit any premium of insurance or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken, as far as relates to all the liabilities, duties, requirements and penalties set forth in this Act; provided, that the provisions of this Act shall not apply to citizens of this State who arbitrate in the adjustment of losses between the insurers and the assured, nor to the adjustment of particular or general average losses of vessels or cargoes by marine adjusters who have paid an occupation tax of two hundred dollars for the year in which the adjustment is made; provided further, that the provisions of this chapter shall not apply to practicing attorneys at law in the State of Texas acting in the regular transaction of their business as such attorneys at law, and who are not local agents nor acting as adjusters for any insurance company. (P. C., Art. 644, and R. S., Art. 4961.)

Note.—(1) Individuals only may become agents of insurance companies, and partnership firms, corporations or companies cannot be licensed as such. (Opinion of Attorney General, May 3, 1904.)

(2) A warehouseman, who in his own name procures from insurance companies policies "on cotton in bales owned or held by the assured in trust or on commission or on joint account with others," and thereafter charging his patrons their proper proportion of insurance carried by him in trust for their benefit, does not thereby become an insurance company or the agent of any such company. (Opinion of Attorney General, April 29, 1911.)

(3) An adjuster for an insurance company may adjust losses occurring under policies lawfully issued by the company while licensed in Texas, although at the time of the adjustment the company has no authority to do business in Texas. (Opinion of Attorney General, June 19, 1911.)

Shall Be Guilty of a Misdemeanor.

98. Any person who shall do or perform any of the acts or things mentioned in the preceding section for any insurance company heretofore referred to, without such company, having first complied with the requirements of the laws of this State, or having received the certificate of authority from the Commissioner of Insurance and Banking of the State of Texas, as required by law, shall be

guilty of a misdemeanor, and on conviction by any court of competent jurisdiction, for the first offense shall be fined five hundred dollars, and also a sum equal to the State, county and municipal licenses required to be paid by such insurance company for doing business in this State, and shall be imprisoned in the county jail where the offense is committed for the period of three months, unless the fine assessed against him and the sum of licenses herein mentioned and the cost of the court be sooner paid; and for any second or other offense such person shall be fined in the sum of one thousand dollars, and shall be imprisoned in the county jail for the period of six months, unless the fines assessed against him and the costs of court be sooner paid. (P. C., Art. 645.)

Note.—An agent soliciting subscriptions to the capital stock of an insurance company not authorized to do business in Texas, is not an insurance agent, and may lawfully solicit such subscriptions and sell such stock without a license from the Commissioner of Insurance and Banking.

Persons Performing Acts of Agent Shall Pay Tax.

99. Whenever any person shall do or perform within this State any of the acts mentioned in Article 4961 (Sec. 427), for or on behalf of any insurance company therein referred to, such company shall be held to be doing business in the State, and shall be subject to the same taxes, State, county and municipal, as insurance companies that have been legally qualified and admitted to do business in this State, by agents or otherwise, are subject; the same to be assessed and collected as taxes are assessed and collected against such companies, and such persons so doing or performing any of the acts or things shall be personally liable for such taxes. (R. S., Art. 4962.)

Shall Be Liable to Policyholders for Loss.

100. Any person who shall do any of the acts mentioned in Article 4961 (Sec. 427), for or on behalf of any insurance company, without such company has first complied with the requirements of the laws of this State, shall be personally liable to the holder of any policy of insurance in respect of which such act was done, for any loss covered by the same. (R. S., Art. 4962.)

Fraudulent Insurance.

101. If any person shall cause insurance to be made in this State upon any merchandise or other commodity represented to be already shipped, or about to be shipped, at any place, whether within this State or out of it, and shall, with intent to defraud the insurer, ship articles of value less than one-half the represented value of those insured, or of a different kind from those insured, he shall be punished by a fine in any sum not exceeding the amount for which such merchandise or commodity may be insured. (P. C., Art. 967.)

All Insurance Business Must Be Transacted Through Authorized and Licensed Agents—Penalty.

102. Any fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance company legally authorized to do business in this State is hereby prohibited from authorizing or allowing any person, agent, firm, or corporation that is a non-resident of the State of Texas to issue or cause to be issued, to sign or countersign, or to deliver or cause to be delivered, any policy or policies of insurance on property, person or persons located in the State of Texas, except through regularly commissioned and licensed agents of such companies in Texas; provided, however, that this law shall not apply to property owned by the railroad companies or other common carriers; and provided further, that upon oath made in writing by any person, that he cannot procure insurance on property through such agents in Texas, it shall be lawful for any insurance company not having an agent in Texas to insure property of any person upon application of said person, upon his filing said oath with the county clerk of the county in which such person resides. (R. S., Art. 4963.)

Note.—A licensed fire insurance company is not prohibited from paying a commission to a non-resident agent on business on Texas property, provided the policy be issued through a licensed resident agent in this State. (Opinion of Attorney General, August 24, 1909.)

Required to File Affidavit That the Law Has Not Been Violated.

103. Before a certificate or license to any fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance company is issued authorizing it to transact business in this State, the Insurance Commissioner shall require in every case, in addition to the other requirements already made and provided by the law that each and all such insurance companies herein mentioned shall file with him an affidavit that it has not violated any provision of this Act. (R. S., Art. 4964.)

Agent of Company Prohibited From Paying Commission or Valuable Consideration on Account of Policy on Property or Persons in Texas to Non-Residents or to Any Person Not a Licensed Agent.

104. That any person, agent, firm or corporation licensed by the Commissioner of Insurance to act as a fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance agent in the State of Texas, is hereby prohibited from paying, directly or indirectly, any commission, brokerage, or other valuable consideration on account of any policy or policies covering property, person or persons, agent, firm or corporation not duly licensed by the Commissioner of Insurance and Banking of the State of Texas

as a fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance agent. (R. S., Art. 4965.)

Note.—A corporation cannot be a licensed agent of an insurance company, and the stockholders of a corporation, individually licensed as agents of insurance companies, are prohibited from paying to the corporation any part of their commissions as insurance agents. (Attorney General's opinion, May 17, 1911.)

Commissioner Must Investigate Any Violation of the Provisions of This Act—Penalty Cumulative.

105. That whenever the Commissioner of Insurance and Banking shall have or receive notice or information of any violation of any of the provisions of this law, he shall immediately investigate or cause to be investigated such violation, and if a fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance company has violated any of such provisions aforesaid, he shall immediately revoke his license for not less than three months, nor more than six months, for the first offense, and for each offense thereafter for not less than one year, and if any person, agent, firm or corporation licensed by the Commissioner of Insurance and Banking as a fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance agent shall violate or cause to be violated any of the provisions of this law, he shall for the first offense have his license revoked for all companies for which he has been licensed, for not less than three months, and for the second offense he shall have his license revoked for all companies for which he is licensed, and shall not thereafter be licensed for any company for one year from date of such revocation. (R. S., Art. 4966.)

For Purpose of Enforcing Provisions of This Act Commissioner to Examine Books, Etc., at Head Office and at Companies' Expense—Other Powers.

106. For the purpose of enforcing the provisions of this law, the Commissioner of Insurance and Banking is hereby authorized and it is made his duty, at the expense of the company investigated, to examine at the head office, located within the United States of America, all books, records and papers of such company and also any officers or employes thereof under oath as to violations of this law, and he is further hereby empowered to examine any person or persons, administer oaths and send for papers and records, and failure or refusal upon the part of any fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insur-

ance company, person or persons, agent, firm or corporations, licensed to do business in the State of Texas to appear before the Commissioner of Insurance and Banking when requested to do so or to produce records and papers, or answer under oath, shall subject such fire, fire and marine, marine, tornado, glass, burglary, bonding, title, surety or fidelity insurance company, person or persons, agent, firm, corporation to the penalties of this law. (R. S., Art. 4967.)

Shall Be Regarded as Agent of Company in Controversy.

107. Any person who shall solicit an application for insurance upon the life of another shall in any controversy between the assured and his beneficiary and the company issuing any policy upon such application be regarded as the agent of the company, and not the agent of the insured, but such agent shall not have the power to waive, change or alter any of the terms or conditions of the application or policy. (R. S., Art. 4968.)

Corporation of Stock Company Shall Not Be Licensed.

108. No corporation or stock company shall be licensed or granted a certificate of authority as the agent or representative of any life insurance company in soliciting, selling or in any manner placing life insurance policies or contracts in this State. No life insurance company shall, after June 30, 1903, be granted a certificate of authority to transact business in this State which has or is bound by any valid subsisting contract with any other corporation, by virtue of which such other corporation is entitled to receive directly or indirectly in any percentage or portion of the premium or other income of such life insurance company for any period. No person shall hereafter be granted a certificate of authority as the agent of any life insurance company who, after June 30, 1903, enters into any contract with any corporation other than such life insurance company, by virtue of which such other corporation is entitled to receive, directly or indirectly, any compensation earned by him as agent for such life insurance company, or any percentage or portion thereof for any period. (R. S., Art. 4969.)

Note.—A life insurance company, having a contract with one of its officers under which he is paid a commission on any part of the company's business, cannot be licensed to do business in Texas, notwithstanding such contract was made before the law in above section became effective. (Opinion of Attorney General, March 14, 1911.)

Companies Shall Designate Officer or Agent to Appoint Agents.

109. Every such foreign company shall, by resolution of its board of directors, designate some officer or agent who is empowered to appoint or employ its agents or solicitors in this State, and such officer or agent shall promptly notify the Commissioner in writing of the name, title and address of each person so appointed

or employed. Upon receipt of this notice, if such person is of good reputation and character, the Commissioner shall issue to him a certificate, which shall include a copy of the certificate of authority, authorizing the company requesting it to do business in this State and the name and title of the person to whom the certificate is issued. Such certificate, unless sooner revoked by the Commissioner for cause or canceled at the request of the company employing the holder thereof, shall continue in force until the first day of March next after its issuance and must be renewed annually. (R. S., Art. 4970.)

Note.—The lists of licensed insurance agents on file in the Department of Insurance are public records, but are not subject to an unqualified inspection by the public. The Commissioner has the right to refuse inspection which would be prejudicial to public interest. To permit persons connected with one insurance company to make copies of the names of agents of another company would be prejudicial to public interest. Such inspection should be permitted only for the protection of a private right or the enforcement of law. (Opinion of Attorney General, April 1, 1914.)

Commissioner Shall Revoke License.

110. Cause for the revocation of the certificate of authority of an agent or solicitor for an insurance company may exist for violation of any of the insurance laws, or if it shall appear to the Commissioner upon due proof, after notice that such agent or solicitor has knowingly deceived or defrauded a policyholder or a person having been solicited for insurance, or that such agent or solicitor has unreasonably failed and neglected to pay over to the company, or its agent entitled thereto, any premium or part thereof, collected by him on any policy of insurance or application therefor. The Commissioner shall publish such revocation in such manner as he deems proper for the protection of the public, and no person whose certificate of authority as agent or solicitor has been revoked shall be entitled to again receive a certificate of authority as such agent or solicitor for any insurance company in this State for a period of one year. (R. S., Art. 4971.)

Penalty for Acting Without Certificate.

111. Any person who for direct or indirect compensation solicits insurance, in behalf of any company, or transmits for a person other than himself, an application for a policy of insurance to or from such company, or assumes to act in negotiation of insurance without a certificate of authority to act as agent or solicitor for such company, or after such certificate of authority shall have been canceled or revoked, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$100. (P. C., Art. 689.)

Penalty for Procuring by False Representations Payment of Premiums.

112. Any such agent or solicitor who knowingly procures by fraudulent representation payment of any obligation for the payment of a premium of insurance shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars. (P. C., Art. 690.)

Penalty for Embezzlement.

113. Any insurance agent or solicitor who collects premiums for an insurance company lawfully doing business in this State and who embezzles or fraudulently converts or appropriates to his own use, or with intent to embezzle, takes, secretes or otherwise disposes of or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies any money or substitutes for money received by him as such agent or broker, contrary to the instructions or without the consent of the company for or on account of which the same was received by him shall be deemed guilty of theft of property of the value of the amount involved in either case, and shall be punished accordingly. (P. C., Art. 691.)

Penalty for False Statements.

114. Any solicitor, agent or examining physician who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for insurance shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars. (P. C., Art. 692.)

Annual Occupation Tax.

115. There shall be levied on and collected from every person, firm, company or association of persons pursuing any of the occupations named in the following numbered subdivisions of this article, an annual occupation tax, which shall be paid annually in advance, except when herein otherwise provided, on every such occupation or separate establishment, as follows: * * * (R. S., Art. 7355.)

Insurance Adjusters and General Agents.

116. From each and every person acting as general adjuster of losses, or agents of life, fire, marine and accident insurance companies, who may transact any business as such in this State, an annual occupation tax of fifty dollars. By "general agent," as used in this law, is meant any person or firm, representative or any insurance company in this State, or who may exercise a general supervision over the business of such insurance company in this State, or over the local agency thereof in this State, or any subdivision

thereof; provided, that when such a general agent acts as a local agent he shall pay an additional tax as local agent, as hereinafter provided. (Sec. 20, R. S., Art. 7335.)

Note.—(1) The occupation tax on local agents and all life insurance agents has been repealed.

(2) The statute levies an occupation tax of \$50 against State or general agents of fire insurance companies and permits counties and cities to levy one-half that amount. (Opinion of Attorney General, August 28, 1915.)

CHAPTER VI

FIRE AND MARINE COMPANIES

Caption to act prescribing business done by insurance companies, except those doing life and health insurance.

117. An act to amend paragraph 4862, Title 71, Chapter 8, of the Revised Civil Statutes of the State of Texas, pertaining to insurance, and declaring an emergency. (Acts Thirty-third Legislature, Chapter 108, Caption.)

May Do What.

118. Be it enacted by the Legislature of the State of Texas, that paragraph 4862, Title 71, Chapter 8, of the Revised Civil Statutes of the State of Texas, be so amended as to hereafter read as follows:

Article 4862. It shall be lawful for any insurance company doing business in this State under the proper certificate of authority, except a life or health insurance company to insure houses, buildings and all other kinds of property against loss or damage by fire, and to take all kinds of insurance on goods, merchandise or other property in the course of transportation, whether on land or water, or any vessel afloat, wherever the same may be; to lend money on bottomry or respondentia; and to cause itself to be insured against any loss or risk it may have incurred in the course of its business and upon the interest which it may have in any property by means of any loan or loans which it may have made on bottomry or respondentia; and generally to do and perform all other matters and things proper to promote these objects; to insure automobiles or other motor vehicles, whether stationery or being operated under their own power, against all or any of the risks of fire, lightning, wind storms, hail storms, tornadoes, cyclones, explosions, transportation by land or water, theft and collision upon filing with the Commissioner of Insurance and Banking of this State, notification of their purpose to do so. (Acts Thirty-third Legislature, Chapter 108, Section 1.)

Note.—(1) The notification of the company's purpose to engage in any particular kind of insurance must be in the form of an amendment to its

charter. (Opinion of Attorney General, June 27, 1913.)

(2) A mutual fire insurance company, organized under the law governing mutual fire insurance companies, cannot amend its charter so as to authorize it to do any other kinds of insurance than such as are mentioned in said law governing mutual fire insurance companies, and cannot therefore avail itself of the provisions of Chapter 108, Acts of the Thirty-third Legislature, which refers only to capital stock companies, and not to mutual companies. (Opinion of Attorney General, August 8, 1914.)

Emergency Clause.

119. The importance of the legislation proposed in this bill, the crowded condition of the calendar, and the probable early adjournment of the present session of the Legislature, create an emergency and an imperative public necessity exists that the constitutional rule requiring bills to be read on three several days in each house, be suspended, and said rule is hereby suspended, and it is so enacted. (Acts 33rd Leg., Chap. 108, Sec. 2.)

Capital Stock May Be Reduced, When.

120. Whenever the joint stock of any fire, fire and marine, or marine insurance company of this State becomes impaired, the Commissioner of Insurance and Banking may, in his discretion, permit the said company to reduce its capital stock and par value of its shares in proportion to the extent of impairment, but in fixing such reduced capital no sum exceeding twenty-five thousand dollars shall be deducted from the assets and property on hand, which shall be retained as surplus assets, and no part of such assets and property shall be distributed to the stockholders, nor shall the capital stock of a company in any case be reduced to an amount less than one hundred thousand dollars. (R. S., Art. 4863.)

Company Must Make Good Its Whole Capital Stock.

121. Any fire, marine or inland insurance company having received notice from the Commissioner of Insurance and Banking, to make good its whole capital stock within sixty days, shall forthwith call upon its stockholders for such amounts as shall make its capital equal to the amount fixed by the charter of such company. (R. S., Art. 4864.)

What Course Shall Be Taken When Stockholder Fails to Pay.

122. In case any stockholder of such fire, marine or inland insurance company shall neglect or refuse to pay the amount so called for, after notice personally given, or by advertisement for such time and in such manner as said Commissioner shall approve, it shall be lawful for said company to require the return of the original certificate of stock held by such stockholder, and in lieu thereof to issue new certificates for such number of shares as such defaulting stockholders may be entitled to, in the proportion that the ascertained value of the funds of said company may be found to bear

to the original capital of said company; the value of such shares, for which new certificates are issued, to be ascertained under the direction of said Commissioner, and the company shall pay for the fractional part of shares. (R. S., Art. 4865.)

Company May Create and Dispose of New Stock.

123. It shall be lawful for such fire, marine or inland insurance company to create new stock and dispose of the same, and to issue new certificates therefor to any amounts sufficient to make up the original capital of the company. (R. S., Art. 4866.)

Texas Companies—When Insurance Companies Organized Under the Laws of the State Shall Purchase or Hold Real Estate.

124. No fire, marine or inland insurance company organized under the laws of the State shall purchase or hold any real estate except—

(1) Such as shall be requisite for its convenient accommodation in the transaction of its business.

(2) Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted or for money due.

(3) Such as shall have been conveyed to it in satisfaction of debts previously contracted in the legitimate business of the company or for money due.

(4) Such as shall have been purchased at sales under assignments, decrees or mortgages, obtained or made for such debts. All lands purchased or held in violation of this article shall be forfeited to the State. (R. S., Art. 4869.)

Shall File Bond.

125. Every fire insurance company not organized under the laws of this State applying for a certificate of authority to transact any kind of insurance in this State shall, before obtaining such certificate, file with the Commissioner of Insurance and Banking, a bond, with good and sufficient surety or sureties to be approved by the Commissioner of Insurance and Banking, payable to the Commissioner of Insurance and Banking, and his successors in office, in a sum equal to 25 per cent of its premiums collected from citizens or upon property in this State during the preceding calendar year, as shown by its annual reports for such year; provided, however, the bond in no case shall exceed fifty thousand dollars, nor be less than ten thousand dollars, conditioned that said company will pay all its lawful obligations to citizens of this State. Such bonds shall be subject to successive suits by citizens of this State so long as any part of the same shall not be exhausted and the same shall be kept in force unimpaired until all claims of citizens of this State arising out of obligations of said company have been fully satisfied. (R. S., Art. 4870.)

Note.—(1) Bond cannot be canceled nor can Commissioner furnish evidence of cancellation. (Opinion of Attorney General, December 29, 1909.)

(2) Companies doing only a marine business are not required to give bond. (Opinion of Attorney General, July 23, 1910.)

(3) Bond is based upon, and in amount must be one-fourth of the gross premium receipts of the company for the preceding year, and such gross premium receipts are defined to be the premium receipts reported to the Commissioner in the annual statement of the company less returned premiums and reinsurance in authorized companies. (Opinion of Attorney General, March 19, 1912.)

(4) Insuring automobiles against fire is fire insurance and a company writing such insurance is subject to the laws governing fire insurance, and if a foreign company, it must give the bond required of foreign fire insurance companies. (Opinion of Attorney General, March 14, 1914.)

Bond Shall Provide.

126. Such bonds shall provide that in the event the company shall become insolvent, or cease to transact business in this State at any time when it has outstanding policies of insurance in favor of citizens of this State, or upon property in this State, the Commissioner of Insurance and Banking shall have the power, after having given ten days' notice to the officers of such company or any receiver in charge of its property and affairs, to contract with any other insurance company transacting business in this State for the assumption and reinsurance by it of all the insurance risks outstanding in this State of such company which is insolvent or has ceased to transact business in this State, which contract shall also provide for the assumption of such reinsuring company of all outstanding and unsatisfied lawful claims then outstanding against such company which has become insolvent or ceased to transact business in this State, and in the event of the Commissioner making any such contract, and if the same shall be approved as reasonable by the Attorney General and the Governor of this State the reinsuring company shall be entitled to recover from the makers of such bond the amount of the premium or compensation so agreed upon for such reinsurance. (R. S., Art. 4870.)

May Deposit Securities in Lieu of Bond.

127. Any company desiring to do so may at its option in lieu of giving the bond required by this section deposit securities of any kind in which it may lawfully invest its funds with the State Treasurer of this State upon such terms and conditions as will in all respects afford the same protection and indemnity as is herein provided for to be afforded by said bond. (R. S., Art. 4870.)

Note.—A company having deposit instead of bond may withdraw deposit by first protecting all its policyholders by reinsurance. (Attorney General's opinion, March 14, 1911.)

Shall File Bond.

128. Every fire insurance company not organized under the laws of this State, hereafter issuing or causing or authorizing to be issued any policy of insurance other than life insurance, shall first have filed with the Commissioner of Insurance and Banking during the calendar year in which such policy may issue or authorize or cause to be issued a bond of good and sufficient sureties to be approved by such Commissioner in a sum not less than ten thousand dollars, conditioned for the payment of all lawful obligations to citizens of this State arising out of any policies or contracts issued by such fire insurance company, which such bond shall be subject to successive suits by citizens of this State so long as any part of the same shall not be adjusted and so long as there remains outstanding any such obligations or contracts of such fire insurance company. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment in the county jail for not less than three nor more than twelve months, or both such fine and imprisonment. This act shall not apply to any person, firm or corporation or association doing an inter-insurance, co-operative or reciprocal business. R. S., Art. 4871.)

Annual Statement Required of Fire, Marine and Inland Companies.

129. It shall be the duty of the president or of the vice-president and secretary, of each fire, marine or inland insurance company doing business in this State, annually, on the first day of January of each year, or within sixty days thereafter, to prepare under oath and deposit with the Commissioner of Insurance and Banking of this State, a full, true and complete statement of the condition of such company on the last day of the month of December preceding. (R. S., Art. 4872.)

What the Statement Shall Show.

130. The annual statement required by the preceding article shall exhibit the following items and facts:

- (1) The name of the company and where located.
- (2) The names and residences of the officers.
- (3) The amount of capital stock of the company.
- (4) The amount of capital stock paid up.

Assets.

(5) The property or assets held by the company, viz.: The real estate owned by such company, its location, description and value as near as may be; and if said company be one organized under the laws of this State, shall accompany such statement with an abstract of title to the same; the amount of cash on hand and deposited in

banks to the credit of the company and in what bank or banks the same is deposited; the amount of cash in the hands of agents, naming such agents; the amount of cash in course of transmission; the amount of loans secured by first mortgages on real estate, with the rate of interest thereon, specifying the location of such real estate, its value and the name of the mortgagor; the amounts of all bonds and other loans, with the rate of interest thereon and how secured; the amount due the company in which judgments have been obtained, describing such judgments; the amount of stocks in this State, of the United States, or any incorporated city of this State, and of any other stock owned by the company, describing the same and specifying the amount and number of shares, and the par and market value of each kind of stock; the amount of stock held by such company as collateral security for loans, with amount loaned on each kind of stock, its par and market value; the amount of interest actually due to the company and unpaid; all other securities, their description and value.

Liabilities.

(6) The liabilities of such company, specifying the losses adjusted and due; losses adjusted and not due; losses unadjusted; losses in suspense, and the causes thereof; losses resisted and in litigation; dividend, either in scrip or cash, specifying the amount of each declared, but not due; dividends declared and due; the amount required to reinsure all outstanding risks on the basis of 40 per cent of the premium on all unexpired fire risks, and 100 per cent of the premiums on all unexpired marine and inland transportation risks; the amount due banks or other creditors, naming such banks or other creditors, and the amount due to each, the amount of money borrowed by the company, of whom borrowed, the rate of interest thereon, and how secured; all other claims against the company, describing the same.

Receipts.

(7) The income of the company during the preceding year, stating the amount received for premiums, specifying separately fire, marine and inland transportation premiums, deducting reinsurance; the amount received for interest, and from all other sources.

Expenditures.

(8) The expenditures during the preceding year, specifying the amount of losses paid during said term, stating how much of same accrued prior and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement; the amount paid for dividends; the amount paid for return premiums, commissions, salaries, expenses and other charges of officers, agents, clerks and other employees; the amount

paid for local, State, National, internal revenue and other taxes and duties; the amount paid for all other expenses, such as fees, printing, stationery, rents, furniture, etc.

The Largest Amount in One Risk.

(9) The largest amount insured in any one risk, naming the risk.

Amount of Risks Written and in Force, Etc.

(10) The amount of risks written during the year then ending.

(11) The amount of risks in force having less than one year to run.

(12) The amount of risks in force having more than one and not over three years to run.

(13) The amount of risks having more than three years to run.

(14) It shall be stated whether or not dividends are declared on premiums received for risks not terminated. (R. S., Art. 4873.)

Limit to Extent of Insurance.

131. (1) No fire, fire and marine, marine or inland insurance company doing business in this State shall expose itself to any one risk, except when insuring cotton in bales and grain, to an amount exceeding 10 per cent of its paid-up capital stock, unless the excess shall be insured by such company in some other solvent insurance company legally authorized to do business in this State.

Note.—(1) The term "one risk" means one building, irrespective of its mode of construction; one building cannot be divided into a number of risks upon the theory that each room is a separate risk because it is fire-proof. (Opinion of Attorney General, August 17, 1910.)

(2) Casualty, surety, fidelity and guaranty companies cannot issue a policy or bond in excess of 10 per cent of their capital without reinsuring the excess. (Opinion of Attorney General, May 7, 1915.)

Reinsurance Must Be Placed in Licensed Companies.

(2) Every fire, fire and marine, marine or inland insurance company doing business in this State may reinsure the whole or any part of any policy obligation in any other insurance company legally authorized to do business in this State. The Commissioner of Insurance and Banking shall require every year, from every insurance company doing business in this State, a certificate, sworn to before an officer legally qualified to administer oaths in the State of Texas, to the effect that no part of the business written by such company in this State has been reinsured in whole or in part in any company, corporation, association or society not authorized to do business in this State. Every insurance company doing business shall also furnish the Commissioner of Insurance and Banking with a list of all reinsurance during the year in authorized companies, showing the name, amount and premium effected in each company.

Note.—(1) Reinsurance, including cotton and grain risks, must be placed in companies licensed by Texas Insurance Department, and the fact that licensed companies will not accept reinsurance at terms and rates obtainable elsewhere will not authorize reinsuring with unlicensed companies or associations. (Opinion of Attorney General, October 4, 1911.)

(2) A general complaint, made under oath, charging that certain insurance companies licensed to do business in Texas, have violated the law requiring all reinsurance of Texas business to be placed with companies authorized to do business in Texas, although not specifying the times, and places and circumstances of such violation of law, is sufficient to require the Commissioner to make an investigation of such charges. (Opinion of Attorney General, March 9, 1914.)

Violation of Law—Revocation of License.

(3) Any insurance company authorized to transact the business of fire, fire and marine, marine or inland insurance in this State failing to comply with the provisions of this act shall forfeit its authority to do such business for a period of one year, and it is hereby made the duty of the Commissioner of Insurance and Banking to investigate any complaint as to violation of said act, and upon satisfactory proof that any company authorized to transact the business of fire, fire and marine, marine or inland insurance in this State has violated the provisions of this act, the said Commissioner shall revoke the certificate of authority of the offending company.

Note.—(1) Reinsuring in unauthorized company forfeits certificate of authority for one year, and the penalty cannot be avoided by afterwards reinsuring in authorized companies. (Opinion of Attorney General, June 29, 1910.)

(2) A licensed company may accept reinsurance of Texas risks from unauthorized company. (Opinion of Attorney General, September 21, 1911.)

Fee for Agent's License \$25—Affidavit to Be Filed.

(4) That the Commissioner of Insurance and Banking may, upon the payment of license fee of twenty-five dollars, issue to an agent who is regularly commissioned to represent one or more fire, fire and marine insurance companies authorized to do business in this State, a certificate of authority to place excess lines of insurance in companies not authorized to do business in this State; provided, that the party desiring such excess insurance shall file with the Commissioner of Insurance and Banking an affidavit that he has exhausted all the insurance obtainable from companies duly authorized to do business in the State.

Must File a Bond.

(5) Before receiving license provided for in *Section 4 of this article, party applying for same shall file with the Commissioner of Insurance and Banking a bond in the sum of one thousand dollars, payable to the Governor of the State for the faithful observance of *Paragraph 4.

the provisions of this act. Said bond to be approved by the Commissioner, and to be for the benefit of the State of Texas.

Agent to Report on Oath and Keep a Separate Record of All Transactions.

(6) Every agent so licensed shall report, under oath, to the Commissioner of Insurance and Banking within thirty days from the first day of January and July of each year the amount of gross premiums received by him for such excess insurance, and shall pay the said Commissioner a tax of 5 per cent thereon. The agent procuring a license as provided in this act shall keep a separate record of all transactions herein provided open at all times to the inspection of the Commissioner or his legally appointed representative. In default of the payment of any sums which may be due the State under this act, the said Commissioner may sue for the same in any court of record in this State. (R. S., Art. 4875.)

Valued Policy—Shall Be Considered a Liquidated Demand.

132. A fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy; provided, that the provisions of this article shall not apply to personal property. (R. S., Art. 4874.)

Caption to Act Providing That Breach of Technical Provisions in Policies Shall Not Avoid Liability.

133. An act to prevent fire insurance companies from avoiding liability for loss and damage to personal property under technical and immaterial provisions of the policy or contract of insurance where the act breaching such provisions has not contributed to bring about the loss, and declaring an emergency. (Acts 33rd Leg., Chap. 105, Caption.)

Breach of Warranty or Other Provision, Unless Contributing to the Loss, Will Not Render Contract Void.

134. Be it enacted by the Legislature of the State of Texas: That no breach or violation by the insured of any of the warranties, conditions or provisions of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property. (Acts 33rd Leg., Chap. 105, Sec. 1.)

Article 4874, Revised Statutes, Not Repealed.

135. That the provisions hereof shall in no way affect or repeal the provisions of Article 4874 of the Revised Civil Statutes of 1911 in so far as the same relates to fire insurance policies upon real or mixed property. (Acts 33rd Leg., Chap. 105, Sec. 2.)

Emergency Clause.

136. Whereas, under the existing laws, insurance policies and contracts may be defeated upon purely technical provisions and defenses that in no way affect the merits of the claim against the insurance company, and such defenses have been upheld to the extent of making it almost impossible for an insurance policy upon personal property to be collected by suit, creates an emergency and imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house, be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted. (Acts 33rd Leg., Chap. 105, Sec. 3.)

Caption to Co-Insurance Law.

137. An act to amend Article 4893, Title 71, Chapter 9 of the Revised Civil Statutes of the State of Texas, adopted at the Regular Session of the Thirty-second Legislature, 1911, and declaring an emergency. (Acts 33rd Leg., Chap. 104, Caption.)

Co-Insurance Clause in Policies Forbidden.

138. Be it enacted by the Legislature of the State of Texas: Section 1. That Article 4893, Title 71, Chapter 9, of the Revised Civil Statutes of the State of Texas, adopted by the Thirty-second Legislature, 1911, pertaining to insurance, be so amended as to hereafter read as follows:

Article 4893. Co-Insurance Clauses.—No company subject to the provisions of this chapter shall issue any policy or contract of insurance covering property, real or personal, situated in this State which shall contain any clause or provision requiring the assured to take out and maintain a larger amount of insurance than that expressed in such policy, nor in any way providing that the assured will be liable as a co-insurer with the company issuing the policy for any part of the loss or damage which may be caused by fire to the property described in the policy, and any such clause or provision shall be null and void and of no effect, whether written with or without the consent of the assured; and any company issuing a policy with such provision or provisions therein shall nevertheless be liable to the assured for the full amount of the damage and loss sustained by the property holder, not exceeding the face of the policy, notwithstanding such provision or provisions. (Acts 33rd Leg., Chap. 104, Sec. 1.)

Exceptions as to Co-Insurance Clause.

139. Provided, that oil in tanks, wool, mohair, grain, rice, cotton, cotton seed oil mills and products attached thereto, are hereby exempted from the provisions of this act. (Acts 33rd Leg., Chap. 104, Sec. 2.)

Emergency Clause to Co-Insurance Law.

140. The fact that there is no adequate law in the State of Texas protecting the assured against the issuance of policies requiring the assured to maintain a larger amount of insurance than expressed in the policy, and also requiring them to become co-insurers with the company or companies issuing the policies, for any part of the loss or damage caused by fire to the property insured, creates an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days before passage, it is therefore enacted that such provision be suspended and this act take effect and be in force from and after its passage. (Acts 33rd Leg., Chap. 104, Sec. 3.)

Caption to State Fire Insurance Commission Law.

141. An act to repeal Chapter 8 of the General Laws of the Fourth Called Session of the Thirty-first Legislature of the State of Texas, approved September 6, 1910, known as the State Insurance Board Law, and to provide conditions upon which fire insurance companies may hereafter transact business in the State of Texas, and to create the State Fire Insurance Commission, and to prescribe its duties and authority and the duties and authority of each member thereof, and to fix the salaries of the members, and to provide for their appointment and removal, and to provide that hereafter the rate of premiums to be charged by fire insurance companies in this State shall be fixed and determined and promulgated exclusively by said State Fire Insurance Commission, and to prohibit any such fire insurance company from collecting or receiving any premiums on account of policies of fire insurance issued by them, unless the rates of such premiums have been so fixed and determined and promulgated by said State Fire Insurance Commission; to provide certain conditions and limitations on fire insurance contracts or policies, and providing penalties for violations of provisions of this act, and appropriating money necessary to carry out its provisions, and declaring an emergency. (Acts 33rd Leg., Chap. 106, Caption.)

State Insurance Board Law Repealed.

142. The act approved September 6, 1910, known and published as Chapter 8 of the General Laws of the Fourth Called Session of the Thirty-first Legislature of the State of Texas, entitled "An Act providing conditions upon which insurance companies writing contracts or policies of insurance against the hazard of fire may transact business in the State of Texas, and providing for the making, promulgation, regulation and control of general basis schedules, insurance rates and premiums and forms of insurance policies; providing certain conditions and limitations on insurance contracts or policies; providing for maximum insurance rates and how com-

panies may write contracts of insurance at rates lower than the maximum rates and the filing of statements of reduced rates with the State Insurance Board and certified copies thereof with city secretaries and county clerks and fixing fees of said last two officers for such service; to prevent discrimination in insurance rates or premiums; except as provided in this act to create a State Insurance Board, and prescribing the duties and authority of said board and each member thereof, and fixing the salaries of the members thereof; and providing for their appointment and removal; providing certain duties for and to give certain authority to the Commissioner of Insurance and Banking; appropriating money necessary to carry out the provisions of this act; providing penalties for the violation of certain provisions of this act; fixing the time when this act shall go into effect and repealing Chapter 18 of the General Laws of the State of Texas, passed by the First Called Session of the Thirty-first Legislature and all other laws and parts of laws in conflict herewith, and declaring an emergency," is hereby repealed. (Acts 33rd Leg., Chap. 106, Sec. 1.)

Maximum Premium Rates Shall Be Fixed by the Commission.

143. After this act shall take effect, a maximum rate of premiums to be charged or collected by all companies transacting in this State the business of fire insurance, as herein defined, shall be exclusively fixed and determined and promulgated by the State Fire Insurance Commission created by this act, and no such fire insurance company shall, after this act takes effect, charge or collect any premium or other compensation for or on account of any policy or contract of fire insurance as herein defined in excess of the maximum rate as herein provided for, but may write insurance at a less rate than the maximum rate as herein provided for; provided, that when insurance is written for less than the maximum rate, such lesser rate shall be applicable to all risks of the same character situated in the same community. (Acts 33rd Leg., Chap. 106, Sec. 2.)

Every Company Writing Fire Insurance in This State Is Subject to Provisions of State Insurance Commission Act.

144. Every fire insurance company, every marine insurance company, every fire and marine insurance company, every fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance against loss by fire on property within this State, whether such property be fixed or movable, stationary or in transit, or whether such property is consigned or billed for shipment within or beyond the boundary of this State, or to some foreign country, whether such company is organized under the laws of this State, or under the laws of any other State,

Territory or possession of the United States or foreign country, or by authority of the Federal government, now holding a certificate of authority to transact business in this State, shall be deemed to have accepted such certificate and to transact business thereunder, upon condition that it consents to the terms and provisions of this act and that it agrees to transact business in this State, subject thereto; it being intended that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this act, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary or in transit, including the shore end of all marine risks insured against loss by fire. (Acts 33rd Leg., Chap. 106, Sec. 3.)

Commission Created—Who Compose—How and When Appointed.

145. That there may be reasonable and just insurance rates in Texas, there is hereby created a commission to be known as the "State Insurance Commission," which shall be composed of the Commissioner of Insurance and Banking, who shall be chairman thereof, and two commissioners, who shall be appointed by the Governor, by and with the consent of the Senate, subject to removal as provided for removal of State officers by Article 3528 of the Revised Statutes of Texas; the members of said Commission, other than the Commissioner of Insurance and Banking, shall be appointed as herein provided within ten days after this act takes effect; one of said members to be so appointed shall be appointed for a term ending February 1, 1914, and biennially thereafter; the other of said members of said commission shall be appointed for a term ending February 1, 1915, and biennially thereafter, and the Governor in making his first appointments to fill these respective offices shall designate which of said officers shall fill the term expiring February 1, 1914, and which of said officers shall fill the term expiring February 1, 1915. The Commissioner of Insurance and Banking, for the purpose of this act, may be referred to as the Commissioner of Insurance. (Acts 33rd Leg., Chap. 106, Sec. 4.)

Compensation of Members of Commission—Expenses of Commission.

146. That Section 5 of Chapter 106 of the General Laws of the Regular Session of the Thirty-third Legislature be amended so as to hereafter read as follows:

Section 5. The members of the commission other than the Commissioner of Insurance and Banking, shall each receive as compensation for their services the sum of thirty-six hundred dollars (\$3,600.00) per annum; and the Commissioner of Insurance and Banking shall receive as compensation or salary for his services under this act, the sum of five hundred dollars (\$500.00) per an-

num, in addition to his compensation as now fixed by law. Such salary of the two appointed members of said commission and the said five hundred dollars (\$500.00) salary of the Commissioner of Insurance and Banking, together with the necessary compensation of experts, clerical force, and other persons employed by said commission, and all necessary traveling expenses, and such other expenses as may be necessary, incurred in carrying out the provisions of this act, shall be paid by warrants drawn by the Comptroller upon the State Treasurer upon the order of said commission; provided, that the total amount of all salaries and said other expenses shall not exceed the sum produced by the assessment of one and one-fourth ($1\frac{1}{4}$) per cent of the gross premiums of all fire insurance companies doing business in this State as provided in Section 29 of said Act. (Approved March 10, 1917. Takes effect 90 days after adjournment.)

Commission Shall Fix, Alter or Amend Rates.

147. That Section 6 of Chapter 106 of the General Laws of the Regular Session of the Thirty-third Legislature be amended so as to hereafter read as follows:

Section 6. The State Fire Insurance Commission shall have the sole and exclusive power and authority and it shall be its duty to prescribe, fix, determine and promulgate the rates of premiums to be charged and collected by fire insurance companies transacting business in this State. As soon as practicable after this act shall take effect, the State Fire Insurance Commission shall begin the work of fixing and determining and promulgating the rates of premiums to be charged and collected by fire insurance companies throughout the State, and the making and adoption of its schedules of such rates, and then until such time as this work shall have been fully completed, said commission shall have full power and authority to adopt and continue in force the rates of premiums which may be lawfully charged and collected when this act shall take effect, or any portion thereof, for such time as it may prescribe, or until the work of making such schedules for the entire State shall be completed. Said commission shall also have authority to alter or amend any and all such rates of premiums so fixed and determined and adopted by it, and to raise or lower the same, or any part thereof, as herein provided. Said commission shall have authority to employ clerical help, inspectors; experts and other assistants, and to incur such other expenses as may be necessary in carrying out the provisions of this act; provided that such expenses, including the salaries of the members of the commission, shall not exceed in the aggregate, for any fiscal year, the sum of one hundred and thirty thousand dollars (\$130,000.00).

Shall Ascertain and Make Record of Fire Losses of This State.

148. It shall be the duty of said Commission to ascertain as soon as practicable, the annual fire loss in this State; to obtain, to make and maintain a record thereof and collect such data and information with respect thereto as will enable said commission to classify the fire losses of this State, the causes thereof, and the amount of premiums collected therefor for each class of risks, and the amount paid thereon, in such manner as will be of assistance in determining equitable insurance rates, methods of reducing such fire losses, and reducing the insurance rates of the State or subdivisions of the State. (Acts 33rd Leg., Chap. 106, Sec. 6. This paragraph also reenacted as part of preceding paragraph by the 35th Leg.)

Selection of Secretary and Fire Marshal of the Commission.

149. For the purpose of facilitating the work of said commission, one of the appointed members thereof shall be selected by the commission as its secretary, who shall perform the duties which shall appertain to that position, and whose official title shall be "Secretary of the State Insurance Commission;" the other of said appointed members thereof shall be selected by said commission as Fire Marshal of the State Insurance Commission, and his official title shall be "Fire Marshal of the State Insurance Commission;" but the said members so selected as secretary and fire marshal as aforesaid, shall receive no compensation for filling their respective positions other than their salaries as members of the State Insurance Commission, and shall perform the duties of those respective positions at the will of the commission, but their expenses incurred in performing the duties of these positions shall be paid as provided in this act. (Acts 33rd Leg., Chap. 106, Sec. 7.)

Duties of Fire Marshal.

150. That Section 8 of Chapter 106 of the General Laws of the Regular Session of the Thirty-third Legislature be amended so as to hereafter read as follows:

Section 8. It shall be the duty of the Fire Marshal of the State Fire Insurance Commission, who, for the purpose of this Act, shall be referred to as the State Fire Marshal, at the discretion of the board, and upon the request of the mayor of any city or village, or the chief of a fire department of any city or village, or any fire marshal where a fire occurs within such city or village, or of a county or a district judge, or of a sheriff or county attorney of any county where a fire occurs within the district or county of

the officers making such request, or of any fire insurance company, or its general, state or special agent, interested in a loss, or of a policyholder sustaining a loss, or upon the direction of the State Fire Insurance Commission to forthwith investigate at the place of such fire before loss can be paid, the origin, cause and circumstances of any fire occurring within this State, whereby property has been destroyed or damaged, and shall ascertain if possible whether the same was the result of any accident, carelessness or design, and shall make a written report thereof to the State Insurance Commission. The State Fire Marshal shall have the power to administer oaths, take testimony, compel the attendance of witnesses and the production of documents. When, in his opinion, further investigation is necessary, he shall take or cause to be taken the testimony on oath of all persons supposed to be cognizant of any facts, or to have knowledge in relation to the matter under investigation, and shall cause the same to be reduced in writing, and if he shall be of the opinion that there is evidence sufficient to charge any person with the crime of arson, or with the attempt to commit arson, or of conspiracy to defraud or criminal conduct in connection with such, he shall arrest or cause to be arrested such person, and shall furnish to the proper prosecuting attorney all evidence secured, together with the names of witnesses and all information obtained by him, including a copy of all pertinent and material testimony taken in the case, and it shall be the duty of the State Fire Marshal to assist in the prosecution of all such complaints filed by him. Provided, that all investigations held by or under the direction of the State Fire Marshal may, in his discretion, be private and persons other than those required to be present may be excluded from the place where such investigation is held, and the witnesses may be kept separate and apart from each other and not allowed to communicate with such others until they have been examined; and all testimony taken in an investigation under the provisions of this act may, at the election of the State Fire Marshal, be withheld from the public. (Approved March 10, 1917. Takes effect 90 days after adjournment.)

Authority and Powers of Fire Marshal.

151. That Section 9 of Chapter 106 of the General Laws of the Regular Session of the Thirty-third Legislature be amended so as to hereafter read as follows:

Section 9. The State Fire Marshall is hereby authorized to enter at any time any buildings or premises where fire occurred or is in progress, or any place contiguous thereto, for the purpose of in-

vestigating the cause, origin and circumstances of such fire. The State Fire Marshal, upon complaint of any person, shall, at all reasonable hours, for the purpose of examination, enter into and upon all buildings and premises within this State, and it shall be his duty to enter upon and make or cause to be entered upon or made, at any time, a thorough examination of mercantile, manufacturing and public buildings, and all places of public amusement, or where public gatherings are held, together with the premises belonging thereto. Whenever he shall find any building or other structure which, for want of repair or by reason of age or dilapidated condition, or which for any cause is liable to fire, and which is so situated as to endanger other buildings or property, or is so occupied that fire would endanger persons or property therein, and whenever he shall find an improper or dangerous arrangement of stoves, ranges, furnaces, or other heating appliances of any kind whatsoever, including chimneys, flues and pipes with which the same may be connected, or dangerous arrangement of lighting systems or devices, or a dangerous storage of explosives, compounds, petroleum, gasoline, kerosene, dangerous chemicals, vegetable products, ashes, combustible, inflammable and refuse materials, or other conditions which may be dangerous in character, or liable to cause or promote fire, or create conditions dangerous to firemen or occupants, he shall order the same to be removed or remedied, and such order shall be forthwith complied with by the occupant or owner of such building or premises, and the State Fire Marshal is hereby authorized, when necessary, to apply to a court of competent jurisdiction for the necessary writs or orders to enforce the provisions of this Section, and in such case he shall not be required to give bond.

Fire Marshal May Designate a Local Fire Marshal or Other Person to Act for Him—Expenses of Investigations, By Whom Paid.

152. If for any reason the State Fire Marshal is unable to make any required investigation in person, he may designate the fire marshal of such city or town or some other suitable person to act for him; and such person so designated shall have the same authority as is herein given the State Fire Marshal with reference to the particular matter to be investigated by him, and shall receive such compensation for his services as may be allowed by the State Insurance Commission. If the investigation of a fire is made at the request of an insurance company, or at the request of a policyholder sustaining loss, or at the request of the mayor, town clerk or chief of the fire department of any city, village or town in which the fire occurred, then the expenses of the Fire Marshal, clerical expenses, witnesses and officers' fees incident and necessary to such investigation shall be paid by such insurance company, or such

policyholder, of such city or town, as the case may be, otherwise the expenses of such investigation are to be paid as part of the expenses of the State Insurance Commission. Provided, the party or parties, company or companies, requesting such investigation shall before such investigation is commenced deposit with the State Insurance Commission an amount of money in the judgment of said Commission sufficient to defray the expenses of said Fire Marshal in conducting such investigation. (Acts 33rd Leg., Chap. 106, Sec. 10.)

No Action or Investigation by Fire Marshal Shall in Any Way Affect Rights of Policyholders.

153. No action taken by the State Fire Marshal shall affect the rights of any policyholder or any company in respect to a loss by reason of any fire so investigated; nor shall the result of any such investigation be given in evidence upon the trial of any civil action upon such policy, nor shall any statement made by any insurance company, its officers, agents or adjusters, nor by any policyholder, or any one representing him, made with reference to the origin, cause or supposed origin or cause of a fire to the Fire Marshal or to any one acting for him or under his direction, be admitted in evidence or made the basis for any civil action for damages. (Acts 33rd Leg., Chap. 106, Sec. 11.)

Authority and Powers of Commission and Its Agents or Representatives.

154. That said commission is authorized and empowered to require sworn statements from any insurance company affected by this act, and from any of its directors, officers, representatives, general agents, State agents, special agents and local agents of the rates and premiums collected for fire insurance on each class of risks, on all property in this State during any or all years for the five years next preceding the first day of January, 1913, and of the causes of fire, if such be known, if they are in possession of such data, and information, or can obtain it at a reasonable expense; and said commission is empowered to require such statements for any period of time after the first day of January, 1913, and said commission is empowered to require such statements showing all necessary facts and information to enable said commission to make, amend and maintain the general basis schedules provided for in this act, and the rules and regulations for applying same and to determine reasonable and proper maximum specific rates to determine and assist in the enforcement of the provisions of this act. The said commission shall also have the right, at its discretion, either personally, or by some one duly authorized by it to visit the office whether general, local or otherwise, of any insurance company doing business in this State, and the home office of said company outside of this State, if there be such, and the

office of any officers, directors, general agents, State agents, local agents or representatives of such company, and there require such company, its officers, agents or representatives to produce for inspection by said commission or any of its duly authorized representatives all books, records and papers of such company or such agents and representatives; and the said commission or its duly authorized agents or representatives shall have the right to examine such books and papers and make or cause to be made copies thereof; and shall have the right to take testimony under oath with reference thereto, and to compel the attendance of witnesses for such purpose; and any company, its officers, agents or representatives failing to make such statements and reports herein referred to and failing or refusing to permit the examination of books, papers and records as herein required, when so called upon or declining or failing to comply with any provisions of this section shall be subject to the penalties provided for in Section 26 of this act. Said commission shall be further authorized and empowered to require the fire insurance companies, transacting business in this State or any of them, to furnish said commission with any and all data which may be in their possession, either jointly or severally, including maps, tariffs, inspection reports and any and all data affecting fire insurance risks in this State, or in any portion thereof, and said Commission shall be authorized and empowered to require any two or more of said companies, or any joint agent or representative of them, to turn over any and all such data in their possession, or any part thereof, to said commission for its use in carrying out the provisions of this act. (Acts 33rd Leg., Chap. 106, Sec. 12.)

Rates Fixed, Promulgated and Published By Commission Under Certain Limitations and Conditions.

155. The rates of premium fixed by said commission under and in pursuance of the provisions of this act shall be at all times reasonable and the schedules thereof made and promulgated by said commission as herein provided, shall be in such form as will in the judgment of the commission, most clearly and definitely and in detail disclose the rate so fixed and determined by said commission to be charged and collected for policies of fire insurance. Said commission may employ and use any facts and information now in the possession of the present State Insurance Board, as well as all facts obtainable from and concerning fire insurance companies transacting business in this State, showing their expenses and charges for fire insurance premiums, for any period or periods, said commission may deem advisable, which in their opinion will enable them to devise and fix and determine reasonable rates of premium for fire insurance. The said commission in making and publishing schedules of the rates fixed and determined by

it shall show all charges, credits, terms, privileges and conditions which in any wise affect such rates, and copies of all such schedules shall be furnished by said commission to any and all companies affected by this act applying therefor, and the same shall be furnished to any citizens of this State applying therefor, upon the payment of the actual cost thereof. No rate or rates fixed or determined by the commission shall take effect until it shall have entered an order or orders fixing and determining same, and shall give notice thereof to all fire insurance companies affected by this act, authorized to transact business in the State. It shall be the duty of the State Fire Insurance Commission, and of any inspector or other agent or employe thereof, who shall inspect any risk for the purpose of enabling the commission to fix and determine the reasonable rate to be charged thereon, to furnish to the owner of such risk at the date of such inspection, a copy of the inspection report, showing all defects that may operate as charges to increase the insurance rate. (Acts 33rd Leg., Chap. 106, Sec. 13.)

Commission May Amend or Change Rate, and Prescribe Rules and Regulations for Certain Risks.

156. Said commission shall have full power and authority to alter, amend, modify, or change any rate fixed and determined by it on thirty days' notice, or to prescribe that any such rate or rates shall be in effect for a limited time, and said commission shall also have the full power and authority to prescribe reasonable rules whereby in case where no rate of premium shall have been fixed and determined by the commission, for certain risks or classes of risks, policies may be written thereon at rates to be determined by the company, provided, however, that such company or companies shall immediately report to said commission such risk so written, and the rates collected therefor, and such rates shall always be subject to review by the commission. (Acts 33rd Leg., Chap. 106, Sec. 13.)

Commission Has Power to Fix and Regulate Rates According to Hazard.

157. Any fire insurance company or companies affected by this act shall have the right at any time to petition the commission for an order changing or modifying any rate or rates fixed and determined by the commission, and the commission shall consider such petition in the manner provided in this act, and enter such order thereon as it may deem just and equitable. The commission shall have full authority and power to give each city, town, village or locality, credit for each and every hazard they may reduce or entirely remove, and also for all added fire fighting equipment, increased police protection, or any other equipment or improvement that has a tendency to reduce the fire hazard of any such city, town, village or locality, and also to give credit for a good

fire record made by any city, town, village or locality. Said commission shall also have the power and authority to compel any company to give any or all policyholders credit for any and all hazards that said policyholder or holders may reduce or remove. Said credit shall be in proportion to such reduction or removal of such hazard and said company or companies shall return to such policyholder or holders such proportional part of the unearned premium charged for such hazard that may be reduced or removed. (Acts 33rd Leg., Chap. 106, Sec. 14.)

Company Shall Furnish Analysis of Rate—Commission Schedules Shall Be Open to Public.

158. When a policy of fire insurance shall be issued by any company transacting the business of fire insurance in this State, such company shall furnish the policyholder with a written or printed analysis of the rate or premium charged for such policy, showing the items of charge and credit which determine the rate, unless such policyholder has theretofore been furnished with such analysis of such rate. All schedules of rates promulgated by said commission shall be open to the public at all times, and every local agent of a fire insurance company transacting business in this State shall have and exhibit to the public copies of such schedules covering all risks upon which he is authorized to write insurance. (Acts 33rd Leg., Chap. 106, Sec. 15.)

Commission, After Giving Notice, May Change Rates to Be Collected By All Companies.

159. The commission shall have full power and authority after having given reasonable notice, not exceeding thirty days, of its intention to do so, to alter, amend or revise any rates of premium fixed and determined by it in any schedules of such rates promulgated by it as herein provided, and to give reasonable notice of such alteration, amendment or revision to the public, or to any company or companies affected thereby. Such altered, amended or revised rates shall be the rates thereafter to be charged and collected by all fire insurance companies affected by this act; provided, that no policy in force prior to the taking effect of such changes, or amendments shall be affected thereby, unless there shall be a change in the hazard of the risk, necessitating a change in the rate, applicable to such risk, in which event such policy shall be subject to the new rates. (Acts 33rd Leg., Chap. 106, Sec. 16.)

Commission Shall Establish and Furnish Uniform Policy Forms, Including Endorsements and Clauses Placed Thereon.

160. It shall be the duty of the State Insurance Commission to make, promulgate and establish uniform policies of insurance applicable to the various risks of this State, copies of which uniform policies shall be furnished each company doing business in this

State or which may hereafter do business in this State. That after such uniform policies shall have been established and promulgated and furnished the respective companies doing business in this State, such companies shall, within sixty days after the receipt of such forms of policies, adopt and use said form or forms and no other; also all companies which may commence business in this State after the adoption and promulgation of such forms of policies, shall adopt and use the same and no other forms of policies.

The said State Fire Insurance Commission shall also prescribe all standard forms, clauses and endorsements used on or in connection with insurance policies. All other forms, clauses and endorsements placed upon insurance policies shall be placed thereon subject to the approval of the commission. The commission shall also have authority in its discretion to change, alter or amend such form or forms, of policy or policies, and such clauses and endorsements used in connection therewith upon giving notice and proceedings in accordance with Section 21 of this act. (Acts 33rd Leg., Chap. 106, Sec. 17.)

Any Provision in a Policy Declaring It Void Because of a Lien on the Insured Property Shall Be Void.

161. Any provision in any policy of insurance issued by any company subject to the provisions of this act to the effect that if said property is encumbered by a lien of any character, or shall after the issuance of such policy become encumbered by a lien of any character, that such encumbrance shall render such policy void, shall be of no force and effect, and any such provision within or placed upon any such policy shall be absolutely null and void. (Acts 33rd Leg., Chap. 106, Sec. 18.)

Co-Insurance Clause Prohibited.

162. No company subject to the provisions of this act may issue any policy or contract of insurance covering property in this State, which shall contain any clause or provision requiring the assured to take out or maintain a larger amount of insurance than that expressed in such policy, nor in any way providing that the assured shall be liable as co-insurer with the company issuing the policy for any part of the loss or damage which may be caused by fire to the property described in such policy, and any such clause, or provision shall be null and void, and of no effect; provided, that the co-insurance clauses and provisions may be inserted in policies written upon cotton, grain or other products in process of marketing, shipping, storing or manufacture. (Acts 33rd Leg., Chap. 106, Sec. 19.)

Complaints as to Rates Fixed By the Commission Shall Be Heard and Adjusted By the Commission.

163. Any citizen or number of citizens of this State or any policyholder or policyholders, or any insurance company affected by this act, or any Board of Trade, Chamber of Commerce, or other civic organization, or the civil authorities of any town, city or village, shall have the right to file a petition with the State Fire Insurance Commission, setting forth any cause of complaint that they may have as to any order made by this commission, or any rate fixed and determined by the commission and they shall have the right to offer evidence in support of the allegations of such petition by witnesses, or by depositions, or by affidavits; upon the filing of such petition, the party complained of, if other than the commission shall be notified by the commission of the filing of such petition and a copy thereof furnished the party or parties, company or companies, of whom complaint is made, and the said petition shall be set down for a hearing at a time not exceeding thirty days after the filing of such petition and the commission shall hear and determine said petition; but it shall not be necessary for the petitioners or any one of them to be present to present the cause to the commission, but they shall consider the testimony of all witnesses, whether such witness testify in person or by depositions, or by affidavits, and if it be found that the complaint made in such petition is a just one, then the matter complained of shall be corrected or required to be corrected by said commission. (Acts 33rd Leg., Chap. 106, Sec. 20.)

Commission Shall Give Notice to All Parties Affected By Its Orders—Shall Hear Protests—Any Dissatisfied Party May Bring Suit—Proceedings in Case of Suit.

164. The State Fire Insurance Commission shall give the public and all insurance companies to be affected by its orders or decisions, reasonable notice thereof, not exceeding thirty days, and an opportunity to appear and be heard with respect to the same; which notice to the public shall be published in one or more daily papers of the State, and such notice to the insurance company or companies to be affected thereby shall be by letter deposited in the postoffice, addressed to the State or general agent of such company or companies, if the address of such State or general agent be known to the Commission, or if not known, then such letter shall be addressed to some local agent of such company or companies, or if the address of a local agent be unknown to the commission, then by publication in one or more of the daily papers of the State, and the commission shall hear all protests or complaints from any insurance company or any citizen or any city, or town, or village or any commercial or civic organization as to the inadequacy or unreasonableness of any rates fixed by it or approved by it, or as to the inadequacy or unreasonableness of any general basis schedules

promulgated by it or the injustice of any order or decision by it, and if any insurance company, or other person, or commercial or civic organization, or any city, town or village, which shall be interested in any such order or decision, shall be dissatisfied with any regulations, schedule or rate adopted by such commission, such company or person, commercial or civic organization, city, town or village shall have the right, within thirty days after the making of such regulation or order, or rate, or schedule or within thirty days after the hearing above provided for, to bring an action against said commission in the district court of Travis county to have such regulation or order or schedule or rate vacated or modified; and shall set forth in a petition therefor the principal ground or grounds of objection to any or all of such regulations, schedules, rates or orders; in any such suit, the issue shall be formed and the controversy tried and determined as in other civil cases, and the court may set aside and vacate or annul any one or more or any part of any of the regulations, schedules, orders or rates promulgated or adopted by said commission, which shall be found by the court to be unreasonable, unjust, excessive or inadequate without disturbing others. No injunction, interlocutory order or decree suspending or restraining (restraining) directly or indirectly the enforcement of any schedule, rate, order or regulation of said commission shall be granted; provided, that in such suit, the court, by interlocutory order, may authorize the writing and acceptance of fire insurance policies at any rate which in the judgment of the court is fair and reasonable, during the pending of such suit, upon condition that the party to such suit in whose favor the said interlocutory order of said court may be shall execute and file with the Commissioner of Insurance and Banking a good and sufficient bond to be first approved by said court, conditioned that the party giving said bond will abide the final judgment of said court and will pay to the Commissioner of Insurance and Banking whatever difference in the rate of insurance, it may be finally determined to exist between the rates as fixed by said State Fire Insurance Commission complained of in such suit, and the rate finally determined to be fair and reasonable by the court in said suit, and the said Commissioner of Insurance and Banking, when he receives such difference in money, shall transmit the same to the parties entitled thereto.

Whenever any action shall be brought by any company under the provisions of this section within said period of thirty days, no penalties nor forfeitures shall attach or accrue on account of the failure of the plaintiff to comply with the orders, schedules, rates or regulations sought to be vacated in such action until the final determination of the same.

Either party to any such action, if dissatisfied with the judgment or decree of said court, may appeal therefrom as in other civil

cases. No action shall be brought in any court of the United States to set aside any orders, rates, schedules or regulations made by said commission under the provisions of this act until all of the remedies provided herein shall have been exhausted by the party complaining. (Acts 33rd Leg., Chap. 106, Sec. 21.)

Company's Certificate of Authority May Be Canceled for Violating Any Provision of This Act.

165. If any insurance company affected by the provisions of this act shall violate any of the provisions of this act, the Commissioner of Insurance shall, by and with the consent of the Attorney General, cancel its certificate of authority to transact business in this State. (Acts 33rd Leg., Chap. 106, Sec. 21.)

Rebatings and Discrimination Prohibited.

166. No company shall engage or participate in the insuring or reinsuring of any property in this State against loss or damage by fire except in compliance with the terms and provisions of this act; nor shall any such company, knowingly write insurance at any lesser rate than the rates herein provided for, and it shall be unlawful for any company so to do, unless it shall thereafter file an analysis of same with the commission, and it shall be unlawful for any company, or its officers, directors, general agents, State agents, special agents, local agents, or its representatives, to grant or contract for any special favor or advantages in the dividends or other profits to come thereon, or in commissions in the dividends or other profits to accrue thereon, or in commissions or division of commission, or any position or any valuable consideration, or any inducement not specified in the policy contract of insurance; nor shall such company give, sell or purchase, offer to give, sell or purchase, directly or indirectly as an inducement to insure or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, partnership or individuals, or any dividends or profits accrued or to accrue thereon, or anything of value whatsoever not specified in the policy; but nothing in this section or in this act shall be construed to prohibit a company from sharing its profits with its policyholders, provided that such agreement as to profit-sharing shall be placed on or in the face of the policy, and such profit-sharing shall be uniform and shall not discriminate between individuals or between classes; provided, however, that no part of the profit shall be paid until the expiration of the policy. Any company, or any of its officers, directors, general agents, State agents, special agents, local agents or its representatives, doing any of the acts in this section prohibited, shall be deemed guilty of unjust discrimination, provided, however, that if any agent of (or) company shall issue a policy without authority, and any policyholder holding such policy shall

sustain a loss or damage thereunder, said company or companies shall be liable to the policyholder thereunder, in the same manner and to the same extent as if said company had been authorized to issue said policies, although the company issued said policy in violation of the provisions of this act. But this shall not be construed to give any company the right to issue any contract or policy of insurance other than as provided in this act. (Acts 33rd Leg., Chap. 106, Sec. 22.)

Rebating and Discrimination Prohibited.

167. No person shall knowingly receive or accept from any insurance company or from any of its agents, sub-agents, brokers, solicitors, employes, intermediaries or representatives, or any other person, any rebate or premium payable on the policy, or any special favor or advantage in the dividends or other financial profits accrued or to accrue thereon, or any valuable consideration, position or inducement not specified in the policy of insurance, and any person so doing shall be guilty of a violation of the provisions of this section, and shall be punished by a fine of not exceeding one hundred dollars (\$100.00) or by imprisonment in the county jail for not exceeding ninety days, or by both such fine and imprisonment. (Acts 33rd Leg., Chap. 106, Sec. 23.)

Extension of Credit for Payment of Premiums Not Forbidden, and Is Not Discrimination.

168. The provisions of this law shall not deal with the collection of premiums, but each company shall be permitted to make such rules and regulations as it may deem just between the company, its agents, and its policyholders, and no bona fide extension of credit shall be construed as a discrimination or in violation of the provisions of this act.

All policies heretofore issued or which shall hereafter be issued by any insurance company prior to the taking effect of this act, which provide that said policies shall be void for non-payment of premiums at a certain specified time, shall be and the same are in full force and effect; provided, that the company or any of its agents, have accepted the premium on said policies after the expiration of the dates named in said provisions fixing the date of payment. (Acts 33rd Leg., Chap. 106, Sec. 24.)

Certificate of Authority of Company May Be Revoked, Subject to Review By Courts.

169. The Commissioner of Insurance and Banking, upon ascertaining that any insurance company or officer, agent or representative thereof, has violated any of the provisions of this act, may, at his discretion, and with the consent and approval of the Attorney General revoke the certificate of authority of such company, officer, agent or representative; but such revocation of any certificate shall

in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by this act, and provided, that any action, decision or determination of the Commissioner of Insurance and Banking and the Attorney General in such cases shall be subject to the review of the courts of this State as herein provided. (Acts 33rd Leg., Chap. 106, Sec. 25.)

Penalty for Violation of Any Provision of State Fire Commission Act.

170. Any insurance company affected by this act, or any officer or director thereof, or any agent or person acting for or employed by any insurance company, who, alone or in conjunction with any corporation, company or person, who shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done any act, matter or thing prohibited or declared to be unlawful by this act, or who shall wilfully omit or fail to do any act, matter or thing required to be done by this act or shall cause or wilfully suffer or permit any act, matter or thing directed not to be done, or who shall be guilty of any wilful infraction of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than three hundred dollars (\$300.00) nor more than one thousand dollars (\$1000.00) for each offense. (Acts 33rd Leg., Chap. 106, Sec. 26.)

No Person Excused From Testifying; Nor Subject to Penalty on Account of Giving Testimony Under Fire Commission Act.

171. No person shall be excused from giving testimony or producing evidence when legally called upon to do so at the trial of any other person or company charged with violating any of the provisions of this act on the ground that it may incriminate him under the laws of this State; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence under this act except for perjury in so testifying. (Acts 33rd Leg., Chap. 106, Sec. 27.)

Fire Commission Act Does Not Apply to Mutual Companies Nor Reciprocal Associations.

172. This act shall not apply to purely mutual or to purely profit-sharing fire insurance companies incorporated or unincorporated under the laws of this State, and carried on by the members thereof solely for the protection of their property and not for profit; nor to purely co-operative inter-insurance and reciprocal exchange carried on by the members thereof solely for the protection of their property and not for profit. (Acts 33rd Leg., Chap. 106, Sec. 28.)

Additional Tax Assessed and Collected for Meeting Expenses of State Fire Insurance Commission.

173. That Section 29 of Chapter 106 of the General Laws of the Regular Session of the Thirty-third Legislature be amended so as to hereafter read as follows:

Section 29. That there shall be assessed and collected by the State of Texas an additional one and one-fourth ($1\frac{1}{4}$) per cent of the gross fire insurance premiums of all fire insurance companies doing business in this State, according to the reports made to the Commissioner of Insurance and Banking as required by law; and said taxes when collected shall be placed in a separate fund with the State Treasurer to be expended during the current year in carrying out the provisions of this act; provided that such expenditures, including the salaries of the members of the commission, shall not exceed in the aggregate the sum of one hundred and thirty thousand (\$130,000.00) dollars per annum; and should there be an unexpended balance at the end of any year, the State Fire Insurance Commission shall reduce the assessment for the succeeding year so that the amount produced and paid into the State Treasury, together with said unexpended balance in the Treasury, will not exceed the amount appropriated for the current year, to pay all necessary expenses of maintaining the commission, which funds shall be paid out upon requisition made out and filed by a majority of the commission, when the Comptroller shall issue warrants therefor. (Approved March 10, 1917. Takes effect 90 days after adjournment.)

Note.—(1) The tax on gross premiums of fire insurance companies required to be collected for the support of the State Fire Insurance Commission must be levied and collected on the premiums on fire insurance only and cannot be levied on any other class of insurance. (Opinion of Attorney General, February 25, 1914.)

(2) Insurance companies insuring automobiles against fire must pay the tax for the support of the State Fire Insurance Commission. (Opinion of Attorney General, March 14, 1915.)

If Any Part of State Fire Commission Act, Declared Unconstitutional, This Does Not Affect Any Other Part.

174. If any part of this act be for any reason held unconstitutional, it shall not affect any other portion or part of this act. (Acts 33rd Leg., Chap. 106, Sec. 30.)

Emergency Clause to State Fire Commission Act.

175. The fact that there is now no sufficient law in this State prohibiting unjust discrimination in the collection of fire insurance rates as between citizens of this State; nor protecting citizens in securing reasonable rates, constitutes an emergency and an imperative public necessity, requiring that the constitutional rule requiring bills to be read on three several days, be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted. (Acts 33rd Leg., Chap. 106, Sec. 31.)

CHAPTER VII

MUTUAL FIRE, LIGHTNING, HAIL AND STORM INSURANCE
COMPANIES—THEIR REGULATION, GOVERN-
MENT AND CONTROL

176. The purposes for which private corporations may be formed are: Article 1121, R. S., 1911.

(50) For the organization of mutual fire, or storm or lightning insurance companies without an authorized capital; provided, that the members of said mutual fire insurance companies applying for such charters shall be resident citizens of the State of Texas, which fact shall be proven by the affidavit of a credible person accompanying the articles of incorporation when filed with the Secretary of State, and such affidavit shall state that the person making the same is cognizant of the facts therein stated; provided further, that no permit to transact business within this State shall be granted to any mutual fire, or storm, or lightning insurance company without an authorized capital, incorporated under the laws of any other State. (Acts of 1897, p. 192.)

Caption of Act Authorizing the Incorporation of Mutual, Fire, Lightning, Hail and Storm Insurance Companies.

177. An act permitting the formation and incorporation of mutual fire, lightning, hail and storm insurance companies, for either or all of such purpose, and providing for the regulation, government and control and permitting the admission of such companies, created under the laws of other States or foreign governments to do business in this State, and prescribing fees to be paid to the Commissioner of Insurance and Banking, and prescribing penalties for the violation of this act, and repealing Chapter 10, Title 71 of the Revised Statutes of the State of Texas, of 1911, and all other acts, or laws or parts of laws, in conflict with this act, or in conflict with any portion of this act; exempting and excepting county mutuals and farmers' mutuals now operating under lodge systems, and printers' mutuals, from the operation of this act, and providing that they shall not be in any way affected by this act, except that they shall make annual reports to the Commissioner of Insurance and Banking, and declaring an emergency. (Acts 33rd Leg., Chap. 29, Caption.)

Incorporation of—"Mutual" Must Be in Title.

178. Any number of persons, not less than seven, who shall be resident citizens of the State of Texas, may form and incorporate a company for the purpose of mutual insurance against loss or damage by fire, lightning, hail and storms and for all or either of such

purposes; provided, that every company incorporated under the provisions of this act shall embody the word "mutual" in its title, which shall appear upon the first page of every policy and renewal receipt. (Sec. 1, Chap. 29, 33rd. Leg.)

Application for Permit to Solicit Insurance—Filing Fee.

179. When any number of persons, not less than seven, desire to organize a mutual insurance company, as herein provided, they shall make application to the Commissioner of Insurance and Banking of the State of Texas for permission to solicit insurance on the mutual plan. Such application shall contain:

(1) The name of the company, and the name selected shall not be so similar to that of any other insurance company as to be likely to mislead the public.

(2) The locality of the principal business office of such company.

(3) The kind of insurance business the company proposes to engage in.

(4) The name and place of residence of not less than seven persons making such application for such permit.

(5) An affidavit of at least one of said applicants, stating the places of residence and names of such applicants correctly.

Upon receipt of such application, together with a fee of one dollar, in payment for filing such application, the Commissioner of Insurance and Banking shall at once file said application, and issue to said applicant a permit authorizing said applicant to solicit insurance on the mutual plan, in accordance with the terms of the application, but not to issue policies of insurance. (Sec. 2, Chap. 29, 33rd Leg.)

Conditions, Etc., for Obtaining Charter, Fees and Taxes.

180. No such company shall be granted a charter, or be authorized to issue policies of insurance, until insurance, upon not less than one hundred separate risks, the total amount of which insurance shall be not less than one hundred thousand dollars, has been applied for and entered on the books of said company, and until an amount equal to not less than fifty per cent of the first premiums for such insurance has been paid in cash to such company, a premium note being taken for the balance, if any, and such mutual annual premiums must aggregate not less than twice the maximum liability to be incurred on any one risk, and no policy of insurance shall be written or liability, as an insurer be incurred, by said company until a statement subscribed and sworn to by the president and secretary of said company, stating that the above provisions have been complied with, has been filed with the Commissioner of Insurance and Banking of the State of Texas, together with the certified copies of the company's proposed charter, and by-laws.

The charter or articles of association of said company shall be signed and acknowledged by at least four of the original applicants for said permits, and shall contain:

- (1) The name of the company.
- (2) The purpose for which it is formed.
- (3) The place or places where its business is to be transacted, and the location of its principal business office.
- (4) The term for which it is to exist.
- (5) The number of its directors, or trustees, and the names and residences of those who are elected for the first year.

When said applicants have complied with all the above requirements, and have filed the necessary copies of their charter and by-laws with the Commissioner of Insurance and Banking of the State of Texas, and have paid the fees and taxes required by the laws of the State of Texas to be paid the Commissioner of Insurance and Banking shall record said charter, and furnish said company with a certified copy thereof, and shall issue to said company a certificate of authority showing it has complied with the laws of the State of Texas, and authorizing it to do business until the last day of the following February. (33rd Leg., Chap. 29, Sec. 3.)

Note.—(1) The charter of a mutual fire insurance company must be in accord with the statute prescribing its requisites; must show the number of directors, and its by-laws on the same subject must be in accord with the number of directors specified in its charter. (Opinion of Attorney General, April 2, 1914.)

(2) A mutual fire insurance company, organized under this statute, cannot amend its charter so as to authorize it to do any other kinds of insurance than fire, lightning, hail and storm mentioned in said statute, and therefore cannot avail itself of the provisions of Chapter 108, Acts of the Thirty-third Legislature (Section 118 this Digest) which refers only to capital stock companies and not to mutual companies. (Opinion of Attorney General, August 8, 1914.)

(3) A mutual fire insurance company must have not less than seven nor more than thirteen directors; its charter should contain some formal words showing the purpose and intention of the incorporators to enter into a contract. (Opinion of Attorney General, May 4, 1915.)

Biennial Examination of Mutual Companies—Charter Forfeited, When.

181. Every mutual fire, lightning and storm insurance company incorporated in this State shall be under the supervision of the Commissioner of Insurance and Banking, who shall make or cause to be made, an examination of the affairs of each mutual insurance company, at the company's expense at least once in every two years and at such other times as he deems proper, and he shall thoroughly and carefully inspect books, accounts and records of the company, and if upon such inspection the affairs of such company are found to be in a sound condition, and the company thus solvent and able to fulfill its obligations, he shall issue to the company a certificate showing the result of such examination. If

upon examination he is of opinion that the mutual insurance company is insolvent or has exceeded its powers or has failed to comply with any provisions of law governing it, he may suspend the company's permit and shall give such company written notice of that objected to, and failing such being remedied (remedied) within thirty days, he shall report the same to the Attorney General, who shall at once bring suit to forfeit the charter of such company. (33rd Leg., Chap. 29, Sec. 4.)

Annual Statement of Company.

182. Every mutual insurance company transacting business in the State shall, before the month of March in each year, file in the office of the Commissioner of Insurance a statement showing the exact condition of affairs of the company upon the 31st day of December preceding; such statement being in conformity with such forms as the insurance company may furnish. (Id., Sec. 5.)

Who Are Members; Their Right to Vote.

183. Every person to whom a policy of insurance has been issued by a mutual company incorporated in this State shall be a member of such company so long as his policy remains in force and shall be entitled to one vote at the meetings of the members of such companies, and shall further be entitled to his equitable share of all benefits derived from being a member of such company. (Id., Sec. 6.)

Payment of Annual Premium—Other Liabilities Assessable at the Discretion of Whom.

184. The by-laws of every company organized under this act shall provide that every member, in addition to his annual premium paid in cash, or in cash and premium notes, shall be liable for a sum equal to another annual premium; or it may provide a sum equal to three or five annual premiums. Such additional liability being assessable at the discretion of the Insurance Commissioner or the company's board of directors, for the member's proportionate share of losses and expenses should the company's fund become impaired. (Id., Sec. 7.)

By-Laws of Company Shall Contain, What—By-Laws Form Part of Contract With the Company.

185. The by-laws of such companies shall specifically provide for the rules and regulations of the government, providing for the collection of adequate premiums or assessments, either all in cash or part cash and part by note, such premiums being based upon the greater or less risk attached to the property insured, and they shall state clearly and plainly the extent of each member's liability to other members, shall provide for the accumulation of a surplus fund to which shall be added not less than ten per cent of the an-

nual saving, being made by the company, shall require (provide) for the bonding of the company's officers and shall name such other provisions and safeguards as may be deemed proper and not contrary to the laws of the State, and a notice in heavy type shall be printed on all policies calling to the attention of the insured that the by-laws are a part of his contract with the company. (Id., Sec. 8.)

Note.—(1) The by-laws of a mutual fire insurance company, authorizing an additional assessment upon the policyholders, cannot limit such assessment to the payment of losses, but must permit it to be used for expenses as well. Under such by-laws an executive committee must be composed of members of the board of directors, but such committee cannot be substituted for or take the place of the board, and the duties of the committee must be limited and prescribed by the by-law. The board of directors cannot amend the by-laws after their adoption by the policyholders, but all such amendments must be made under authority of the policyholders or members of the corporation. Such by-laws filed with the charter of the company should be certified to. (Opinion of Attorney General, June 27, 1913.)

(2) The executive committee of a mutual fire insurance company, provided for in the by-laws of the company, must be members of the company and of the Board of Directors. The duties of such committee should be denied, but they cannot be made to embrace the general management of the company. Such general management must be by and through the Board of Directors. (Opinion of Attorney General, July 9, 1913.)

(3) The Board of Directors of a mutual fire insurance company cannot lawfully transfer all their powers to an executive committee, and the by-laws of the company should not attempt to do so. The powers and duties of the executive committee should be limited and clearly defined in the by-laws, and in such a way as to leave the actual management of the company in the hands of the directors and not with the committee. The by-laws can be amended only by members of the company and cannot be lawfully amended by the directors only. (Opinion of Attorney General, September 19, 1913.)

(4) The by-laws of a mutual fire insurance company having reference to the number of its directors must be in accord with its charter. A by-law, providing for the levying of assessments, should follow the requirements of the statute, and should not conflict with it nor contain provisions not authorized by it. It is contrary to the statute and unlawful for such by-laws to provide for the creation of a reserve fund as capital of a mutual company which shall belong to the company and not be subject to distribution or division among the policyholders, and prohibiting persons who have ceased to be policyholders from having an interest in such reserve fund. It is also unlawful for them to provide that at the dissolution of the company such reserve fund shall be divided among those who may be policyholders at the time of the dissolution. Such by-laws must clearly provide for the collection of adequate premiums and assessments based upon the greater or less risk of the property insured. By-laws cannot be amended by the directors or officers, but by the stockholders who in a mutual company are its policyholders. (Opinion of Attorney General, April 2, 1914.)

(5) By-laws of a mutual fire insurance company attempting to provide that officers of the company shall hold office for five years should not be approved, because contrary to the law which requires that the directors of a corporation shall be elected annually and shall then elect the officers from their own membership. Nor should by-laws of such company

be approved if they provide that the secretary shall receive for his services and all other expenses of the company 35 per cent of the premiums; nor if they attempt to exempt the officers and directors from liability for the obligations of the company; nor if they attempt to limit the place where suits may be brought against the company to a single county; nor if they provide that the policyholders shall participate in the profits and losses of the company; nor if they attempt to give the officers of the company power to make rates on risks. A by-law of such a company which provides that no dividend shall be declared until its surplus amounts to \$100,000 and that 10 per cent of the annual savings shall be added to the surplus, should be in such language as to make the meaning clear. (Opinion of Attorney General, May 27, 1914.)

(6) The by-laws of a mutual fire insurance company must be in harmony with its charter. An article stating the name of the company, vesting the management in the Board of Directors and locating the principal office, are not necessary in the by-laws; their presence there is merely superfluous, not illegal. The term of office of the officers should be fixed by the by-laws. The by-laws as an original proposition are to be adopted by the Board of Directors, but after their adoption they cannot be changed except by vote of the policyholders or members, and a provision to the effect that the directors shall have authority to amend the by-laws is contrary to the statutes of this State. An article of the by-laws of such a company limiting the purpose for which an additional premium or assessment may be collected for payment of loss is contrary to the statute. When assessed by legal authority such additional collection must be made not only for payment of loss but for expense as well. By-laws limiting the maximum liability to be assumed on any one fire to \$1000 should not be approved. By-laws of such a company should state the date of the annual meeting of the members, provide for the collection of premiums either in cash or part cash, such premiums to be based upon the greater or less risk attached to the property insured; should state clearly the extent of each members liability to other members, provide for the accumulation of a surplus fund to which must be added not less than 10 per cent of the annual savings of the company, and for the bonding the officers charged with handling the company's funds. (Opinion of Attorney General, May 4, 1915.)

Investment of Funds.

186. Funds of mutual companies may be invested in United States bonds, Texas State bonds, county or city bonds of the State of Texas, provided that such bonds are issued by authority of law, and that interest upon them has never been defaulted, or in first mortgages on improved real estate within the State where the first mortgage does not exceed fifty per cent of the value of the land and improvements thereon. (Id., Sec. 9.)

Expenses of Company Limited to 85 Per Cent of Annual Premiums—Statement.

187. The expenses of all companies incorporated under this act must not exceed an amount equal to thirty-five per cent of the annual premiums, and a statement must be made annually to the Commissioner of Insurance and Banking by the president or secretary of the company that they are being so limited. (Id., Sec. 10.)

Note.—The annual premiums mentioned in above section refer to gross

annual premiums and not to net premiums. (Opinion of Attorney General, May 4, 1915.)

Reserve—Dividend.

188. In determining the solvency of any mutual company, organized for any purpose mentioned in this act, and in determining the profit or saving to be distributed among members forty per cent of the actual cash premiums paid on policies in force for one year, and a pro rata of all premiums received on risks that have more than one year to run shall be deemed to be a sufficient reserve under the said policies, and no dividends to members shall be paid out of this reserve. (Id., Sec. 11.)

Special Examination of Company, When Necessary.

189. If any time the admitted assets of any mutual company, operating under this act, shall come to be less than the largest single risk for which the company is liable, then the president and the secretary of the company shall at once notify the Commissioner of Insurance and Banking, and he may make an examination into the company's affairs if he deems it best. (Id., Sec. 12.)

When to Suspend or Revoke License—Forfeit of Charter.

190. If upon the examination of the company's affairs, as required in Section 12, it appear that the largest single risk for which the company is liable exceeds the admitted assets of the company, the Commissioner of Insurance and Banking shall immediately suspend or revoke the license of the company until the assets of the company are increased by assessment or otherwise, sufficiently to meet the requirements.

The company shall have thirty days withip which to meet this requirement, and if within that time it fails to do so the Commissioner of Insurance and Banking shall refer the matter to the Attorney General of the State of Texas, with instructions to institute proper legal proceedings to forfeit the charter of said company. (Id., Sec. 13.)

Penalty for Failure to Report or Make False Statement.

191. Failure to report the company's condition as required in Section 12 of this act shall be considered a misdemeanor, punishable by a fine of not less than one hundred dollars, nor more than five hundred dollars for such offense.

The intentional submitting of a false statement, or the intentional misappropriation of the funds of mutual companies, shall be considered a felony, punishable by confinement in the penitentiary for a term of years not less than five, nor more than ten years for such offense. (Id., Sec. 14.)

Law Governing Stock Fire Insurance Companies Applicable to Mutual Companies.

192. Every mutual company organized for any purpose mentioned in this act shall be amenable to, and subject to the provisions of all laws of this State governing stock fire insurance companies, in so far as they are applicable to mutual companies, and not in conflict with the provisions of this act. (Id., Sec. 15.)

License or Permit Suspended, When—Penalty for Violation of Failure to Comply With Provisions of This Act.

193. Any mutual company that shall wilfully violate, or fail to comply with the provisions of this act, shall be subject to, and liable to pay a penalty of not less than five dollars, nor more than one hundred dollars for each violation thereof, and such penalty may be collected and recovered in an action brought in the name of the State of Texas in any court having jurisdiction thereof; and for any violation or failure to comply with any of the provisions of this act the Commissioner of Insurance and Banking may suspend a company's permit, or license, and while suspended such company shall be prohibited from writing or renewing any insurance policies. (Id., Sec. 16.)

Foreign Mutual Companies Must Have.

194. Mutual companies incorporated under the laws of any other State, or foreign government, for any, or all of the purposes, specified in the first section of this act, and duly licensed to transact business in such other States or government, and that have not less than one hundred thousand dollars assets in excess of liabilities, shall when they have complied with the requirements and restrictions of this act, as far as applicable to them, be admitted to do business in this State, and the Commissioner of Insurance and Banking shall issue to any such company so complying a permit authorizing such company to do business in this State until the last day of the following February. (Id., Sec. 17.)

Filing Fees and Taxes.

195. Every mutual company operating under this act shall pay to the Commissioner of Insurance and Banking of the State of Texas, for obtaining a charter, a fee of twenty dollars, and for each license granted or renewal thereof, a fee of one dollar, and for filing each annual statement, a fee of ten dollars annually on the 31st day of each December, and when the Insurance Commissioner has certified to the Treasurer of the State of Texas, the correct amount to be paid, every mutual company operating under this act shall pay to the Treasurer of the State of Texas one-half of one per cent of all the net premiums, or assessments, received by it during the year, and no other tax shall be required of such mutual company or companies, their officers and agents, except such fees

as shall be paid to the Commissioner of Insurance as required by law. (Id., Sec. 18.)

Withdrawal of Securities on Depositing With State Treasurer in Accordance With Repealed Law, R. S., Art. 4909, When.

196. Any mutual fire, lightning and storm insurance company which has deposited securities with the State Treasurer of the State of Texas, in accordance with Chapter 10, Title 71, of the Revised Statutes of Texas of 1911, repealed in Section 20 of this act, may withdraw from such depository any securities so deposited upon filing with the Commissioner of Insurance and Banking of the State of Texas as declaration of its intentions to comply with the provisions of this act, and upon the execution and delivery to the State Treasurer of the State of Texas of a proper receipt for such securities, which receipt shall release the State Treasurer from all further liabilities on account of such deposit, or the withdrawal thereof. (Id., Sec. 19.)

Repeal of Chapter X, Title 71, R. S., 1911.

197. Chapter 10, Title 71 of the Revised Statutes of the State of Texas of 1911 and all other acts or laws, or parts of laws in conflict with this act, or in conflict with any portion of this act are hereby repealed, but nothing in this act shall be deemed to apply in any way to the present law governing county mutual insurance, or farmers' mutuals, now operating under lodge systems, or printers' mutuals, and such companies and associations shall not be subject to the provisions of this act, except that they shall make annual reports to the Commissioner of Insurance and Banking of the State of Texas. (Id., Sec. 20.)

Emergency Clause.

198. The fact that there is now no adequate law in the statutes of this State, regulating or permitting the organization of mutual fire, lightning, hail and storm insurance companies, or the admission of such companies from other States and governments to do business in this State, creates an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended, and that this act take effect and be in force from and after its passage, and it is so enacted. (Id., Sec. 21.)

CHAPTER VIII

MUTUAL HAIL INSURANCE COMPANIES

Caption of Act Authorizing the Incorporation of Mutual Hail Insurance Companies.

199. An act authorizing the incorporation of mutual hail insurance companies, regulating the business of such companies, providing for the investment of reserve funds, requiring annual reports and fixing the fees to be paid by such companies, and declaring an emergency. (Acts 33rd Leg., Chap. 22, Caption.)

Seven or More Resident Citizens May Form Private Corporation for Mutual Hail Insurance—Mutual "Must Be in Title."

200. Private corporations may be created without a capital stock within this State by the voluntary association of seven or more persons, resident citizens of this State, who collectively own not less than one thousand acres of growing crops of all kinds for the purpose of mutual insurance against loss or damage by hail; provided, that every company incorporated under the provisions of this act shall embody the word "mutual" in its title. (Acts 33rd Leg., Chap. 22, Sec. 1.)

Must Obtain Permit to Solicit, Stating Name and Place of Company, Purpose of Organization—Amount of First Assessment to Be Levied on Risk.

201. When any number of persons not less than seven desire to organize a mutual hail insurance company, as herein provided, they shall make application to the Commissioner of Insurance and Banking for permission to solicit business under the mutual plan, stating the principal place of business, and name of the company; that said company is to be organized for the insurance of growing crops against loss or damages by hail. Upon receipt of said application the Commissioner of Insurance and Banking shall issue said applicants a permit to solicit insurance against loss or damage by hail on the mutual plan in accordance with the terms of the application, but not to issue policies of insurance. Said mutual company shall take from each applicant an obligation specifying the property to be insured and the amount to be paid, as the first assessment evidenced by a promissory note for such sum and payable on or before the 31st day of the succeeding December and upon the State of Texas granting to said mutual insurance company a charter authorizing it to do business in this State. (Id., Sec. 2.)

Conditions, Etc., for Obtaining Charter; Fees.

202. When applications have been secured for insurance with such company from at least two hundred applicants, residing in

not less than twenty-five different counties in this State, the first assessment or premium on which applications shall amount to at least ten thousand dollars for which notes of solvent parties founded on actual bona fide applications for insurance payable upon the granting a charter by the State to said mutual hail insurance company, which premium notes shall be a lien on the crop insured or otherwise secured and which notes and applications shall be submitted to the Commissioner of Insurance and Banking, and when he finds the applications and notes to be genuine and secured by lien on growing crops or otherwise secured, he shall upon the payment of a fee of twenty-five dollars certify the fact that he has examined and approved said applications and notes to the Secretary of State, who shall upon an application of said persons to which application shall be attached the said certificate of the Commissioner of Insurance and Banking permit said company to incorporate and issue to it a charter. A certified copy of the charter shall thereupon be filed with the Commissioner of Insurance and Banking who upon the payment of the fees required by law shall issue to said mutual hail insurance company a license to solicit and transact business and issue policies against loss or damage by hail. Every person making application for insurance in such company prior to the granting of a charter to such company and signing a non-negotiable promissory note shall be liable upon the note upon the granting of a charter by the State, and, if payment is refused, suit may be brought on same in any court in this State having jurisdiction of the amount at the principal office of said insurance company. (Id., Sec. 3.)

Application for Charter—What It Shall Show.

203. The application for a charter shall state the name of the corporation, the purpose for which it is formed, the place of its principal office, the term for which it is to exist, the number, name and residence of its directors for the first year, and shall be subscribed and acknowledged by seven or more of the applicants. (Id., Sec. 4.)

Organization and Qualifications of Officers and Directors.

204. Upon the issuance of a charter by the Secretary of State to such mutual hail insurance company the persons making application for such charter shall constitute a board of directors for the first year, which board of directors shall consist of not less than seven persons, all of whom shall be residents of this State. The officers of such company shall be such as may be provided by the by-laws, and the treasurer or the secretary and treasurer, if such offices should be combined in one, shall execute a bond in the sum of ten thousand dollars payable to the Commissioner of Insurance and Banking and his successors in office, conditioned for the faith-

ful performance of his duties, and that he will account for all moneys, notes or other assets that may come into his hands, said bond shall be signed by two or more good and solvent sureties or be executed by a guaranty company authorized to do business in this State, and shall be approved by the Commissioner of Insurance and Banking. (Id., Sec. 5.)

What Policy Shall Contain—Bigger Losses Than the Sum of All Premiums Shall Be Paid By Proportionate Shares.

205. Mutual hail insurance companies organized under the provisions of this act may issue policies on growing crops of all kinds against loss or damage by hail only. Any person desiring insurance in such company shall make application on blanks furnished by the company and shall pay the full amount of the premium in cash or secured notes. Provided, that no contract shall be made providing for payment of any obligation by the insured or for suit on any such obligation of the insured, except those given by the charter members referred to in Section 3 of this act, in any county other than the county in which the insured has his domicile. In case the whole amount of the premium collected by such company for any one year shall be insufficient to pay all losses occurring during said year, after paying the necessary expenses for said year, the persons insured by such company shall receive their proportionate share of the sums realized from said premiums after deducting the expenses therefrom, in full satisfaction of their losses, and no member shall be liable to the company or to any other person for more than the premium which shall be paid by him or secured to be paid by him in making his application for insurance. (Id., Sec. 6.)

Fund Set Apart for Payment of Losses—Investment of Such Fund—How Disposed of.

206. All companies incorporated under this act shall set aside sixty per cent of all premiums collected as a policyholders' fund for the payment of losses, which fund shall be used for no other purpose, and the remainder of the gross premiums collected shall be used, if needed, for paying the expenses of said company, and if not needed for such purpose, such remainder not so used shall be added to the policyholders' fund at the end of the current year, and if, at the end of such current year, the total of said policyholders' fund has not been appropriated or necessary in the payment of losses to policyholders, then such amount of said fund so remaining may be invested in first mortgage notes on lands in this State, said investment not exceeding fifty per cent of the value of said lands, or in bonds of this State, or in county, city, town or school district bonds of this State; provided, said bonds have been approved by the Attorney General, which funds or securities shall be deposited in trust for said policyholders with any bank approved by the Commissioner of Insurance and Banking as a reserve fund,

which fund may be used for the payment of policyholders, if necessary, in case of excessive and unprecedented losses, and such company may collect and receive the interest and dividends thereon to be used in defraying the expenses and paying the losses of said company. (Id., Sec. 7.)

Note.—The company has the right to sell real estate paper in which its surplus is invested to pay policyholders when necessary account of unprecedented losses. Commissioner may require losses to be paid out of this fund to be submitted to him for approval before payment. Commissioner is authorized to designate depository for the funds and securities of the company. (Opinion of Attorney General, October 18, 1915.)

Rates to Be Determined and Fixed.

207. The board of directors of such company shall have the authority to fix the rates to be charged for such insurance, and may fix at their discretion different rates for different sections of the State based upon the frequency of hail storms in such sections. (Id., Sec. 8.)

Annual Statement of Companies.

208. Every such corporation shall, on or before January 1st, or within thirty days thereafter, each year make and file with the Commissioner of Insurance and Banking a report upon blank forms to be furnished by such commissioner, which report shall be verified by the oath of the secretary of such corporation, and shall show the number of policies issued for the preceding year, the number and amount of losses paid, the gross amount received from premiums, the amount of expenses paid, and the amount set aside or invested during the year as a reserve fund, if any, and the books, records and documents of such corporation shall be subject to the inspection and examination of the Attorney General or the Commissioner of Insurance and Banking. (Id., Sec. 9.)

Filing Fees.

209. The following fees shall be paid by companies organized under this law: In addition to the application fee, charter fee, to the Secretary of State when charter is issued \$25.00, annual franchise tax of \$50.00, and to the Commissioner of Insurance and Banking for filing annual statement, \$5.00, certificate of authority to corporation, \$1.00, and no other fees shall be paid by said companies. (Id., Sec. 10.)

Emergency Clause.

210. The fact that there is great destruction of growing crops in this State by hail, and that there is no law under which mutual companies for the insurance against hail may be organized, creates a public necessity and an emergency which requires the constitutional rule that bills be read on three several days be and the same is hereby suspended, and that this law shall take effect on and after its passage, and it is so enacted. (Id., Sec. 11.)

CHAPTER IX

RECIPROCAL OR INTER-INSURANCE—INDEMNITY CONTRACTS—AUTHORIZING AND REGULATING

Caption to Act Regulating Certain Indemnity Contracts.

211. An act authorizing and regulating certain classes of indemnity contracts, empowering corporations to make such contracts, and fixing certain fees and the penalty for violation thereof. (Acts 34th Leg., Chap. 156, Caption.)

Note.—Act is unconstitutional. Provisions construed. (Opinion of Attorney General, April 8, 1915.)

Declaring Who May Exchange Reciprocal or Inter-Insurance Indemnity Contracts—Life Insurance Excepted.

212. Individuals, partnerships and corporations of this State hereby designated subscribers are hereby authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other States and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance. (Acts 34th Leg., Chap. 156, Sec. 1.)

Attorney in Fact May Execute for Subscribers—Power of Attorney Designates His Place of Office.

213. That such contracts may be executed by a duly appointed attorney in fact authorized and acting for such subscribers. The office or offices of such attorney may be maintained at such place or places as may be designated by the subscribers in the power of attorney. (Acts 34th Leg., Chap. 156, Sec. 2.)

Requisites of Declaration to Be Filed By Attorney.

214. That such subscribers, so contracting among themselves, shall, through their attorney, file with the Insurance Commissioner of this State a declaration verified by the oath of such attorney setting forth:

(a) The name or the title of the office at which such subscribers propose to exchange such indemnity contracts. Said name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of the Insurance Commissioner is calculated to result in confusion or deception. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or inter-insurance exchanges.

(b) The kind or kinds of insurance to be effected or exchanged.

(c) A copy of the form of policy, contract or agreement under or by which such insurance is to be effected or exchanged.

(d) A copy of the form of power of attorney or authority of such attorney under which such insurance is to be effected or exchanged.

(e) The location of the office or offices from which such contracts or agreements are to be issued.

(f) That applications have been made for indemnity upon at least seventy-five separate risks, aggregating not less than one-half million dollars as represented by executed contracts or bona fide applications to become concurrently effective, or in case of liability or compensation insurance, covering a total payroll of not less than two thousand employees.

(g) That there is on deposit with some State or national bank as a depository for the payment of losses not less than the sum of ten thousand dollars. (Acts 34th Leg., Chap. 156, Sec. 3.)

**Shall File Instrument Designating Commissioner as Attorney for Service—
How Service is Made.**

215. That concurrently with the filing of the declaration provided for by the terms of Section 3, hereof, the attorney shall file with the Insurance Commissioner an instrument in writing, executed by him for said subscribers, conditioned that, upon the issuance of certificates of authority provided for in Section 10 hereof, service of process may be had upon the Insurance Commissioner in all suits in this State arising out of such policies, contracts or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the Insurance Commissioner shall file one copy, forward one copy to said attorney, and return one copy with his admission of service. (Acts 34th Leg., Chap. 156, Sec. 4.)

**Attorney Shall File Statement Under Oath Showing Maximum Indemnity
Upon Any Single Risk—Also as to Single Risk of Any Subscriber
Shall Not Be Greater Than 10 Per Cent of His Net Worth.**

216. That there shall be filed with the Insurance Commissioner of this State by such attorney a statement under the oath of such attorney showing the maximum amount of indemnity upon any single risk, and such attorney shall, whenever and as often as the same shall be required, file with the Insurance Commissioner a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount greater than 10 per cent of

the net worth of such subscriber. (Acts 34th Leg., Chap. 156, Sec. 5.)

Reserve to Be Maintained.

217. That there shall at all times be maintained as a reserve a sum in cash or convertible securities equal to 50 per cent of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements for expenses and reinsurance. Said sum shall at no time be less than ten thousand dollars, and if at any time 50 per cent of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. (Acts 34th Leg., Chap. 156, Sec. 6.)

Attorney Shall Make Annual Reports and Furnish Additional Information—Shall Be Subject to Examination.

218. That such attorney shall make an annual report to the Insurance Commissioner for each calendar year, which report shall be made on or before March the 1st for the previous calendar year ending December 31, showing that the financial condition of affairs at the office where such contracts are issued is in accordance with the standard of solvency provided for herein, and shall furnish such additional information and reports as may be required to show the total premiums or deposits collected, the total losses paid, the total amounts returned to subscribers, and the amounts retained for expenses; provided, however, that such attorney shall not be required to furnish the names and addresses of any subscribers. The business as shown at the office of the attorney thereof shall be subject to examination by the Insurance Commissioner. (Acts 34th Leg., Chap. 156, Sec. 7.)

All Corporations Authorized to Exchange Indemnity Contracts.

219. That any corporation now or hereafter organized under the laws of this State shall, in addition to the rights, powers and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized and as much granted as the rights and powers expressly conferred. (Acts 34th Leg., Chap. 156, Sec. 8.)

Attorney Prohibited From Exchanging Contracts, or Soliciting for or Negotiating Applications for Same, Without Complying With This Act, Under Penalty.

220. That any attorney who shall, except for the purpose of applying for certificate of authority as herein provided, exchange any contract of indemnity of the kind and character specified in this act, or directly or indirectly solicit or negotiate any application for same, without first complying with the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subjected to a fine of not less than one hundred dollars nor more than one thousand dollars. (Acts 34th Leg., Chap. 156, Sec. 9.)

Attorney Must Annually Procure Certificate of Authority From Commissioner, Who May Revoke or Suspend Same.

221. That each attorney by whom or through whom are issued any policies of or contracts for indemnity of the character referred to in this act shall procure from the Insurance Commissioner annually a certificate of authority, stating that all of the requirements of this act have been complied with, and upon such compliance and the payment of the fees required by this act, the Insurance Commissioner shall issue such certificate of authority. The Insurance Commissioner may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by this act after reasonable notice has been given said attorney, in writing, so that he may appear and show cause why action should not be taken. Any attorney who may have procured a certificate of authority hereunder shall renew same annually thereafter; provided, however, that any certificate of authority shall continue in full force and effect until the new certificate of authority is issued or specifically refused. (Acts 34th Leg., Chap. 156, Sec. 10.)

License Fee.

222. That such attorney shall pay as a fee for the issuance of the certificate of authority herein provided for the sum of twenty dollars, which shall be in lieu of all license fees and taxes of whatsoever character in this State. (Acts 34th Leg., Chap. 156, Sec. 11.)

Insurance Laws Do Not Apply to Exchange of Indemnity Contracts.

223. That except as herein provided no insurance law of this State shall apply to the exchange of such indemnity contracts unless they are specifically mentioned. (Acts 34th Leg., Chap. 156, Sec. 12.)

Repealing Chapter 109, General Laws, Thirty-third Legislature.

224. That Chapter 109, General Laws of the State of Texas, passed at the Regular Session of the Thirty-third Legislature, be

and the same is hereby repealed, and all other laws and parts of laws in conflict with this act are hereby repealed. (Acts 34th Leg., Chap. 156, Sec. 13.)

Emergency Clause to Reciprocal Act.

225. There being no law now existing in this State adequately covering the subject of reciprocal insurance, creates an emergency and an imperative public necessity requiring that the constitutional rule requiring bills to be read on three several days be suspended, and that this act become a law from and after its passage. (Acts 34th Leg., Chap. 156, Sec. 14.)

CHAPTER X

PRINTERS' MUTUAL FIRE AND STORM INSURANCE ASSOCIATIONS

Printers' Mutual Fire and Storm Insurance Associations—Three or More Persons to Organize—No Capital Stock.

226. Private corporations may be created within this State by the voluntary association of three or more persons for the organization of printers' mutual fire and storm insurance associations without an authorized or subscribed capital stock; and for the purpose of insuring against loss by fire or storm, only such property as may be owned and operated for the purpose of publishing daily, weekly or other periodical newspapers, or such as may be incident thereto, or conducting job printing offices. (R. S., Art. 4919.)

Must Have Certificate of Authority, Make Reports and Pay Certain Fees.

227. Before beginning operations the company provided for in this act must obtain from the Commissioner of Insurance and Banking a certificate of authority such as is issued to mutual fire and tornado insurance companies doing business in this State, first making a showing to said commissioner that the company has fully complied with all the requirements of law applicable to such mutual fire and tornado insurance companies; provided, that no officers of printers' mutual fire and storm insurance associations shall be required to give a bond except the treasurers thereof, who shall annually file a bond with good securities and in amount to be approved by said commissioner. (R. S., Art. 4920.)

Shall Report Annually.

228. All printers' mutual fire and storm insurance associations and all mutual fire and tornado insurance companies which transact business in only one county shall report annually on or before the last day of February to said commissioner on blanks prepared

by him and pay to said commissioner as a fee for filing the same the sum of \$5.00, and such association shall not be required to pay the annual franchise tax collected of other corporations under the laws of this State. (R. S., Art. 4921.)

ARSON AND WILLFUL BURNING

Burning Personal Property Insured.—If any person, with intent to defraud, shall willfully burn any personal property owned by himself, which shall be at the time insured against loss or damage from fire, he shall be punished by confinement in the penitentiary not less than two nor more than five years. (Art. 1220, Crim. Stat., 1916.)

Owner May Destroy, Except When.—The owner of a house may destroy it by fire or explosion without incurring the penalty of arson, except in the cases mentioned in the succeeding article. (Art. 1207, Crim. Stat., 1916.)

Exceptions.—When a house is within a town or city, or when it is insured or when there is within it any property belonging to another, or when there is apparent danger by reason of the burning thereof, that the life or person of some individual, or the safety of some house belonging to another will be endangered, the owner, if he burn the same, is guilty of arson, and shall be punished accordingly. (Art. 1208, Crim. Stat., 1916.)

Case Law.—In a prosecution for the burning of a building to secure the insurance thereon, it must be shown, where the accused was not the owner, that he knew of the insurance, and that he burned the building at the instigation of the owner or some one else to defraud the insurance company. *Moore vs. State* (Crim. App.), 146 S. W. 183.

Under Pen. Code. 1911, Arts. 1200, 1207, 1208, an indictment charging one with procuring another to burn his house, which was insured, need not allege that the person who set fire to the house knew that it was insured. —*Arnold v. State*, 168 S. W. 122.

An indictment charging one with procuring another to set fire to his insured house, contrary to Penal Code 1911, § 1208, need not allege by whom or by what authority the house was insured.—*Id.*

Under Pen. Code 1911, Art. 1208, making one who burns his own house, which is insured, guilty of arson, it is not necessary that the property was burned with intent to defraud the insurance company, and therefore the state need not prove that the insurance policy was valid or was issued by a company

authorized to do business within the state.—*Arnold v. State*, 168 S. W. 122.

Where an indictment, charging the defendant with procuring another to burn his insured house, alleged that the setting fire to the house was malicious, and that the defendant paid the other a certain sum of money in another county, the state need not prove those allegations, which were mere surplusage.—*Id.*

In a prosecution of defendant for procuring another to burn his insured house, evidence of the circumstances attending the issuance and assignment of the policy, and the defendant's attempt to collect the policy after the fire, held sufficient to render the policy and assignment admissible.—*Arnold v. State*, 168 S. W. 122.

Fraudulent Insurance.—If any person shall cause insurance to be made in this state upon any merchandise or other commodity

represented to be already shipped, or about to be shipped, at any place, whether within this state or out of it, and shall, with the intent to defraud the insurer, ship articles of value less than one-half the represented value of those insured, or of a different kind from those insured, he shall be punished by fine in a sum not exceeding the amount for which such merchandise or commodity may be insured. (Art. 967, Crim. Stat., 1916.)

LIFE INSURANCE

Definition 276

I. Control and Regulation in General 276 (See pages 1, 483, 529)*What are Insurance Companies 276**Construction of Foreign Insurance Statutes 276***II. Insurance Companies 276** (See pages 8, 483, 530)*Foreign Companies—Incorporation, Organization and Existence—Statutory Regulations 276**Shall File Power of Attorney—Statutory Regulations 277**Investment in Texas Securities—Statutory Regulations 277**Foreign Assessment Companies—Statutory Regulations 277**General Statutory Regulations as to All Foreign Corporations 278**Foreign Corporations 278**(a) As to What Constitutes Doing Business 278**(b) Application of Local Laws 278**(c) Issuance of License 278**(d) Regulation of Local Agents 279**(e) Actions 279**Incorporation of Home Insurance Companies—Statutory Regulations 280**Life, Health and Accident Insurance Companies—Statutory Regulations 281**Shall Not Take Risks for Any Other Kind of Insurance—Statutory Regulations 281**Co-operative Life Insurance Companies—Statutory Regulations 281**Contract for Stock Subscription 282**Capital and Stock 282**Liability After Consolidation of Companies 283***III. Insurance Agents And Brokers 283** (See pages 12, 488, 536)*Agents Must Be Authorized to Solicit Insurance—Statutory Regulations 283**Who Are Agents—Statutory Regulations 283**Policies Must Be Issued Only Through Resident Agents, Except—Statutory Regulations 284**Solicitor of Insurance to Be Deemed Agent of Company—Statutory Regulations 284**Persons Debarred from Acting as Agent—Statutory Regulations 284*

<i>Appointment or Employment of Agent</i>	284
<i>Duration and Termination of Agency</i>	285
<i>Liabilities of Agents and Their Sureties</i>	286
<i>Compensation of Agent</i>	287
<i>Breach of Contract of Agency by Insurer</i>	289
<i>Extent and Exercise of Powers of Agent—In General</i>	290
(a) <i>General and Special Agents</i>	290
<i>Unauthorized and Wrongful Acts of Agents</i>	291
(a) <i>In Accepting Notes in Payment of Premiums</i>	291
(b) <i>Trade Talk of Agents</i>	292
<i>Ratification</i>	292
<i>Representation of Both Parties</i>	292
<i>Criminal Prosecution of Agent—Statutory Regulations</i>	292
(a) <i>Case Law</i>	293
<i>Revocation of Agent's Authority—Statutory Regulations</i>	294

IV. Insurable Interest 294 (See pages 20, 580)

<i>What Constitutes Interest in Human Life</i>	294
<i>Insurance Without Interest</i>	295
<i>Wagering Policies</i>	295
<i>Assignment of Policy to Person Without Interest</i>	295

V. The Contract in General 296 (See pages 21, 489, 543)

(a) <i>Nature, Requisites and Validity</i>	
<i>Policies Shall Contain, What—Statutory Regulations</i>	296
<i>Policies Shall Not Contain, What—Statutory Regulations</i>	297
<i>Policies of Foreign Insurance Companies May Contain—Statutory Regulations</i>	297
<i>No Level Premium Policies Shall Be Issued—Statutory Regulations</i>	297
<i>Forms of Policies to Be Filed—Statutory Regulations</i>	297
<i>What Law Governs—Statutory Regulations</i>	297
a. <i>Case Law</i>	297
<i>Powers of Agents in Respect to Contracts in General</i>	298
<i>Application or Offer and Acceptance</i>	299
<i>Form and Requisites of the Policy</i>	300
<i>Validity of Oral Contract</i>	300
<i>Papers Accompanying Policy—Statutory Regulations</i>	301
<i>Policies Must Be Accompanied by Copy of Questions—Statutory Regulations</i>	301
<i>Premium Notes</i>	301
<i>Indisputable Policies</i>	301
<i>Delivery and Acceptance of Policy</i>	301
<i>Payment of Premium</i>	302
<i>Estoppel or Waiver as to Defects or Objections</i>	302

- Reformation of Application* 303
- Modification of Policy* 303
- Misstatement or Concealment of Material Facts in Application* 303
- (B) *Its Construction and Operation* 304
 - Application of the General Rules of Construction* 304
 - What Law Governs* 305
 - Matter on Margin of or Slip Attached to Policy* 306
 - Construing Together Policy and Application* 306
 - Loans on Policies* 306
 - Co-operative Life Insurance—Loan Value on Policies—Statutory Regulations* 306
 - Loan Value on All Life Insurance Policies—Statutory Regulations* 306

VI. The Premium 306 (See pages 37, 492, 564)

- Companies Shall Not Discriminate—Statutory Regulations* 306
- Amount of Premiums* 307
- Rebate from Premiums* 307
- Payment of Premiums—Statutory Regulations* 307
- Co-operative Life Insurance—Premiums—Statutory Regulations* 307
- Payment of Premiums—Case Law* 307
- Subrogation of Agent* 308
- Notes for Premiums* 308
- Actions for Premiums* 309
- Premium or Deposit Notes* 310
- Refunding or Recovery of Premiums Paid* 310
 - (a) *In General* 310
 - (b) *After the Premium Note Has Been Negotiated* 310
 - (c) *Because of Insolvency* 312
 - (d) *Judgment and Interest* 312

VII. Assignment or Other Transfer of Policy 312 (See pages 38, 560)

- What Law Governs* 312
- Right of Insured to Assign Policy* 312
- Consent of Beneficiary to Assignment by Insured* 313
- Validity of Oral Assignment* 313
- Form and Requisites of Assignment in Writing* 314
- Validity of Assignment in General* 314
- Rights and Liabilities of Assignee* 315
 - (a) *In General* 315
 - (b) *Transfer as Collateral Security* 316

VIII. Cancellation, Surrender, Abandonment or Rescission of Policy 317 (See pages 40, 493, 562)*Right of Insured to Surrender 317**Validity of Surrender 317**Remedies for Wrongful Cancellation 317**Measure of Damages for Wrongful Cancellation 318**Abandonment by Insured 318**Rescission of Insured or Beneficiary 319**(a) In General 319**(b) By Reason of False Representations of Agent 319**Rescission by Insurer 321**Actions for Rescission 321***IX. Avoidance of Policy for Misrepresentation, Fraud or Breach of Warranty or Condition 322** (See pages 43, 494, 551)*Misrepresentation Must Be Material—Statutory Regulations 322**No Defense Based Upon Misrepresentation Valid, Unless—Statutory Regulations 322**Shall Not Constitute Defense, Unless Shown—Statutory Regulations 322**Defense Based on Misrepresentation in Application Not Valid After Two Years—Statutory Regulations 322**Companies Shall Not Misrepresent Policies—Statutory Regulations 323**Policy Shall Not Be Defeated—Statutory Regulations 323**Interpretations of Statutory Provisions 323**Representations 323**(a) In General 323**(b) Materiality 323**(c) Effect of Misrepresentations 324**Warranties 324**(a) In General 324**(b) Practical Application of General Doctrine 325**(c) Distinction Between Warranties and Representations 326**(d) Fulfillment of Breach 326**Warranties—Matters Relating to Person Insured 327**(a) As to Health and Physical Condition of Applicant 327**(1) In General 327**(2) As to Having Consulted a Physician 328**(3) As to Good Health of Applicant at Time of Delivery of Policy 329**(b) As to Family History of the Applicant 329**(c) As to Residence 330**(d) As to Occupation 330**(e) As to Habits 331**(f) As to Other Existing Insurance 331*

X. Forfeiture of Policy for Breach of Promissory Warranty, Covenant, or Condition Precedent 332 (See pages 60, 496, 568)*Grounds for Forfeiture 332*

- (a) *In General—Notice and Proceedings to Give Effect 332*
- (b) *Assignment of Policy 333*
- (c) *Non-Payment of Premium or Assessment*
 - (1) *In General 333*
 - (2) *By Default in Payment of Note 334*

*Statutory Provisions Against Forfeiture 335**Notice of Time for Payment*

- (a) *In General 335*
- (b) *Necessity 337*

Extension of Time of Payment 338

- (a) *In General 338*
- (b) *By Agent or Broker 339*

Sufficiency of Payment or Tender to Prevent Forfeiture 339

- (a) *In General 339*
- (b) *To Agent or Broker 340*

*Excuses for Non-payment 340**Rights of Insured After Default 341*

- (a) *Reinstatement—Statutory Regulations 341*
 - (1) *Case Law 341*
 - (2) *Reinstatement of Policy After Death 342*
- (b) *Paid Up Policy or Value 343*
- (c) *Insurance for Limited Term or Amount 343*

*Remedies for Relief Against Forfeiture 343***XI. Estoppel, Waiver, or Agreements Affecting Right to Avoid or Forfeit Policy 344** (See pages 92, 498, 556)*Application of Doctrines of Estoppel and Waiver 344**What Conditions May Be Waived 344**Estoppel of Insurer 344**Powers of Officers or Agents Respecting Waiver 345*

- (a) *In General 345*
- (b) *Effect of Provisions of Policy 345*

*Knowledge or Notice of Facts in General 346**Knowledge of or Notice to Officers or Agents 346**Insertion of False Answers in Application by Agent or Under His Direction 348**Form and Requisites of Express Waiver 348*

- (a) *Waiver in Writing 348*
- (b) *Construction and Operation of Express Waiver 349*

*Implied Waiver in General 349**Failure to Assert Forfeiture or to Cancel or Rescind Policy—Statutory Regulations 350*

- a. *Case Law 350*

Demand, Acceptance or Retention of Premiums or Assessments
351

- (a) *In General* 351
- (b) *Notes* 351
- (c) *By an Agent* 352
- (d) *With Knowledge of Habits and Occupations of Insured* 352
- (e) *By the Offer of a Loan* 352
- (f) *By a Future Assessment* 352
- (g) *Incomplete Reinstatement* 352
- (h) *What is Necessary to Show Waiver of Forfeiture* 353

Estoppel by Consent to Assignment of Policy 353

Provisions of Policy Against Forfeiture 353

XII. Risks and Causes of Loss 354 (See pages 111, 501)

Provisions of Policy as to Liability 354

Suicide

- (a) *In General* 355
- (b) *Effect of Insanity*
- (c) *Time When Liability for Begins* 356

XIII. Extent of Loss and Liability of Insurer 356 (See pages 113, 505)

Amount Payable on Death 356

- (a) *Statutory Regulations* 356
- (b) *Case Law* 356

Deductions and Offsets 356

XIV. Notice and Proof of Loss 357 (See pages 121, 509, 590)

Necessity of Proofs of Death 357

Sufficiency 358

Effect of Statements and of Proofs in General 358

Estoppel or Waiver as to Proofs or Defects and Objections 358

- (a) *In General* 358
- (b) *Denial of Liability* 358

XV. Adjustment of Loss 359 (See page 128)

Settlement Between Parties 359

Necessity of Consideration 359

XVI. Right to Proceeds 359 (See pages 133, 512, 591)

Policy Payable to Insured, His Representatives or Estate 359

Policy Designating Beneficiary 360

- (a) *Rights of Persons Designated in General* 360
- (b) *Vested Interest of Beneficiary* 360

- (c) *Change of Beneficiary* 361
- (d) *Death of Beneficiary* 361
- (e) *Rights of Creditors* 361
- Policy for Benefit of Creditor* 362
- Assignee of Policy Before Loss* 363
- Where the Beneficiary Has No Insurable Interest* 363
- Policy as Community Property* 363
 - (a) *In General* 363
 - (b) *After Divorce* 364

XVII. Payment or Discharge, Contribution and Subrogation 364
(See pages 138, 512)

- Interest on Amount of Loss* 364
- Mode and Sufficiency of Payment* 365
- Recovery of Payment* 365
- Release or Discharge from Liability* 365
- Damages for Refusal of Payment* 365
 - (a) *Statutory Regulations* 365
 - (b) *Change in Law* 366
 - (c) *As to Constitutionality of Law* 366
 - (d) *As to Its Construction and Operation* 368
 - (e) *Application to Foreign Companies* 368
 - (f) *Application to Assessment Companies* 368
 - (g) *Necessity for Demand as a Condition Precedent* 368
 - a. *Offer of Settlement No Bar* 369
 - (h) *Good faith on the Part of Insurer With No Desire to Evade Payment* 369
 - (i) *Insurer Liable for Penalty Though Policy Has Been Surrendered* 370
 - (j) *Computation of Penalty* 370
 - (k) *Amount of Attorney's Fees* 370

XVIII. Actions 371 (See pages 143, 514, 596)

- Conditions Precedent in General* 371
- Service of Process—Statutory Regulations* 371
 - (a) *Change in Law* 371
- Defenses in General* 372
- Joinder of Causes of Action* 372
- Venue of Suits* 372
 - (a) *Statutory Regulations* 372
 - (b) *Case Law* 373
- Limitations by Provisions of Policy* 373
- Statutory Regulations as to Limitations in Policy* 373
- Time Within Which Actions Must Be Brought* 374
- Parties* 374

*Process in General 375**Petition 375*

(a) *Form and Requisites in General 375*

(b) *Performance or Waiver of Conditions 376*

*Filing of Supplemental Pleadings 377**The Answer of the Defendant 377**Replication and Subsequent Pleadings 377**Issues, Proof and Variance 378**Presumption and Burden of Proof 378*

(a) *In Showing Suicide 378*

(b) *In Showing Insured Was Not in Sound Health 378*

(c) *In Showing Waiver 379*

(d) *In Showing Deceased Indebted to Recipient of Proceeds of Policy 379*

(e) *In Showing Survivorship 379*

(f) *In Showing Financial Condition of the Insured 379*

*The Burden of Showing a Prima Facie Case 379**Admissibility of Evidence 380*

(a) *In General 380*

(b) *Payment of Premiums 383*

(c) *Death of Insured and Cause Thereof 385*

(d) *Persons Entitled to Proceeds 385*

(e) *Estoppel or Waiver 385*

Weight and Sufficiency of Evidence 386

(a) *In General 386*

(b) *As Regards the Payment of the Premium 387*

(c) *Authority and Agreement to Extend Premium 388*

(d) *Showing Suicide 388*

(e) *Showing False Answers in Application and Effect Thereof 389*

*Amount of Recovery 390**Questions for the Jury 390*

(a) *In Regard to the Application 390*

(b) *As to Good Health of Insured 392*

(c) *As to Issue and Delivery of Policy 392*

(d) *As to Waiver of Forfeiture 392*

(e) *As to Suicide 392*

(f) *In Regard to Release from Liability and Settlement 392*

Instructions 393

(a) *In General 393*

(b) *As to Agents 394*

(c) *As to the Sale of Stock 394*

(d) *As to Attorney's Fees 395*

*Findings 395**Judgment 395**Costs and Attorney's Fees 396*

Appeal and Error 397

- (a) *Settlement of Policy Through Agents 397*
- (b) *Prejudicial Evidence as to Suicide 398*

XIX. Reinsurance 398 (See page 193)

*Cross References**Fire Insurance—Index vii**Accident and Health Insurance—Index 482-i**Fraternal Benefit Insurance—Index 528-i**Industrial Accident and Liability Insurance—Index 479**Livestock Insurance—Index 676**Burglary Insurance—Index 674**Fidelity, Guaranty and Surety Insurance—Index 656**Casualty Insurance—Index 670*

LIFE INSURANCE

The contract of life insurance is a mutual agreement by which one party undertakes to pay a given sum upon the happening of a particular event contingent upon the duration of human life in consideration of the payment of a smaller sum immediately, or in periodical payments. (25 Cyc. 697.)

CONTROL AND REGULATION IN GENERAL

What Are Insurance Companies?—It has been held that a corporation organized to provide for its members during life and their families after death, providing in its constitution and by-laws, for the payment at death of a certain sum, in consideration of a membership fee and certain future assessments, applicants being examined by a physician before becoming members, the officers and agents receiving good salaries, was not a corporation for benevolent purposes within the meaning of the statute, but an insurance company, and amenable to all the provisions relating to such companies.¹

Construction of Foreign Insurance Statutes.—Where a suit involves the construction of a statute of another state, it will be construed as a domestic statute, the decisions of the foreign state being considered for such light as they may throw on the question.²

INSURANCE COMPANIES

Foreign Companies—Incorporation, Organization and Existence—Statutory Regulations.—Foreign insurance companies desiring to do business in this state shall furnish a sworn statement by the

CONTROL AND REGULATION IN GENERAL

3—What Constitutes Insurance and What Are Insurance Companies.

1. A corporation organized to provide for its members during life, and their families after death, provided, in its constitution and by-laws, for the payment at death, of a certain sum, in consideration of a membership fee and certain future assessments. Applicants were obliged to be examined by a physician before becoming members. The officers and agents of the corporation received good salaries. Held, that it was not a corporation

for benevolent purposes within the meaning of Rev. St. Tex. tit. 20, but an insurance company, and amenable to all the provisions relating to such companies.—*Farmer v. State*, 7 S. W. 220.

4—Constitutional and Statutory Provisions. (See 23 Cent. Dig. Insurance, § 4.)

2. Where a suit involves the construction of a statute of another state, it will be construed as a domestic statute, the decisions of the foreign state being construed for such light as they may throw on the question.—*New York Life Ins. Co. v. English*, 67 S. W. 884, 95 Tex. 391.

president, vice-president, treasurer or secretary of such company to the Commissioner of Insurance showing:

The name of the company; the amount of the capital stock; the amount of the capital stock paid up; the assets of the company; amount of liabilities of the company; losses adjusted and due; losses adjusted and not due; losses adjusted; losses in suspense and for what cause; all other claims against the company, describing same. (Art. 4765, Rev. St., 1914.) Such statement shall be accompanied by a certified copy of its articles of incorporation, with all amendments and by-laws, together with names and residences of each of its officers and directors—all sworn to under the hand of the president or secretary of the company. (Art. 4766, Rev. St., 1914.) Each such foreign insurance company must be possessed of at least \$100,000 paid up in cash money capital stock. All mutual companies must be possessed of at least \$100,000 of net surplus assets invested according to law. (Art. 4767, Rev. St. 1914.)

Foreign Companies—Shall File Power of Attorney—Statutory Regulations.—Each life insurance company doing business in this state must file a power of attorney with the Commissioner of Insurance empowering him to accept service for it in any suit that may be pending. (Art. 4773, Rev. St. 1914.)

Investment in Texas Securities—Statutory Regulations.—All life insurance companies transacting business in this state shall invest in Texas securities and Texas real estate a sum of money equal to at least seventy-five per cent of the aggregate amount of legal reserve required by law. (Art. 4775-4790, Rev. St. 1914.) This does not apply to fraternal beneficiary associations or to companies the total amount of whose Texas reserves does not exceed \$5000.

Foreign Assessment Companies—Statutory Regulations.—Foreign companies having cash assets of not less than \$100,000, invested according to the laws of this state may be licensed to do business in Texas subject to the provisions of Chapter 4, Art. 4791-4793, Rev. St. 1914. Such a company must first file with the Commissioner of Insurance the following: A copy of its charter; a power of attorney to the Commissioner of Insurance; a sworn certificate that it is paying and has paid for the past twelve months the full amount named in its policies; a sworn statement of its business for the previous fiscal year ending December 31st; certified copy of its constitution and by-laws and a copy of its policy and application; a certificate from the proper authority of its home state that it is legally entitled to do business there and has at least \$100,000 surplus assets subject to its indebtedness. An annual report is also required. (See *National Life Assn. v. Hagelstein*, 156 S. W. 353.) The provisions of this chapter do not apply to mutual benefit associations.

General Statutory Regulations as to All Foreign Corporations.—The provisions of Title 71 of the Revised Statutes, entitled "General Provisions" are conditions upon which foreign insurance corporations shall be permitted to do business within this state and such corporations are held to have assented thereto as a condition precedent to their right to engage in such business in the State of Texas. (Art. 4972, Rev. St. 1914.)

Foreign Corporations—(A) As to What Constitutes Doing Business.—Selling stock of a foreign corporation in Texas and taking notes for the price has been held not to constitute the doing of business in Texas by the corporation without having complied with the Texas statutes.⁴

(B) Application of Local Laws.—Foreign assessment companies are subject not only to the provisions of the particular chapter governing them (Art. 4791, Rev. St. 1914) as to obtaining a license to do business in Texas but are subject to other regulatory statutes.⁵ The policies of such companies are governed by the laws of Texas notwithstanding stipulations to the contrary (Art. 4950, Rev. St. 1914) and are not voidable on the ground of misrepresentation except as are the policies of other companies as set out in the title "General Provisions," of the Revised Statutes.⁶

(C) Issuance of License.—Mandamus will lie to compel the Insurance Commissioner to issue a certificate to a foreign insurance company where it is his clear ministerial duty to do so.⁷ The fact

3. Act May 17, 1907 (Laws 1907, p. 479, ch. 18) provides for the levy of occupation taxes for the year 1908 and annually thereafter; the tax each year to be levied on the gross receipts for the preceding year. Such act went into effect August 14, 1907. Held, that the tax assessed for 1908 on an insurance company was not a tax upon the gross receipts of the company for 1907, during which year, up to August 14th, the rate prescribed by a previous law prevailed, but that it was an occupation tax for 1908 merely based upon the receipts of 1907, and affected in no way by the tax payable in 1907.—*Kansas City Life Ins. Co. v. Love*, 109 S. W. 863, 101 Tex. 531.

16—**Foreign Underwriters or Companies and Their Agents.** (1) **What Constitutes "Doing Business."** (See 28 Cent. Dig. Insurance, §17.)

4. Selling, in Texas, stock of a foreign corporation, and taking notes for the price, held not to constitute the doing of business in Texas by the corporation without having complied with the Texas statutes.—*Hughes v. Four States Life Ins. Co.*, 164 S. W. 898.

17—**(2) Application of Local Laws.** (See 28 Cent. Dig. Insurance, § 12.)

5. Rev. Civ. St. 1911, Art. 4791, declaring that foreign assessment com-

panies should be subject only to the provisions of the chapter, related only to proceedings for obtaining license to do business in Texas, and did not prevent the application to them of other regulatory statutes.—*National Life Ass'n v. Hagelstein*, 156 S. W. 353. See 28 Cent. Dig. Insurance, § 12.

6. Under Rev. Civ. St. 1911, Art. 4947, foreign assessment insurance companies writing insurance in Texas are subject to Rev. Civ. St. 1911, Arts. 4947-4950, which contain most of the provisions of Acts 28th Leg. ch. 69, regulating insurance.—Id.

20—**(3) Local Authority or License and License Fees or Taxes.**

7. Where it is the clear ministerial duty of an insurance commissioner to issue a certificate to a foreign insurance company entitling it to do business in the State, mandamus will lie to compel its issuance, and the fact that the insurance company had not complied with a statute which it claimed was unconstitutional will not defeat jurisdiction, since the constitutionality of the act may be determined in that proceeding.—*Metropolitan Life Ins. Co. v. Love*, 108 S. W. 821, 101 Tex. 444, rehearing denied 108 S. W. 1157, 101 Tex. 444.

that the company had not complied with a statute which it claimed was unconstitutional will not defeat jurisdiction, since the constitutionality of the act may be determined in that proceeding.⁷ But mandamus will not lie to compel the commissioner to issue the certificate before he has completed his investigation enjoined under the statute, and his action is discretionary, there being no absolute ministerial duty on him.⁸ It must appear that the acts requested are imperatively required by law before mandamus can issue.⁹

(D) Regulation of Local Agents.—The statutory regulations requiring agents to procure certificates of authority from the Commissioner of Insurance before soliciting risks has no application to agents of foreign insurance companies selling the company's stock in Texas.¹¹

(E) Actions.—It has been held that the fact that the insurer is a foreign corporation, domiciled in another state does not deprive a court of equity in Texas of jurisdiction of a suit to determine whether a policy has been in fact forfeited or is still in force and to pass a decree determining the status of the parties thereto.¹² A motion to quash service of citation on an agent on the ground that he was not the agent of the company, was properly overruled where it was not shown that plaintiffs had knowledge of the revocation of a power of attorney given the agent some years before and filed in the Department of Insurance, it appearing that the agent

8. Under Rev. St. 1895, Arts 3048, 3050, 3061, 3062, providing that a foreign insurance company, as a condition of doing business in the State, must comply with all the requirements of law, and furnish a statement giving certain information, and obtain a certificate from the insurance commissioner, who is vested with discretionary power, as shown by article 3048, providing that the commissioner "be satisfied that such company has fully and in good faith complied with all requirements of the law and is possessed of the amount of capital stock required by law" and further authorizing the commissioner to "make or cause to be made such examinations into the affairs of the company as he may deem prudent," mandamus will not lie to compel the commissioner to issue the certificate before he has completed his investigation, as his action is discretionary, and there is no absolute ministerial duty on him.—Id.

9. Before mandamus can issue to compel the commissioner of banking and insurance to issue a license, etc., it must appear that the acts are imperatively required of him by law.—*Trinity Life & Annuity Society v. Love*, 115 S. W. 26, 102 Tex. 277.

21—(4) **Local Funds and Securities.**
(See 28 Cent. Dig. Insurance, § 23.)

10. Rev. St. Art. 3066, requiring deposits to secure payment of their policies to be made by insurance companies organized under the laws of foreign countries and of those organized in states requiring deposits from insurance companies organized in this state, does not apply to corporations created under the laws of any state of the United States, unless the laws of any such state require a deposit from such companies organized in this State. *Judgment, Sieders v. Merchants' Life Ass'n of United States*, 51 S. W. 547, reversed.—*Selders v. Merchants' Life Ass'n of the United States*, 54 S. W. 753, 93 Tex. 194.

22—(5) **Appointment and Regulation of Local Agents.** (See 28 Cent. Dig. Insurance, § 26.)

11. Rev. St. 1911, Arts. 4960, 4961, requiring agents of insurance companies to procure certificates of authority from the commissioner of insurance and banking before soliciting risks, and receiving applications, etc., has no application to agents of a foreign insurance company selling the company's stock in Texas.—*Hughes v. Four States Life Ins. Co.*, 164 S. W. 898. See 28 Cent. Dig. Insurance, § 26.

had continued to receive premiums and was appointed by the company to adjust the loss.¹²

Incorporation of Home Insurance Companies—Statutory Regulations.—Any number of persons desiring to form a company for the purpose of transacting insurance business shall adopt and sign articles of incorporation, and submit the same to the Attorney General; and, if said articles shall be found by him to be in accordance with the law of this state, and of the United States, he shall attach thereto his certificate to that effect, whereupon such articles shall be deposited with the Commissioner of Insurance and Banking. (Art. 4705, Rev. St. 1914.)

This article in its origin was, as in its language it is, a general provision applicable to all insurance corporations, except such as may be excluded by Articles 4793, 4830, 4855 and 4860, Rev. St. 1914. (State vs. Burgess, 109 S. W. 923, 101 Texas 524.)

The articles of incorporation shall contain: (1) The name of the company; (2) the place of the principal business office; (3) the kind of insurance to be transacted; (4) the amount of capital stock, to be in no case less than one hundred thousand dollars. (Art. 4706, Rev. St., 1914.) The Commissioner of Insurance shall then examine into the company and the company must certify under oath that the capital is bona fide its property. The stock shall be divided into shares of one hundred dollars each, and the capital stock shall consist of (1) lawful money, (2) bonds, state, county, city or national bank stock or (3) in first mortgages on real estate. The surplus money of a company may be invested in or loaned upon the pledge of stocks, bonds of the United States or any of the states or those of any solvent dividend paying corporations or in bills of exchange. (Art. 4712, Rev. St. 1914.) The affairs of the company shall be managed by not more than thirteen and not fewer than seven directors, who shall choose a president and other officers.

"The laws relating to and governing corporations in general shall apply to and govern insurance companies incorporated in this state in so far as the same may not be inconsistent with the provisions of this title." (Arts. 4723-4733, Rev. St. 1914.)

28—(6) Actions. (See 28 Cent. Dig. Insurance, § 33.)

12. In an action against a foreign life insurance company, a motion to quash service of citation on defendant's agent, on the ground that he was not its agent, was properly overruled, where it was shown that plaintiffs or the assured had knowledge of the revocation of a power of attorney to accept service of process for it, given the agent some years before, and filed in the department of insurance statistics, and it appeared that the agent

continued to receive premiums, and was appointed by the company to adjust the loss.—*Aetna Life Ins. Co. v. Hanna*, 17 S. W. 35.

13. The fact that insurer is a foreign corporation, domiciled in another state, does not deprive a court of equity in Texas of jurisdiction of a suit to determine whether a policy has been in fact forfeited or is still in force, and to pass a decree determining the status of the parties thereto.—*Royal Fraternal Union v. Lundy*, 113 S. W. 185. See 12 Cent. Dig. Corporation, §§ 2571, 2572, 2595-2600.

Life, Health and Accident Insurance Companies—Statutory Regulations.—Any three or more citizens of this state may associate themselves together and form a company to transact any one or more of these different kinds of insurance and the signed and acknowledged articles of incorporation shall contain (a) the name and residence of each one of the incorporators, (b) the name of the company, (c) location of home office, (d) kind of insurance to be transacted, (e) amount of capital stock, to be not less than \$100,000, (f) period of time it is to exist, (g) number of shares of capital stock, (h) other provisions which incorporators may deem proper to insert. (Art. 4725, Rev. St. 1914.) These articles shall be filed with the Commissioner of Insurance who shall submit them to the Attorney General for approval. If they are approved they are then filed and recorded and the new company may then complete its organization. (Art. 4726, Rev. St. 1914.) After this is done the Insurance Commissioner then makes a thorough examination and if satisfied he issues a certificate of authority to the company to transact the kind of insurance desired in this state. (Art. 4728, Rev. St. 1914.) The company may sue or be sued but only the Commissioner of Insurance may enjoin. (Art. 4732, Rev. St., 1914.)

Under Article 4762 of the Revised Statutes of 1914, companies may be formed with but \$25,000 capital stock to transact life, health and accident insurance business in Texas only, on the weekly or monthly premium plan and writing policies in amounts of one and two thousand dollars.

Shall Not Take Risks for Any Other Kind of Insurance—Statutory Regulations.—Companies doing a life, accident or health business shall not take risks for any other kind of insurance. (Art. 4748, Rev. St. 1914.)

Co-Operative Life Insurance Companies—Statutory Regulations.—Nine or more residents of the State of Texas may form a corporation of this kind for the purpose of insuring the lives of individuals on the mutual, level premium, legal reserve plan.

The articles of incorporation shall set forth: Names and residences of the incorporators, name of the proposed company (which must contain the words "Co-operative life insurance company"), location of the principal office, and the number, names and residences of the directors. After approval by the Attorney General the articles shall be filed by the Commissioner of Insurance and Banking and he shall issue his certificate authorizing it to receive applications for insurance and collect premiums. His certificate shall state, however, that the company is not authorized to issue policies or transact other business other than that specifically authorized therein until it has received bona fide applications of at least two hundred individuals for not less than one thousand dol-

lars each of insurance. This being complied with the company is then empowered to begin business as a co-operative life insurance company, under the certificate of the commissioner. (Art. 4809, Rev. St. 1914.) The business of the company is to be controlled and directed by a board of directors of not less than five nor more than nine members who shall elect the officers of the company. (Art. 4810, Rev. St. 1914.) An annual meeting of all the policy holders is to be held at the home office on the second Tuesday in January and each policy holder has one vote for each five hundred dollars insurance carried by him. Such companies may only do business in Texas, and they shall issue no policies other than whole life or twenty-payment life on the annual payment dividend plan, the form of the policy being prescribed by the Commissioner of Insurance and Banking and the amount not to exceed \$5000 upon any one life when the amount of total insurance in force is less than ten million dollars. (Art. 4817, Rev. St. 1914.)

Contract for Stock Subscription.—An insurance company is liable on a contract made by its promoters in consideration of a sale of stock.¹⁴

Capital and Stock.—Under the Constitution an insurance company cannot issue stock for a note and trust deed.^{15 16 19} Where a company issued its stock for a note and indorsed the latter before maturity to a third person as part consideration for property transferred, it was liable to the third person on its endorsement.¹⁷ However, a note violative of a statute is void, even in the hands of one otherwise a bona fide holder.¹⁷ Where notes were given for corporate stock and were attached to and made a part of a subscription contract, the rejection of the notes, together with the failure

INSURANCE COMPANIES.

32—Incorporation, Organization and Existence. (See 28 Cent. Dig. Insurance, § 37.)

14. Where the promoters of an insurance company took a stock subscription and agreed that the company, if organized, would loan a certain sum to the stockholder, and the company accepted the contract, it was liable for refusal to make the loan as agreed. —American Home Life Ins. Co. v. Compere, 159 S. W. 79. See 28 Cent. Dig. Insurance, § 37.

33—Capital and Stock. (See 28 Cent. Dig. Insurance, § 38.)

15. Stock of an insurance company issued for a note and a deed of trust and the note were void, being in violation of Const. Art. 12, § 6, providing that no corporation shall issue stock except for money, labor, or property actually received, though a third person subsequently sold property to the corporation, taking the note in part payment. —Prudential Life Ins. Co. of Texas v. Smyer, 183 S. W. 825.

The stock and note were also void, as violative of Vernon's Sayles' Ann. Civ. St. 1914, Arts. 4725, 4726, 4728, touching the organization of insurance companies.—Id.

16. Const. Art. 12, § 6, and Rev. St. 1911, Arts. 4725, subd. "e," 4733, and 1146, prohibiting the issuance of stock except for money received, labor done, or property received, held not to prevent a life insurance company from contracting to sell an increase of its capital stock and from taking notes of the subscribers in payment therefor, where the stock was not issued until the notes were fully paid.—Cope v. Pitzer, 166 S. W. 447.

17. An insurance company, which issued its stock, contravening Constitution and statute, for a note, and indorsed before maturity to a third person as part consideration for property transferred, was liable to the third person on its endorsement.—Prudential Life Ins. Co. of Texas v. Smyer, 183 S. W. 825.

A note violative of a statute is void, even in the hands of one otherwise a bona fide holder.—Id.

to deliver the shares to the person contracting for them, justified the latter in concluding that the subscription contract had been rejected.¹⁸

Liability After Consolidation of Companies.—Where the defendant company was consolidated with another which offered to assume the plaintiff's policy, which he refused, the latter company was not liable to plaintiff for defendant's alleged breach of contract arising out of such consolidation.²⁰ Where such a consolidation did not deprive the defendant company of its ability to perform its contracts and it was amply solvent when plaintiff elected to treat his policy as repudiated, he could not recover damages against the company on the theory that it absorbed all of the defendant's assets.²¹

INSURANCE AGENTS AND BROKERS

Agents Must Be Authorized to Solicit Insurance—Statutory Regulations.—Agents before soliciting insurance for any company must first procure a certificate from the Commissioner of Insurance. (Art. 4960, Rev. St. 1914.)

Who Are Agents—Statutory Regulations.—A person is held to be an agent of an insurance company who solicits insurance, who takes or transmits an application for or policy of insurance, or who advertises or gives notice that he will do so, who receives or delivers a policy, who examines or inspects any risk, who collects or transmits any premium, who makes or forwards any diagram of any building or buildings, who performs any other act in the consummating of a contract of insurance, or who shall examine into or adjust any loss. This, however, does not make citizens who arbitrate in the adjustment of losses agents, nor does it cover attorneys at law. (Art. 4961, Rev. St. 1914.)

18. Where notes given for corporate stock were attached to and made a part of the subscription contract, the rejection of the notes, together with the failure to deliver the shares to the person contracting for them, justified him in concluding that the subscription contract had been rejected.—*Amicable Life Ins. Co. v. Kenner*, 166 S. W. 462.

19. Although Rev. St. Art. 4711, provides that the capital stock of insurance companies may consist of valid first mortgages on realty, an insurance company cannot, in view of Const. Art. 12, § 6, issue stock for note and trust deed.—*Prudential Life Ins. Co. of Texas v. Pearson*, 188 S. W. 513.

47—Consolidation. (See 28 Cent. Dig. Insurance, § 49.)

20. Where defendant insurance company was consolidated with the P. Company, which offered to assume plaintiff's policy, which he refused, the P. Company was not liable to plaintiff for defendant's alleged breach of contract, arising out of such consolidation.—*Provident Savings Life Assur. Society of New York v. Ellinger*, 164 S. W. 1024. See 28 Cent. Dig. Insurance, § 49.

21. Where defendant insurance company was consolidated with the P. Company but such consolidation did not deprive it of ability to perform its contracts, and it was amply solvent when plaintiff elected to treat his policy as repudiated, he could not recover damages against the P. Company on the theory that it had absorbed all defendant's assets.—*Id.*

Policies Must Be Issued Only Through Resident Agents, Except—Statutory Regulations.—All companies of whatsoever kind are prohibited from authorizing or allowing any person or agent who is a non-resident of Texas to issue or deliver any policy of insurance on persons or property located in this state. It is provided that this does not apply to common carriers or to persons who on oath state that they cannot obtain insurance on their person or property through agents in this state. (Art. 4963, Rev. St. 1914.)

Solicitor of Insurance to Be Deemed Agent of Company—Statutory Regulations.—A person who solicits an application for life insurance is to be regarded as the agent of the insurer in any controversy arising but such an agent does not have the power to waive, change or alter any of the terms or conditions of the application or policy. (Art. 4968, Rev. St. 1914.)

Persons Debarred From Acting As Agent—Statutory Regulations.—No corporation or stock company can be the agent of a life insurance company. (Art. 4969, Rev. St. 1914.)

Appointment or Employment of Agent.—The typewritten provision of a contract of employment between the superintendent of agencies and the insurance company that it should remain in force for a certain length of time is held to control the printed provision recognizing the company's right to discharge at pleasure.^{22 25} One who enters into a contract with the general agent of an insurance company, whereby the latter appoints him district agent, and fixes his compensation by commission on the original cash premiums on policies secured by him, the contract providing that he shall have no claims for commissions or other services against the company, has no right of action against the company for breach of the contract.²³ In such a case where the contract does not make him exclusive agent and stipulates that if any other agent shall secure business conjointly with him the commissions shall be divided between them, the contract is not broken by the appointment of another agent for the same district.²⁴

INSURANCE AGENTS AND BROKERS. (See 25 CYC. 712.)

74—Agency for Insurer. (A) Appointment or Employment of Agent. (See 28 Cent. Dig. Insurance, §§ 99, 100.)

22. Typewritten provision, of contract of employment between superintendent of agents and insurance company, that it should remain in force for five years, held to control printed provision recognizing company's right to discharge at pleasure. —American Nat. Ins. Co. v. Van Dusen, 185 S. W. 634.

23. One who enters into a contract with the general agent of an insurance company, whereby the latter appoints him district agent, and fixes his

compensation by commission on the original cash premiums on policies secured by him, the contract providing that he shall have no claims for commissions or other services against the company, has no right of action against the company for breach of the contract.—Lester v. New York Life Ins. Co., 19 S. W. 356.

24. A contract appointing a person district agent for an insurance company for a certain district, without giving him any exclusive rights as sole agent, and stipulating that if any other agent shall secure business conjointly with him the commissions shall be divided between them, is not broken by the appointment of another agent for the same district.—Lester v. New York Life Ins. Co., 19 S. W. 356.

Duration and Termination of Agency.—An officer of an insurance company who violates his contract of employment or is unfaithful in the discharge of his duties may be dismissed.^{26 27} An agent may be dismissed without cause under certain circumstances even though his employment is under a contract.²⁸ The word "corrupt" as used in the words "corrupt or false representations" in a contract of employment was held to mean a consciously wrongful and fraudulent act.²⁹ (As to agents collecting money which they failed to remit to the company, see Ann. 30; as to assistance of third persons and estoppel of agent asserting such third person's responsibility for certain applications for insurance, see Ann. 31; as to

76—(B) Evidence as to Agency. (See 28 Cent. Dig. Insurance, § 101.)

25. In suit by its superintendent against insurance company for breach of contract of employment, evidence held to show the parties intended that the employment was for five years, and that the company was not to have the right to discharge at pleasure.—*American Nat. Ins. Co. v. Van Dusen*, 185 S. W. 634.

79—(C) Duration and Termination of Agent. (See 28 Cent. Dig. Insurance, § 104.)

26. Where superintendent of insurance company violated his contract of employment or was unfaithful in discharge of his duties, the company could dismiss him, though the contract provided it should run for five years, provided the superintendent made a stipulated increase in business.—*American Nat. Ins. Co. v. Van Dusen*, 185 S. W. 634.

27. The contract of employment of superintendent of insurance company, which after providing it should run five years, if the superintendent made an increase in business, provided the compensation to which he would be entitled if the contract were terminated by "dismissal," referred to dismissal for cause besides a breach of the stipulation as to increase in business.—*Id.*

28. A contract of employment as soliciting agent for an insurance company for seven years stipulated for the payment of a commission on renewal premiums in the event the company discontinued the contract after one year, provided that the agent should forfeit his rights under the contract on his being guilty of specified acts, and declared that the contract might be terminated by the company "at any time for good cause in accordance therewith." Held, that the company could without cause discharge the agent at any time after one year, in which case he was entitled to the commissions on renewal premiums, and the company could also discharge

him for any of the acts operating to forfeit his rights, "good cause" applying to the matters specified in the contract.—*Armstrong v. National Life Ins. Co.*, 112 S. W. 327.

29. A contract of employment as soliciting agent for an insurance company stipulated that the agent should forfeit his rights under the contract in the event he increased the company's liabilities by any "corrupt" or false representations. The failure of the agent to keep within his control notes delivered to him, in payment of premiums, wrongfully increased the liabilities of the company, but the failure resulted from the agent reposing confidence in a third person, which confidence had for its basis representations made by an agency manager of the company. Held that, since the word "corrupt" meant a consciously wrongful and fraudulent act, his failure did not operate to forfeit his rights.—*Id.*

30. A contract of employment as soliciting agent of an insurance company stipulated that the agent should forfeit his rights under the contract on his failing to remit to the company money collected by him. Premiums on policies issued by the company were covered by notes which were sold, and a portion of the proceeds was misappropriated by a third person acting with the agent in soliciting insurance. It did not appear that the notes were collected by the agent or by the third person for him. Held not to show that the agent collected money for the company which he failed to remit.—*Id.*

31. An agent of an insurance company with authority to solicit insurance, had the assistance of a third person, but the company notified him that it would treat as his business alone the applications sent to it in his name, and would not recognize any other understanding between him and the third person. Applications purporting to be sent by the agent were sent to the company, and policies issued thereon were transmitted to him. Held, that the agent failing to notify the company that he was not respons-

failure of agent to make reports required by the company, see Ann. 32, and waiver of same by company, see Ann. 33.)

Liabilities of Agents and Their Sureties.—In an action on a bond of an insurance agent for moneys embezzled, it was no defense that the general agent who appointed defendant's principal was also liable to plaintiff for the default,³⁴ there was no variance between the contract and the petition on the ground that the contract was that of the general agent and not that of the company;³⁵ and it was no defense that almost all the money sued for came into the agent's hands in transactions conducted by him as a district manager, which employment was not within the bond, where there was no evidence showing that any of the defalcations related to any funds derived from the employment of sub-agents, which was the only increase in the principal's duties.^{36 37 39} Neither could

ible for the applications was estopped from asserting as against the company that the third person was responsible for them.—Id.

32. A contract of employment as soliciting agent of an insurance company stipulated that the agent should forfeit his rights under the contract on his failing to make "any and every report required of him." The contract required him to make a monthly report of business transacted during the preceding month and stipulated that all the policies should be reported on or returned within 30 days. Held, that a failure of the agent to make a monthly report, and the report on policies issued, operated to forfeit his rights, but a failure to make any other kind of report, though properly required by the company as growing out of implied terms of the contract, did not so operate.—Id.

33. A contract of employment as soliciting agent of an insurance company required the agent to make a monthly report of business transacted during the preceding month, and provided that all policies should be reported on or returned within 30 days, and declared that a failure to make the reports should operate to forfeit the rights of the agent. The agent did not make reports, though the company demanded them. Previous to the demand the nonobservance of the contract had been acquiesced in by the company. The agent showed that he had transacted no business during the months covered by the demand, and that he had made a verbal report covering certain policies. Held that the failure of the agent to make the reports in writing, as demanded by the company, operated to forfeit his rights under the contract, though the company might waive its right to demand such reports.—Id.

83—(D) **Liabilities of Agents and Their Sureties.** (See 28 Cent. Dig. Insurance, §§ 107-110.)

34. In an action on the bond of an insurance agent for moneys embezzled, it was no defense that the general agent who appointed defendant's principal was also liable to plaintiff for the default.—*Foster v. Franklin Life Ins. Co.*, 72 S. W. 91.

35. Where a petition in an action on the bond of an insurance agent alleged that plaintiff, through W., its general agent, contracted with R. to become its agent, for certain purposes specified, and the agreement recited that it was between such general agent party of the first part, and R., party of the second part, and that the party of the first part thereby appointed the party of the second part agent of the company, and the signature to the contract was "W., general agent (party of the first part). R. (party of the second part)." "The foregoing agreement is approved. Franklin Insurance Company, by B., general manager of agencies,"—there was no variance between the contract and the petition on the ground that the contract was that of W. and not that of the company.—*Foster v. Franklin Life Ins. Co.*, 72 S. W. 91.

36. Where, in an action to recover from an insurance agent's sureties moneys embezzled by him, the complaint alleged in detail every item sought to be recovered, a plea that almost all the money sued for came into the agent's hands in transaction conducted by him as a district manager, which employment was not within the bond, was not sufficiently specific in the absence of an allegation that defendants were not in a position to specify the protested items.—*Foster v. Franklin Life Ins. Co.*, 72 S. W. 91.

37. Where sureties on an insurance agent's bond claimed freedom from liability on the ground that they were

such sureties escape liability, where the bond was executed after the agent became district manager, on the ground that they understood they were becoming sureties for a soliciting agent only and that the position was altered without their consent and without notice.³⁸

Compensation of Agent.—If a contract of general agency for a life insurance company is doubtful as to whether a provision as to deduction from commissions on renewal premiums when not collected by the agent applies to policies written under prior contracts, the practical construction put on it by the parties on termination of the agency should control.^{45 41 42 43 44} In a case where the general office of insurer sent a policy to a local office, where,

released by the appointment of the agent as a district manager, but there was no evidence showing that any of the defalcations related to any transactions or funds derived from the employment of subagents, which was the only increase in the principal's duties, error, if any, in sustaining an exception to a plea alleging such discharge from liability, was harmless.—*Foster v. Franklin Life Ins. Co.*, 72 S. W. 91.

38. Where a bond of an insurance agent was not executed until after the agent had been appointed a district manager, and there was no fact stated showing that any article was practiced to mislead the sureties as to his position, they cannot escape liability for his embezzlements on the ground that they understood they were becoming sureties for a soliciting agent only, and that the position was altered without their consent and without notice.—*Foster v. Franklin Life Ins. Co.*, 72 S. W. 91.

39. Where an insurance agent's bond was conditioned that he should pay to the company all moneys which might come to his hands as such, and all advances made to him by the company, or to any special or subagents appointed by him, and that he should faithfully keep all the conditions which ought to be fulfilled by him in any contracts theretofore or thereafter made between him and the company or its general agent, or contained in any change of the same, a plea, in an action to recover embezzlements by the agent, that a large part of them occurred after he had been appointed district manager in his dealings with subagents appointed under a subsequent contract, stated no defense, such contracts being contemplated by the bond.—*Foster v. Franklin Life Ins. Co.*, 72 S. W. 91.

84—(E) **Compensation of Agent.** (See 28 Cent. Dig. Insurance, §§ 111-114.)

40. In insurance agent's contract for bonus on business procured during the year, the words "sixty days 21—Ins.

allowed for settlements" held not to give interest in business done in the additional 60 days.—*Reliance Life Ins. Co. v. Beaton*, 187 S. W. 743.

In action by insurance agent for contracted bonus upon insurance procured during year, evidence held to support finding that business procured during year exceeded \$1,250,000.—*Id.*

41. A provision in contracts of general agency for a life insurance company, as to deductions from the agent's commissions on renewal premiums, where the agent did not collect the premiums, held to apply to commissions on all policies written by the agent, and not merely those policy holders who removed from the state.—*Washington Life Ins. Co. v. Reinhardt*, 142 S. W. 596. See 28 Cent. Dig. Insurance, §§ 111-114.

42. Provision in a contract of general agency for a life insurance company as to commissions on renewal premiums after discontinuance of agreement held not to entitle the agent to commission free of the provision for deduction where the premiums were not collected by him.—*Id.*

43. Provision in a contract of general agency for a life insurance company as to collecting renewal premiums on policies written by others held not to require the company to allow such agent to collect them.—*Id.*

44. Provision in each of several successive contracts of general agency of a life insurance company as to deduction from the agent's commissions on renewal premiums when they were not collected by the agent held to succeed that in the prior contracts as to all policies, under whatever contract written.—*Id.*

45. If a contract of general agency for a life insurance company is doubtful as to whether a provision as to deduction from commissions on renewal premiums when not collected by the agent applies to policies written under prior contracts, held the practical construction put on it by the parties on termination of the agency should control.—*Id.*

according to rule, it was held pending an investigation of the applicant, and not being satisfied with the risk, it was declined, the policy recalled, and no premium was ever paid, the agent was not entitled to commissions.⁴⁶ However, where the company sent a policy and it was impossible for the insured to receive it at the time although he was willing to do so and the insurer recalled the policy before he could accept it, the agent was entitled to his commission.⁴⁷ It has been held that an agent cannot recover a balance of commissions included in notes not yet paid.^{48 53} Where an agent agrees that the company's record of his account is correct there is an account stated.⁴⁹ (As to advances to agent after account stated, see Ann. 50 and 51. As to estoppel of agent to insist he was working on a salary basis, see Ann. 52. As to cancellation of contract and deprivation of agent of right to commissions on renewal premiums, see Ann. 54.)

46. Where the general office of insurer sent a policy to a local office, where according to rule, it was held pending an investigation of the applicant, and not being satisfied with the risk, it was declined, and the policy recalled, and no premium was ever paid, the agent was not entitled to commissions.—*Mutual Life Ins. Co. of New York v. Hodnette*, 147 S. W. 615.

47. Where a contract of agency provided that 50 per cent. of the first annual insurance premiums should be paid to the agent, and the agent procured a person to take out a policy, and such person was out of town when the policy was sent, and did not know that it was awaiting him, and the company recalled the policy and refused to return it, although the person was willing to take it and pay the premium, the agent was entitled to a commission on such policy.—*Lea v. Union Cent. Life Ins. Co.*, 43 S. W. 927, 17 Tex. Civ. App. 451.

48. An agent cannot recover a balance of commission included in notes not yet paid.—*San Antonio Life Ins. Co. v. Griffith*, 185 S. W. 335.

49. Where the secretary of an insurance company took from the books an itemized statement of its account with an agent, and the agent went carefully over it and pointed out two or three errors, which were accordingly corrected, and said that the account was otherwise correct, there was an account stated.—*General v. Security Life Ins. Co. of America*, 163 S. W. 386.

50. Where an insurance agent knew that the company was making an advance to him on the belief that certain items of dispute were settled by an account stated, the agent was estopped to thereafter insist that there was no account stated.—*Id.*

51. Evidence held to support a finding that it was the intention that an insurance agent be allowed a monthly

advance, chargeable against commissions to be earned, not intended as salary in addition to commissions.—*Generes v. Security Life Ins. Co. of America*, 163 S. W. 386. See 28 Cent. Dig. Insurance, §§ 111-114.

52. Insurance agent, by acquiescence and practical construction of his contract, held thereafter estopped to insist that he was working upon a salary basis.—*Id.*

53. Evidence held to support a finding that notes received by the agent upon premiums, and sent to the company, were, with the agent's knowledge, only received by the company as collateral to his account, and he was not entitled to commissions until the notes were paid.—*Id.*

54. A contract of employment as soliciting agent for an insurance company stipulated for the payment of commissions on renewal premiums in the event of a discontinuance of the contract after one year, and provided that the rights of the agent under the contract should be forfeited on his wrongfully increasing the company's liabilities by any corrupt act, or failing to remit to the company money collected by him, or to make required reports, and authorized the termination of the contract for good cause. Held, that a forfeiture of the rights of the agent under the contract operated only as to rights which might in the future accrue under the contract if it remained in force, and to exempt the company from liabilities on account of transactions which might in the future be had, and which, if the contract remained in force, would create liabilities against it, and a cancellation of the contract, because of the wrongful acts of the agent deprived him of the right to commissions on renewal premiums subsequently paid.—*Armstrong v. National Life Ins. Co.*, 112 S. W. 327. See 28 Cent. Dig. Insurance, § 111-114.

Breach of Contract of Agency By Insurer.—In a matter of alleged breach of contract of employment it is the province of the court to determine whether the contract is ambiguous as to right of discharge.⁵⁵ It is not necessary in such a case for the petition to allege what effort the discharged agent made to obtain other employment and what amount he earned or might have earned by reasonable diligence.⁵⁶ He can testify on the trial what amount he would have made under his contract of employment.⁵⁷ The insurance company can reduce the amount of damages by showing that the discharged agent by proper diligence could have obtained other remunerative employment.⁵⁸ In an action for breach of an insurance company's contract to make advances to an agent to enable him to continue work, it was held that the plaintiff could not recover for the loss of the business given up by him to accept employment with the insurance company.⁵⁹ In such a case the burden of proving that the agent could have reduced the damages is on

55.—(F) Breach of contract by Insurer.

55. In suit by superintendent of agents against insurance company for breach of contract of employment, it was the province of the court to determine whether contract was ambiguous as to right of discharge.—*American Nat. Ins. Co. vs. Van Dusen*, 185 S. W. 634.

56. In action by superintendent against insurance company for breach of contract of employment, it was not necessary that plaintiff's petition allege what effort he made to obtain other employment, and what amount he earned or might have earned by reasonable diligence.—*Id.*

57. In suit by superintendent against insurance company for wrongful discharge, testimony of plaintiff as to amount he would have made under his contract of employment, held admissible.—*Id.*

58. Where a person employed by an insurance company merely obligated himself to furnish his personal services in the performance of specified duties, and to perform such other duties as might be required of the departments with which he was to be connected, and was discharged before the end of the term, the company, in his action for breach of the contract, could reduce the amount of damages by showing that he had or by proper diligence could have obtained other remunerative employment.—*Texas Life Ins. Co. v. Roberts*, 119 S. W. 926. See 28 Cent. Dig. Insurance, § 115.

59. That plaintiff filed a waiver of certain elements of damages claimed did not render the evidence of other employment immaterial, where, after the waiver, he still claimed some damages from the alleged breach of contract.—*Id.*

60. In an action for breach of a contract of employment by destroying plaintiff as a traveling agent for defendant insurance company, it was error to exclude plaintiff's expense accounts submitted to defendant from the time he entered defendant's employ until his discharge; the evidence being material upon the question of good faith in terminating the contract.—*Id.*

61. A contract of employment with an insurance company provided that it might be terminated by the company if the employee should fail to produce sufficient business to make the business written under the contract profitable to the company, that a vote of its board of directors on the question should be final, and that they should have the power to terminate the contract at any time they should consider it for the best interest of the company to do so. Held, that the contract was ambiguous as to the right of discharge, and it was a question for the jury whether it was the intention of the parties that the company should have the absolute right to discharge the employee at any time or without cause, and whether the vote of the directors was intended to be final, so that the employee could not question the good faith of their act in the absence of fraud.—*Id.*

62. Evidence held sufficient to sustain the court's finding as to the amount of recovery for time lost by the company's failure to make advances as agreed.—*San Antonio Life Ins. Co. v. Griffith*, 185 S. W. 335.

63. Evidence held sufficient to warrant a finding that the agent's commission would have been more than they were at the beginning.—*Id.*

the defendant.⁶⁴ (As to evidence as to the amount of recovery for time lost by the company's failure to make advances to the agent, see Ann. 62, and as to evidence sufficient to warrant a finding that the agent's commission would have been more than it was at the beginning, see Ann. 63. In regard to ambiguity of contract and right of company to discharge employee at any time without cause, see Ann. 61. As to admissibility of expense accounts of discharged agent on the question of good faith, see Ann. 60. As to waiving certain elements of damages claimed not rendering evidence of other employment immaterial, see Ann. 59.)

Extent and Exercise of Powers of Agent.—In General.—An Insurance company is responsible for the acts and declarations of their local agents within the scope of their employment,⁶⁵ and is chargeable with notice of the acts of its agents within the apparent scope of the agent's authority.⁶⁷ However, an agent may bind the company by acts transcending his authority as defined and limited in the policy, if it appears that such limitation was waived by the company.⁶⁸ Incidentally, it has been held that authority in an agent to collect premiums does not imply authority to accept property as payment in lieu of cash.⁶⁹

(A) General and Special Agents.—Where defendant's agent received money for it on a stock subscription the defendant was liable for such money under the contract entered into.⁷⁰ In such a case also the company could not object if the agents accepted a smaller cash payment than was called for in the contract.⁷¹

64. In an action for breach of a life insurance company's agreement to make advances to the agent, the burden of proving that the agent could have reduced the damages is on defendant.—Id.

65. In an action for breach of an insurance company's contract to make advances to the agent to enable him to continue work, plaintiff could not recover for the loss of the business, given up by him to accept employment with the insurance company.—Id.

87—(G) **Extent and Exercise of Powers of Agent.—In General.** (See 28 Cent. Dig. Insurance, §§ 116, 121.)

66. An insurance company is responsible for the acts and declarations of their local agents within the scope of their employment.—Amarillo Nat. Life Ins. Co. v. Brown, 166 S. W. 658.

67. An insurance company is chargeable with notice of the acts of its agents within the apparent scope of the agents' authority.—Security Mut. Life Ins. Co. v. Calvert, 100 S. W. 1033, judgment reversed, 105 S. W. 320.

68. An insurance agent may bind the company by acts transcending his authority, as defined and limited in the

policy, if it appears that such limitation was waived by the company.—Equitable Life Assur. Soc. v. Cole, 35 S. W. 720.

69. Authority in an insurance agent to collect premiums does not imply authority to accept property as payment in lieu of cash.—Equitable Life Assur. Soc. v. Cole, 35 S. W. 720.

88 (a)—**General or Special Agents.**

70. Where defendant's agent received money for it on a stock subscription, defendant, was liable for the money in its agent's hands, and hence was liable for its return if the contract under which the money was paid required its return in certain contingencies, which happened.—Amicable Life Ins. Co. v. Kenner, 166 S. W. 462.

71. Where a stock subscription contract provided that \$5 a share should be paid in cash to the corporation's agents as compensation for services, the corporation could not object that they accepted a less sum from the purchaser, except that, upon rejection of the contract, it was bound to return the sum accepted by the agents under the provisions requiring the return of the amount paid in case the contract was rejected.—Id.

Unauthorized and Wrongful Acts of Agents.—The general rule is that a company which authorizes its agent to solicit and obtain insurance is responsible for the fraud of the agent in the line of his agency.⁷² Further, though agents violate the instructions of the company in taking policies, the company is liable if the act is within the apparent scope of the agent's authority.⁷⁶ In a case where the agent guaranteed a certain surplus to accrue in the years to come his statement was held to be a mere expression of opinion and the plaintiff was not entitled as a matter of law to recover the difference between the surplus accruing on the policy and the amount stated by the agent on the ground that such statement was fraudulently and deceitfully made.⁷⁵

(A) **In Accepting Notes in Payment of Premiums.**—Where an agent accepted a negotiable note for a policy, knowing that the policy would not be issued, and transferred the note to an innocent holder, he perpetrated a fraud for which the insurance company was responsible.⁷⁴ After a risk is declined the acts of an agent amount to a conversion if he refuses to return the premium note and the applicant has a right of action.⁷⁷ Where a note is given with the understanding that if the policy is not issued the note will be returned, and the policy is not issued, the company is

93—(H) Unauthorized and Wrongful Acts of Agents. (See 28 Cent. Dig. Insurance, § 123.)

72. A life insurance company which authorized its agent to solicit and obtain insurance is responsible for the fraud of the agent in the line of his agency.—*Mutual Reserve Life Ins. Co. v. Seidel*, 113 S. W. 946. See Cent. Dig. Insurance, § 123.

73. If a promise by an agent of a life insurance company to an applicant for a policy that a premium note should be returned to the applicant in case he did not accept the policy was unauthorized, the contract for the insurance was nugatory, and, where the agent fraudulently negotiated the note to an innocent purchaser before the policy was accepted, the applicant was entitled to recover the amount of the note from the insurance company.—*Id.*

74. Where an insurance agent obtained negotiable notes of applicants for policies, knowing that one of the policies would not be issued, and transferred the notes to an innocent holder, he perpetrated a fraud for which the insurance company was responsible.—*Security Life Ins. Co. of America v. Stephenson*, 136 S. W. 1137. See 28 Cent. Dig. Insurance, § 123.

75. Plaintiff took out a policy guaranteeing payment of a fixed sum in 10 years, and a surplus, based on insurer's experience with such policies, relying on representations of defendant's agent that, from past experi-

ence, the surplus on similar policies amounted to a given sum, but that some variation might be expected from the rate of mortality, interest, etc. Insurer classified its policy holders, and the estimates made by the agent were based on larger amounts paid a class other than that to which plaintiff was assigned, but such classification was abandoned before the payment of plaintiff's policy, and at the time of its issuance it did not appear that insurer had had any experience with matured policies in plaintiff's class. Held, that the agent's statement was a mere expression of opinion, and hence plaintiff was not entitled, as a matter of law, to recover the difference between surplus accruing on his policy and the amount stated by the agent, on the ground that such statement was fraudulently and deceitfully made.—*Donoho v. Equitable Life Assur. Soc. of the United States*, 54 S. W. 645, 22 Tex. Civ. App. 192.

76. Though insurance agents violate the instructions of the company in taking policies, the company is liable if the act is within the apparent scope of the agent's authority.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

77. Where an insurance agent took the applicant's note for a premium, and, when the insurer declined the risk, refused to return the note and negotiated it, his acts were a conversion, giving the applicant a right of action.—*Adams v. San Antonio Life Ins. Co.*, 185 S. W. 610.

liable to the maker of the note in case the latter is compelled to pay it at the suit of a bona fide purchaser from the agent.^{78 79} Such a suit is for detention and conversion and is barred in two years.⁷⁸

(B) Trade Talk of Agents.—Often statements are made by agents in selling stock which are regarded by the courts as mere puffing inducements or promises for future performance and not fraudulent misrepresentations.^{79a}

Ratification.—Where a policy providing that it should not become operative until actually delivered to insured while in good health was delivered to him though the agent knew him not to be in good health at that time, the company, by retaining the premium and not repudiating the agent's act, ratified the delivery.⁸⁰ The fact that it was a custom of the agent to issue more than one policy to the same person for a single period does not of itself show that the insurer had knowledge of the issuance of the policies on which to base a ratification of the agent's acts.⁸¹

Representation of Both Parties.—It has been held that the local agent can become the custodian of a policy for the insured, notwithstanding his agency for the insurer.⁸²

Criminal Prosecution of Agent—Statutory Regulations.—Any person who transacts the business of a life insurance agent without first obtaining a license from the Commissioner of Insurance and Banking shall be punished by a fine and imprisonment (Art. 645, Criminal Statutes 1916), and any person who embezzles the pre-

78. An action for the recovery of money paid by plaintiff's assignor to the transferee of a note given by the assignor to decedent and wrongfully appropriated by him is for detention and conversion of personalty, and barred in two years under Vernon's Sayles' Ann. Civ. St. 1914, Art. 5687.—*Adams v. San Antonio Life Ins. Co.*, 185 S. W. 610.

79. Where a note is given to an insurance agent by an applicant for a policy to pay the premium, with the understanding the note will be returned if the policy is not issued, and the policy is not issued, the insurance company is liable to the maker of the note in case the latter is compelled to pay it at the suit of a bona fide purchaser from the agent, to whom it was made payable.—*New York Life Ins. Co. v. Baese*, 31 S. W. 824.

79a. Statements by an agent in taking subscriptions for the increased capital stock of a life insurance company held mere puffing inducements or promises for future performance, and not fraudulent misrepresentations.—*Cope v. Pitzer*, 166 S. W. 447.

84—(I) **Ratification.** (See 23 Cent. Dig. Insurance, § 124.)

80. Where a life policy, which provided that it should not become operative until "actually delivered to the insured herein named while in good health," was delivered to the insured, though he was known to the agent making the delivery not to be in good health, the company, by retaining the premium paid thereon, and not repudiating the agent's act, ratified the delivery.—*Northwestern Life Ass'n v. Findley*, 68 S. W. 695.

81. The fact that it was the custom of the agent procuring the policies, and other agents as well, to issue more than one policy to the same person for a single period, did not alone show that the insurer had knowledge of the fact of the issuance of the policies on which to base a ratification of the agents' acts.—*Wilkinson v. Travelers' Ins. Co.*, 72 S. W. 1016.

109—**Representation of Both Parties.** (See 28 Cent. Dig. Insurance, § 133.)

82. The local agent of a life insurance company could become the custodian of the policy for insured, notwithstanding his agency for the company.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

miums which he collects is guilty of theft. (Art. 691, Criminal Statutes 1916.)

Criminal Prosecution of Agent.—Under the statute relating to the soliciting of insurance without a certificate to act as insurance agent, an information failing to allege that the solicitor was to receive compensation, charges no offense.⁸⁵ ⁸⁵ The information must also allege that the company for whom the agent solicited was an insurance company.⁸⁶ In a prosecution for larceny by embezzling insurance premiums, the contract under which the accused was working for the insurance company is admissible, its terms being binding on him.⁸⁶ In such a case where the accused testified that he had received a premium and paid it to no one it was admissible to admit testimony of his superior that he had not received it or permitted accused to appropriate it.⁸⁷ Further, where the accused told the applicant that his application had been cancelled and he would have to see the state agent to get the premium, the state agent could testify that the applicant called and did receive the premium.⁸⁸ Where the agent testified that he had received the premiums and had paid them to no one but had spent the money, an instruction as to good faith in retaining the money was properly refused.⁸⁹ Article 691 of the Penal Code has been held sufficient to include prosecutions of agents for larceny

Criminal Prosecutions.

83. Under act Tex. July 9, 1879, prohibiting any person from acting as agent of an insurance company which has not complied with the laws of that state, an information charging that defendant did "solicit insurance on behalf of the Kentucky Mutual Security Fund Company of Louisville, Ky." and transmit "an application for insurance from said company," etc., is insufficient on motion in arrest of judgment, in not alleging that the company named was an insurance company.—*Brown v. State*, 10 S. W. 112.

84. An indictment for engaging in the occupation of local insurance agent without a license was drawn under the law of 1895 (Acts 1895, p. 80) requiring such agent to procure a license in each county in which he solicited insurance. The laws of 1897 (Acts 1897, p. 53), without reference to the Act of 1895, re-enacted its provisions omitting the requirement that local agents should procure licenses in each county, and making no provisions for violation of that act. Held, that the latter act having repealed the former, no conviction could be had.—*Eichlitz v. State*, 46 S. W. 643, 39 Tex. Cr. R. 486.

85. Under Pen. Code 1911, Art. 689, relating to the soliciting of insurance without authority, a conviction cannot be sustained on an information fail-

ing to allege that the solicitor was to receive compensation either directly or indirectly, though no motion was made to quash it before trial.—*Jasper v. State*, 164 S. W. 851.

86. In a prosecution for larceny by embezzling insurance premiums, the contract under which the accused was working for the insurance company was admissible; its terms being binding upon him.—*Meredith v. State*, 184 S. W. 204.

87. Where one accused of having embezzled insurance premiums testified that he had received a premium and had paid it to no one, it was not error to admit testimony of his superior that he had not received it or permitted accused to appropriate it.—*Id.*

88. Where one accused of larceny by embezzlement testified that he told the applicant that his application had been canceled and he would have to see the state agent to get the premium, the state agent could testify that the applicant called and did receive the premium.—*Meredith v. State*, 184 S. W. 204.

89. In a prosecution for embezzlement of insurance premiums, where the agent testified that he had received them and had paid them to no one but had spent the money, an instruction as to good faith in retaining the money was properly refused.—*Meredith v. State*, 184 S. W. 204.

by embezzlement of premiums paid.⁹⁰ An agent receives premiums under his employment and may not appropriate them to his own use, so that failure of the applicant to sign a new application as required would not affect his guilt in appropriating the premiums.⁹¹ Although the agent could have retained his per cent as commissions, had the policy been issued, that would not reduce the crime from felony to misdemeanor where the policy was not in fact issued.⁹² In a prosecution under the statute for embezzlement (Art. 691 of the Criminal Statutes of 1916), it is not necessary to allege the ownership of the money.⁹³ Although an indictment for larceny by embezzlement from corporation must allege that the defrauded party was a corporation, it is not necessary to allege that other corporations interested were such.⁹⁴

Revocation of Agent's Authority—Statutory Regulations.—An agent's authority to solicit insurance may be revoked for violation of any of the insurance laws, for knowingly deceiving or defrauding a policy holder or for unreasonably failing and neglecting to pay over to the company the premiums collected by him. (Art. 4971, Rev. St. 1914.)

INSURABLE INTEREST

What Constitutes Interest in Human Life.—A woman has an insurable interest in the life of her intended husband,⁹⁷ and an illegitimate daughter has an insurable interest in the life of her father.⁹⁸ However, a niece, who has no expectation of pecuniary benefit from her uncle further than the probability of an occasional gift, has no insurable interest in his life.⁹⁶ A community creditor has no

90. Title of Acts 31st Leg. c. 108, § 51 (now Pen Code 1911, Art. 691), held sufficient to include prosecutions of insurance agents for larceny by embezzlement of premiums paid.—*Meredith v. State*, 184 S. W. 204.

91. An insurance agent receives premiums under his employment, and may not appropriate them to his own use, so that failure of the applicant to sign a new application as required would not affect his guilt in appropriating the premiums.—*Meredith v. State*, 184 S. W. 204.

92. Although an insurance agent accused of embezzling premiums could have retained 40 per cent. thereof, had the policy been issued, that would not reduce the crime from felony to misdemeanor, where the policy was not in fact issued.—*Meredith v. State*, 184 S. W. 204.

93. In a prosecution under Pen. Code 1911, Art. 691, making an insurance agent who collects premiums and converts them guilty of larceny, it is not necessary to allege the ownership of the money.—*Meredith v. State*, 184 S. W. 204.

94. While indictment for larceny by

embezzlement from corporation must allege that the defrauded party was a corporation, it is not necessary to allege that other corporations interested were such.—*Id.*

95. Under Pen. Code 1911, Art. 689, relating to the soliciting of insurance without a certificate to act as insurance agent, an information, failing to allege that the solicitor was to receive compensation, charges no offense.—*Jasper v. State*, 164 S. W. 861.

INSURABLE INTEREST. (SEE 25 CYC. 701.)

116—**What Constitutes Interest in Human Life. (See 28 Cent. Dig. Insurance, §§ 139-157, 177.)**

96. A niece, who had no expectation of pecuniary benefit from her uncle further than the probability of an occasional gift, has no insurable interest in his life.—*Wilton v. New York Life Ins. Co.*, 78 S. W. 403, 34 Tex. Civ. App. 156.

97. A woman has an insurable interest in the life of her intended husband.—*Taylor v. Travellers' Ins. Co.*, 39 S. W. 185.

insurable interest in the life of the wife.¹⁰⁰ Whatever insurable interest one may have in his partner's life ceases when the latter retires undebted to the firm.⁹⁸ Where each of two partners took out a policy on his life payable to the firm, and premiums of like amount on each were paid out of the firm's assets, the continuing partner has no claim on his retired partner's policy as against the latter's estate.⁹⁸ A wife has no interest in her husband's life after divorce, as beneficiary.^{100a}

Insurance Without Interest.—A person who has no insurable interest in the life of the insured may be made the beneficiary in a policy but the courts will consider him a trustee for the benefit of those legally entitled to the proceeds.¹⁰¹ The fact that the premiums are paid by the beneficiary does not render the policy void.¹⁰¹ One may be made the legatee of the proceeds of a policy taken out by the testator on his own life, though having no insurable interest in the life of the testator.¹⁰²

Wagering Policies.—Where one brother took out a policy on the life of his brother who was indebted to him it was held that recovery could not be defeated on the ground that it was a wagering policy.¹⁰³

Assignment of Policy to Person Without Interest.—The general rule is that there can be no recovery on a policy by one having no insurable interest in the life insured, to whom the policy was assigned after its issuance.¹⁰⁴ ¹⁰⁵ Such an assignment is valid only

98. Whatever insurable interest one may have in his partner's life ceases when the latter retires undebted to the firm; and where each of two partners took out a policy on his life payable to the firm, and premiums of like amount on each were paid out of the firm's assets, the continuing partner has no claim on his retired partner's policy as against the latter's estate.—*Cheeves v. Anders*, 25 S. W. 324.

99. An illegitimate daughter has an insurable interest in the life of her father.—*Maxey v. Franklin Life Ins. Co.*, 164 S. W. 438. See 28 Cent Dig. Insurance, §§ 158-162.

100. A community creditor has no insurable interest in the life of the wife. *Cameron v. Barcus*, 71 S. W. 423.

100a. Wife, on being divorced, ceased to have any interest as beneficiary in policy on husband's life.—*Northwestern Mut. Life Ins. Co. v. Whiteselle*, 188 S. W. 22.

118—Insurance without Interest. (See 28 Cent. Dig. Insurance, §§ 164, 165.)

101. As an insured may make a person who has no insurable interest in his life the beneficiary in the life policy, the fact that the premiums are paid by such beneficiary does not render the policy void, but the courts will

consider him a trustee for the benefit of those legally entitled to the policy.—*Mutual Life Ins. Co. of New York v. Blodgett*, 27 S. W. 286.

102. One may be made the legatee of the proceeds of a life insurance policy taken out by the testator on his own life, though having no insurable interest in the life of the testator.—*Fletcher v. Williams*, 66 S. W. 860.

119—(A) Wagering Policies in General. (See 28 Cent. Dig. Insurance, § 165.)

103. Recovery on a policy for \$15,000, taken out by plaintiff on the life of his brother, who was indebted to him in the sum of \$1,200, cannot be defeated on the ground that it was a wagering policy.—*Equitable Life Assur. Soc. v. Hazlewood*, 12 S. W. 621.

122—Assignment of Policy to Person Without Interest. See 28 Cent. Dig. Insurance, §§ 166, 167.)

104. There can be no recovery on a life policy by one having no insurable interest in the life insured, to whom the policy was assigned after its issuance.—*Wilton v. New York Life Ins. Co.*, 73 S. W. 403, 34 Tex. Civ. App. 156.

105. One to whom insured assigns his life policy, not being a relative of

to the extent of reimbursing the assignee for the amount paid out by him.¹⁰⁶ The rule that a wife's interest as assignee of a policy on her husband's life ceases on the divorce of the parties is applicable to, an endowment policy issued to the husband.¹⁰⁶ The reason is that after the divorce and before the arrival of the date of the policy becoming due, the wife, if continuing to hold the policy would be interested in his death.¹⁰⁶ The wife would, of course, be entitled to reimbursement for premiums paid.¹⁰⁷

THE CONTRACT IN GENERAL

(A) NATURE, REQUISITES AND VALIDITY

Policies Shall Contain What—Statutory Regulations.—A provision that—

- (1) All premiums shall be payable in advance.
- (2) A grace of one month shall be allowed for payment.
- (3) The policy, or policy and application shall constitute the entire contract and shall be incontestable not later than two years from its date except for non-payment of premiums.
- (4) All statements made by insured shall, in the absence of fraud, be deemed representations and not warranties.
- (5) If the age of insured has been understated the amount payable under the policy shall be such as the premium paid would have purchased at the correct age.
- (6) A loan value shall be included, after three years premiums have been paid, except in term and pure endowment insurance.
- (7) In default of premium payment after payments have been made for three years, the owner shall have a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default. Term insurance excepted.
- (8) A table showing the loan values shall be included, with options.
- (9) If, in the default of premium payments, the value of the policy shall be applied to the purchase of other insurance. Also a provision for reinstatement.
- (10) When policy shall become a claim by death of insured

insured, and not alleging an insurable interest in the life of insured or in the policy, may not recover thereon.—*Dugger v. Mutual Life Ins. Co.*, 81 S. W. 335.

¹⁰⁶. The rule that a wife's interest as assignee of a policy on her husband's life ceases on the divorce of the parties is applicable to an endowment policy issued to the husband, payable on a designated future date or on his death prior to that time; for, after the divorce and before the arrival of the designated date, the wife, if continuing to hold the policy, would be interested in his death.—*Hatch v. Hatch*, 80 S. W. 411, 85 Tex. Civ. App. 373. See

Cent. Dig., vol. 28, cols. 682-687, §§ 168-171.

¹⁰⁷. As an assignee of life policy, to be entitled to hold an interest therein, must have an insurable interest in the life insured, a wife's interest as assignee of a policy on her husband's life ceases on the divorce of the parties, except so far as she has paid premiums.—*Hatch v. Hatch*, 80 S. W. 411, 35 Tex. Civ. App. 373.

¹⁰⁸. An assignment of a life policy to one without insurable interest is valid in Texas only to the extent of reimbursing the assignee for the amount paid out by him.—*Manhattan Life Ins. Co. v. Cohen*, 139 S. W. 51.

upon due proof of death and the right of claimant to proceeds settlement shall be made not later than two months after the receipt of such proof.

(11) Policy shall include a table showing amounts of installments in which it may provide its proceeds may be payable. (Art. 4741, Rev. St. 1914.)

Policies Shall Not Contain What—Statutory Regulations.—1. A provision limiting the time within which any action may be commenced to less than two years after the cause of action shall accrue.

2. A provision by which the policy shall purport to be issued more than six months before the original application, if thereby insured would rate at any age younger than his age at date when application was made.

3. A provision for any mode of settlement at maturity of less value than the amounts insured, plus dividend additions, if any, less any indebtedness to the company, except in case of suicide or in case of certain hazardous occupations. (Art. 4742, Rev. St. 1914.)

Policies of Foreign Insurance Companies May Contain—Statutory Regulations.—Any provision which the laws of the state, territory, district or country, under which the company is organized, prescribes shall be in such policies when issued in this state. (Art. 4743, Rev. St. 1914.)

No Level Premium Policies Shall Be Issued—Statutory Regulations.—It is now unlawful for level premium policies providing for more than one year preliminary term insurance to be sold in this state. (Art. 4952, Rev. St. 1914.)

Forms of Policies to Be Filed—Statutory Regulations.—The forms of policies shall be filed with the Department of Insurance and Banking within five days after insurance. (Art. 4748, Rev. St. 1914.)

What Law Governs—Policies Governed By the Laws of Texas, Notwithstanding Stipulations to the Contrary—Statutory Regulations.—All contracts of insurance payable to any citizen of this state are held to be contracts entered into by virtue of the laws of this state and governed thereby although such policy may provide that the contract was executed and is payable together with the premiums outside this state or at the home office of the company issuing the same. (Art. 4950, Rev. St. 1914.)

(A) **Case Law.**—The legal effect of an insurance contract making the principal and premiums payable in a state other than that of insured's residence is to be determined by the laws of such state,¹¹⁰ and this despite the fact that the laws of this state require foreign insurance corporations to establish an office and appoint

an agent upon whom service may be had.¹⁰⁹ It has been held that the statute of another state providing that no policy shall be forfeited without due notice applies only to that state and not to Texas where the policy is delivered there, even though the premiums and policy are payable in New York.¹¹⁴ Where an application from this state provided that it should be the basis of the contract and waived notice to pay the premiums and that the contract was completely set forth in the policy and application taken together, it could not be presumed that the parties intended that the contract was to be governed by provisions of a statute of New York requiring notice to pay premiums to be given before forfeiture.¹¹⁵ ¹¹³ In an early case it was held that where a life policy provided that it should be construed and governed by the laws of a foreign state, the provisions of the statute applying thereto could not be waived by the parties.¹¹¹

Powers of Agents in Respect to Contracts in General.—It is held

THE CONTRACT IN GENERAL.
(A) NATURE, REQUISITES AND
VALIDITY. SEE 25 CYC. 718.)

125—What Law Governs. (See 28
Cent. Dig. Insurance, §§ 173-175.)

109. The fact that the laws of Texas require foreign insurance corporations, as a condition precedent to their doing business in that state, to establish an office, and appoint an agent upon whom service of process can be made, does not, where the principal and premiums are made payable in another state, operate to make the contract performable in, and its legal effect to be determined by, the laws of Texas. Judgment, *Sieders v. Merchants' Life Ass'n of United States*, 51 S. W. 547, reversed.—*Sieders v. Merchants' Life Ass'n of United States*, 54 S. W. 753, 93 Tex. 194.

110. The legal effect of an insurance contract making the principal and premiums payable in a state other than that of the insured's residence, is to be determined by the laws of such state. Judgment, *Sieders v. Merchants' Life Ass'n of United States* (Civ. App. 1899) 51 S. W. 547 reversed.—*Sieders v. Merchants' Life Ass'n of United States*, 54 S. W. 753, 93 Tex. 194.

111. Where a life policy provides that it shall be construed and governed by the laws of a foreign state, the provisions of a statute applying thereto cannot be waived by the parties.—*New York Life Ins. Co. v. Orlopp*, 61 S. W. 336, 25 Tex. Civ. App. 284.

112. Though a contract of insurance was made in Texas, it was made payable at the home office in New York, and all premiums were likewise made payable there, and no provision was

made for any act to be done elsewhere by the company. Held that, as there was nothing indicating that the parties contracted with reference to the laws of Texas, the contract was governed by the laws of New York.—*Metropolitan Life Ins. Co. v. Bradley*, 79 S. W. 367. Judgment reversed 82 S. W. 1031, 98 Tex. 230.

113. Where an application for a life policy in a New York company is made, and the policy is delivered in Texas, a New York statute prohibiting forfeitures for nonpayment of premiums, unless written notice shall have been duly addressed to the insured, forms no part of the contract of insurance, though the policy itself provides, in general terms, but without reference to the New York law, for a notice of accruing premiums.—*Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404.

114. A statute of New York, providing that no life insurance corporation doing business in that state shall declare a policy forfeited or lapsed within one year from the failure to pay a premium, unless a notice stating the amount of the premium, etc., shall have been duly addressed and mailed to the last known post office address "in this State" of the insured applies only to contracts made in New York with persons having a known post office address therein, and cannot, therefore, be applied where the insured lives in Texas, and the policy is delivered there, though the premiums and policy itself are payable in New York.—*Metropolitan Life Ins. Co. v. Bradley*, 82 S. W. 1031.

115. Where an application for an insurance policy on the life of a resident of Texas provided that the answers and statements contained therein should be the basis and become part of the contract of insurance, and

that in the absence of an express restriction an agent has power to make a verbal agreement with an applicant that a premium note signed by the applicant shall be surrendered in case he declines to accept the policy.^{115a} The secretary and general manager of a company have more power than the local agent, as it has been held that a clause in a certificate denying to agents the power to make, alter or discharge contracts, waive forfeiture or extend credits does not apply to the secretary and general manager of the company.^{115b}

Application or Offer and Acceptance.—Acceptance of the policy must be shown before the contract is complete.¹¹⁶ Where pending an investigation by the insurer the insured died it devolved on the plaintiff to prove that the contract had been completed by the acceptance by the insurer of the application.¹¹⁹ Postponement of action in accepting is not tantamount to an acceptance in such a case.¹²⁰ After the premium has been ordered returned to the insured the fact that it has not been returned will not estop the insurer from denying an acceptance of the application.¹¹⁸ Where the application provided that no verbal statement should modify the contract unless written and approved by the officers of the insurer and the application should be the sole basis of the con-

waived notice to pay the premiums, and the policy provided that the answers and statements contained in the application were made a part of the contract, and that the contract was completely set forth in the policy and application taken together, it could not be presumed that the parties intended that the contract was to be governed by provisions of a statute of New York requiring notice to pay premiums to be given to insured as a condition of declaring the policy forfeited.—Id.

120—Powers of Agents in Respect to Contracts in General. (See 28 Cent. Dig. Insurance, § 180-182, 1849, 1850.)

115a. In the absence of an express restriction on his authority, an agent of a life insurance company has power to make a verbal agreement with an applicant for a policy that a premium note signed by the applicant shall be surrendered in case the applicant declines to accept the policy.—*Mutual Reserve Life Ins. Co. v. Seidel*, 113 S. W. 945. See 28 Cent. Dig. Insurance, §§ 180-182, 1849, 1850.

115b. A clause in a certificate denying to agents the power to make, alter, or discharge contracts, waive forfeitures, or extend credits, does not apply to the secretary and general manager of the company.—*Bankers' & Merchants' Mut. Life Ass'n v. Stapp*, 14 S. W. 168.

130—Application or Offer and Acceptance. (See 28 Cent. Dig. Insurance, §§ 195-202.)

116. Decedent applied for term insurance to June 10, 1904, and a 20-payment policy at an annual premium of \$288 from that date. He executed a note for both the term and first year's premium to defendant's local agent, which was placed in the local bank in escrow, to be delivered "when a satisfactory policy for \$10,000 was turned over" to decedent by the bank. The premium in the application was fixed at decedent's age when the application was written, instead of at the age he would be on the commencement of the regular policy, and, this being changed without his knowledge, a policy at the new rate was written and mailed to defendant's agents, with instructions to deliver on decedent signing a correction of the application. The policy was sent to the bank, and decedent, on the day he was killed, authorized G. to transfer the policy to another bank, and then asked another to go to the bank to which he expected it to be changed and get the same; but neither applied to the bank holding the note in escrow for the policy until after decedent's death, when delivery was refused. Held, that such facts did not show an acceptance of the policy by decedent, and that no contract had been consummated.—*Aetna Life Ins. Co. v. Hocker*, 89 S. W. 26.

tract the oral communications of the insured to the agent do not affect the validity of such contract.¹¹⁷

Form and Requisites of the Policy.—In a case where, under the authority of the applicant, the agent signed the application and executed an assignment of such applicant's wages for the premium, and, while the beneficiary's name was inserted that same day, it was inserted after the applicant's death the facts were held insufficient to establish a contract of insurance consummated before the death of the insured,¹²¹ especially where the necessary countersigning by the policy writer took place after insured's death, the policy signer and other officers of the insured being ignorant of his death.¹²²

Validity of Oral Contract.—It has been held that a contract for life insurance may be effected by parol.¹²³ Where an agent represented that the annual premium would be a certain sum but the by-laws, made a part of the policy, provided for assessments, the

117. Where life insurance was issued on an application providing that no verbal statement should modify the contract or affect the rights of the insurer, unless written and approved by its officers, and that such application should be the sole basis of the contract, the validity of the insurance was not affected by oral communications of the insured to the agent who solicited the insurance.—*Fidelity Mut. Life Ass'n v. Harris*, 57 S. W. 635.

118. Though the premium be not returned, yet when its return has been directed by the company in instructions to its agent, the fact that it has not been returned will not estop the company from denying an acceptance of the application.—*Connecticut Mut. Ins. Co. v. Rudolph et al*, 45 Tex. 454.

119. Where premium was paid to an agent and policy was to take effect at once if the application was accepted, otherwise insurance was to be null and void and pending an inquiry by the company as to the spelling of name in application, applicant died, it was held: 1. That it devolved on the plaintiff to prove that the contract of insurance had been completed by the acceptance on the part of the company of the application.—*Id.*

120. Though the failure of the company to take definite action on the application might afford ground for the applicant to withdraw his application and demand repayment of his money, there is no rule which would make a postponement of the action in accepting, pending further inquiry tantamount to an acceptance.—*Id.*

123—**Form and Requisites of the Policy.** (See 28 Cent. Dig. Insurance, §§ 203, 211-213.)

121. In an action on a life policy it was shown that the agent of the insurer, under the authority given by the insured, signed insured's name to the application and executed an assignment of insured's wages for the premium between 9:30 a. m. and 12 o'clock noon on a certain day. The name of the beneficiary was inserted in the application on the same day, but in fact after the death of the insured. The testimony only raised a mere suspicion that insured was alive when the agent signed the application. The insured and the agent had agreed that the agent should write up a policy for a specified sum, when the first premium could be taken out of certain wages of insured, which could not be done until two days before the agent prepared the application and the assignment of wages for the premium. Held, insufficient to establish a contract of life insurance consummated before the death of the insured.—*Dickey v. Continental Casualty Co.*, 89 S. W. 436.

122. Where a life policy stipulated that it should not be binding on the insurer unless countersigned by the policy writer, and the actual time of the countersigning was after the death of the insured, and the policy writer and the officers of the insurer were at such time ignorant of the insured's death, there could be no recovery on the policy.—*Dickey v. Continental Casualty Co.*, 89 S. W. 436.

121—**Validity of Oral Contract.** (See 28 Cent. Dig. Insurance, §§ 203-209.)

123. A contract for life insurance may be effected by parol.—*Pacific Mut. Ins. Co. v. Shaffer*, 70 S. W. 566.

fact that the representation was oral and preceded delivery of policy is immaterial.^{123a}

Papers Accompanying Policy—Policies of Life Insurance Shall Contain the Entire Contract—Statutory Regulations.—All life insurance policies now sold in Texas are to contain the entire contract between the insurer and insured and the application for such policy may be made a part thereof. (Art. 4953, Rev. St. 1914.)

Policies Must Be Accompanied By Copy of Questions—Statutory Regulations.—A copy of the questions and answers of the application shall accompany every policy—either photographic or printed. However, this provision does not apply to life policies with provisions making the policies indisputable after two years, providing the premiums are paid. (Art. 4951, Rev. St. 1914.)

Premium Notes.—A policy and premium note executed at the same time are parts of the same contract.¹²⁴

Indisputable Policies.—A policy containing a clause providing that it is incontestable after one year provided the required premiums are paid and is free from conditions as to residence, travel and place of death is within the indisputable policy provision of the statute.¹²⁵ (Art. 4951, Rev. St. 1914.)

Delivery and Acceptance of Policy.—The rule is that actual or constructive delivery of an insurance policy is essential to its validity.¹²⁶ Further, the execution and delivery of a policy by an insurance company in accordance with the written application evidences a completed transaction and constitutes a contract between the parties.¹²⁶ However, the mere intention by the officer executing the policy that it should become effective as soon as executed does not make it so.¹²⁹ The retention of a policy by the local agent at the insured's request is some evidence on the question of delivery.¹²⁷

123a. Where the soliciting agent representing that the annual premium would be a certain sum, whereas the by-laws, by reference incorporated in the policy, provided for assessments, the fact that the representation was oral and preceded delivery of the policy which was accepted without objection, is of no serious consequence.—*Illinois Bankers' Life Ass'n v. Dodson*, 189 S. W. 992.

124.—**Papers Accompanying Policy.** (See 28 Cent. Dig. Insurance, §§ 214-217.)

124. A life policy and premium note executed contemporaneously are parts of the same contract.—*Laughlin v. Fidelity Mut. Life Ass'n*, 78 S. W. 411.

125. Under Rev. Civ. St. 1911, Art. 4951, requiring life insurance policies, except indisputable policies, to be accompanied by a copy of the application, a policy containing a clause providing that it is incontestable after one year, provided the required premiums are paid, and is free from conditions as to residence, travel, and

place of death, is within the exception contained in the statute.—*Grell v. Sam Houston Life Ins. Co.*, 157 S. W. 757, 28 Cent. Dig. Insurance, §§ 214-217.

126.—**Delivery and Acceptance of Policy.** (See 28 Cent. Dig. Insurance, §§ 219-230.)

126. The execution and delivery of a policy by an insurance company in accordance with a written application evidences a completed transaction, and constitutes a contract between the parties.—*Travelers' Ins. Co. v. Jones*, 73 S. W. 978.

127. The retention of the policy by the local agent receiving it for delivery at insured's request was some evidence on the question of delivery to insured.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

128. Actual or constructive delivery of an insurance policy is essential to its validity.—*American Home Life Ins. Co. v. Melton*, 144 S. W. 362.

129. A mere intention by the officer executing a life policy that it should

Payment of Premium.—In a case where the applicant gave the agent his note in payment of the first premium on the promise by such agent that the note should be returned if the applicant did not accept the policy, there was no completed contract.¹³⁰ And, where the agent wrongfully negotiated the note to an innocent purchaser before the policy was accepted the insurer was liable where the policy was not accepted.¹³⁰

Estoppel or Waiver as to Defects or Objections.—The insurer is estopped to claim that no application was made for the policy sued on so that it was not a binding contract.¹³³ The insurer is further estopped to deny that a policy was issued on the application of the insured where it took the note of the beneficiary, who was related to insured, in payment of the first premium, there being no deception as to the real party to the insurance.¹³² The insured's retention of a policy is held a ratification thereof.¹³¹ In such a case he is estopped to plead fraud in inducing him to take the insurance in an action on premium notes.¹³¹ Where the insured is induced to sign an application by agent's false representations that it provides for the policy agreed upon when as a matter of fact it provides for a materially different policy, he is not estopped to set up such false representations unless inexcusably negligent in informing himself.¹³⁵ Neither is the insured estopped from asserting that a policy was procured by misrepresentations where

become effective as soon as executed held not to make it effective.—*Id.* See 23 Cent. Dig. Insurance, §§ 219-230.

137.—Payment of Premium or Dues.
(See 28 Cent. Dig. Insurance, §§ 231-245.)

130. Where an applicant for a life insurance policy gave the agent of the insurer his note in payment of the first year's premium on a promise by the agent that the note should be returned in case the applicant should not accept the policy, there was no completed contract, and where the agent wrongfully negotiated the note to an innocent purchaser before the policy was accepted, the applicant was entitled to recover the amount of the note from the insurance company on his refusal to receive the policy.—*Mutual Reserve Life Ins. Co. v. Seidel*, 113 S. W. 945. See 28 Cent. Dig. Insurance, §§ 231-245.

141.—Estoppel or Waiver as to Defects or Objections. (See 28 Cent. Dig. Insurance, §§ 75, 253-262.)

131. Insured's retention of policy held a ratification thereof estopping him from pleading fraud inducing him to take the insurance as a defense to an action on notes given for the premiums.—*Ribble v. Roberts*, 180 S. W. 620.

132. Where a life insurance policy

recites that it is issued on the application of the insured, and the company takes the note of the beneficiary, a grandson of the insured, in payment for the first premium, there being no deception as to the real party to the insurance, the company is estopped to deny that the policy was issued on the application of the insured.—*Mutual Life Ins. Co. of New York v. Blodgett*, 27 S. W. 286.

133. A life insurance company held estopped to claim that no application was made for the policy sued on, so that it was not a binding contract.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

134. Where it appears that an applicant, who had answered that no policy had been applied for in any other company which had been refused, had been rejected by the Legion of Honor, it may be shown that the agent told him that the Legion of Honor was not regarded as a life insurance company.—*Equitable Life Assur. Soc. v. Hazlewood*, 12 S. W. 621.

135. Insured, induced to sign an application by agent's false representations, that it provides for the policy agreed upon, when, in fact, it provides for a materially different policy, is not estopped from setting up such false representations, unless inexcusably negligent in not informing himself.—*Federal Life Ins. Co. v. Hoskins*, 185 S. W. 607.

he declined to accept the policy written so as to mature differently from the time represented and received possession of it solely to deliver it to the company's adjuster.¹³⁶ Where the evidence shows that the applicant, who had answered that no policy had been refused in any other company that had been applied for, had been rejected by a certain fraternal benefit association, it is admissible to show that the agent had told him that such association was not regarded as a life insurance company.¹³⁴

Reformation of Application.—The failure of the agent, on the request of the insured, to write his address in the application is no ground for a reformation of the application in the absence of any fraud.¹³⁷

Modification of Policy.—The insurer cannot without the consent of the insured substitute another insurer in the carrying out of its undertakings.¹³⁸ Therefore, where insured sued for recovery of premiums and damages for the insured's breach of contract the company which had taken over the contracts and assets of the original company was liable.¹³⁹

Misstatement or Concealment of Material Facts in Application.—The binding force of answers written in an application by an agent and signed by the insured cannot be avoided by evidence that the applicant did not know the contents of the application or that they were known to be false by the agent where the policy declares that no agent is empowered to modify the policy or to bind the insurer by making any promise or receiving any representation not contained in the application.¹⁴⁰ In a case where a wife with

136. Insured was not estopped from asserting that a life policy was procured by misrepresentations, where he declined to accept the policy written so as to mature differently from the time represented, and received possession of it solely to deliver it to the company's adjuster.—*Stengel v. Colorado Nat. Life Assur. Co.*, 147 S. W. 1193. See 28 Cent. Dig. Insurance, §§ 75, 253-262; 12 Cent. Dig. Corp., § 1556.

137.—*Reformation.* (See 28 Cent. Dig. Insurance, §§ 265-272.)

138. The fact that insured requested the agent who took his application to write the street and number of insured's place of business in the application, so that notices of accruing premiums should be sent there, and that the agent negligently failed to do so, of which failure the insured was ignorant, was no ground for a reformation of the application so as to make it state the insured's place of business, in the absence of any fraud on the part of the agent, or explanation of the insured's failure to read and understand the instrument.—*Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404.

22—Ins.

144.—*Modification.* (See 28 Cent. Dig. Insurance, §§ 273-275.)

138. It is not within the power of an insurer against the consent of the insured to substitute another insurer in the carrying out of its undertakings.—*Washington Life Ins. Co. v. Lovejoy*, 149 S. W. 398.

139. In action by insured for recovery of premiums and damages for the insurer's breach of its contract held that a company which had taken over the contracts and assets of the original company and had assumed its obligations was liable.—*Id.*

Application.—Misstatement or Concealment of Material Facts.

140. Where a policy of insurance declares that no agent is empowered by the company issuing the policy to modify it, or "to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy," and an agent of the company, in receiving an application for insurance, writes the applicant's answers to certain questions, and the applicant signs his name thereto, the binding

her husband's consent, procured insurance on her life for his benefit, the premiums being paid by him and the policy delivered to him, she becomes his agent and though he may have been ignorant of false statements in her application, he cannot claim, in an action against him to recover the sum paid on such insurance that he was so ignorant, the evidence showing the facts to be well known to him.¹⁴² Where an agent conspires with the applicant to insert false statements in the application to induce the company to issue the policy he becomes the agent of the applicant alone and the company cannot be charged with notice of the facts known to such agent.¹⁴¹

THE CONTRACT—(B) ITS CONSTRUCTION AND OPERATION

Application of the General Rules of Construction.—The rule is that a policy must be favorably construed in favor of the insured and against a forfeiture.¹⁴⁶ Forfeitures are not favored in law, and if the language of the policy is fairly susceptible of a construction preventing a forfeiture that construction will be adopted.¹⁴³ When some of the provisions of the policy are printed and some written and there is a conflict as between the written and printed provisions the printed must yield.¹⁴⁵ The policy contract should be construed most strongly against the insurance company and in order to prevent a forfeiture even a forced construction might be placed on it.¹⁴⁴

force of such answers cannot, in an action on the policy, in which defendant alleges that a certain answer was false, be avoided by evidence that the applicant did not know the contents of the application, or that they were known to be false by the agent.—*Fitzmaurice v. Mutual Life Ins. Co. of New York*, 19 S. W. 301.

141. Where the agent of an insurance company enters into a conspiracy with an applicant for a life policy to insert false statements in the application, and thereby induce the company to issue the policy, he ceases to be the agent of the latter, and becomes the agent of the applicant, and the company cannot be charged with notice of the facts known to such agent.—*Centennial Mut. Life Ass'n v. Parham*, 16 S. W. 316.

142. Where a wife, acting with her husband's knowledge and consent, procures an insurance of her life for his benefit, the premiums being paid by him, and the policy delivered into his possession, she is, in effect, his agent, and, though he may have been ignorant of misrepresentations made in her application, he cannot claim, in an action against him to recover the sum paid on such insurance, that he was ig-

norant of false statements made in the application, which the evidence showed to be well known to him.—*Centennial Mut. Life Ass'n v. Parham*, 16 S. W. 316.

(B) CONSTRUCTION AND OPERATION. (SEE 25 CYC. 739.)

146—**Application of the General Rules of Construction.** (See 28 Cent. Dig. Insurance, §§ 292, 294-298.)

143. Forfeitures are not favored in law; and, if the language in an insurance policy is fairly susceptible of a construction preventing a forfeiture, such construction will be adopted.—*Aetna Life Ins. Co. v. Wimberly*, 108 S. W. 778, judgment reversed 112 S. W. 1038, 102 Tex. 46. See 28 Cent. Dig. Insurance, §§ 292, 294-298.

144. Even, if from the language of an insurance policy it is doubtful whether it remains in force until 5 o'clock or midnight of a certain day, and whether a provision of the policy allowing the company to deduct any unpaid current premium from the face thereof, in case the insured die before its expiration, makes unnecessary the payment of the premium by the bene-

What Law Governs.—An early case held that where a policy provides that it shall be construed and governed by the laws of another state, the statutes applicable are considered as part of the written contract.¹⁴⁶ In another early case where a policy provided that it should be construed under the laws of Pennsylvania and where no proof was made of the Pennsylvania laws in an action in Texas the court charged that under such laws certain representations in an application for reinstatement were material and it was held not error, since the representations would be material under Texas law and in the absence of evidence the law of Pennsylvania should be presumed to be the same.¹⁴⁷ Provisions of a contract relating to the law governing its construction have no application to an action brought in this state predicated upon a breach of the contract by the insured.¹⁴⁸ Where a foreign policy, after receipt of the application and payment of the first premium, provided that the losses should be paid at the insurer's office in a foreign state, the law of such state was held to apply in determining its validity and construction.¹⁴⁹ This last was also an early case. The statute (Art. 4950, Rev. St. 1914) now provides that all policies payable to citizens of this state shall be governed by the

fiary after the insured's death, the holding that the policy remains in force until midnight of the day in question, and that the payment of the premium by the beneficiary after the insured's death is unnecessary, would be justified, since the policy should be construed most strongly against the insurance company, and in order to prevent a forfeiture, even a forced construction might be placed upon it.—*Id.*

145. When some of the provisions of a contract are printed and some written, and there is a conflict between the written and printed provisions, the printed must yield.—*American Nat. Ins. Co. v. Van Dusen*, 185 S. W. 634.

146. An insurance policy must be liberally construed in favor of the insured and against a forfeiture.—*Philadelphia Underwriters' Agency of the Fire Association of Philadelphia v. Neurenberg*, 144 S. W. 357. See 28 Cent. Dig. Insurance, §§ 292, 294-298.

147.—**What Law Governs.** (See 23 Cent. Dig. Insurance, § 293.)

147. A life policy provided that it should be construed under the laws of Pennsylvania, where the company was chartered. In an action in Texas, where no proof was made of the Pennsylvania laws, the court charged that under such laws certain representations in an application for reinstatement were material. Held not error, since the representations would be material under the Texas law, and, in the absence of evidence, the law of Pennsylvania should be presumed to

be the same.—*Ash v. Fidelity Mut. Life Ass'n*, 63 S. W. 944, 26 Tex. Civ. App. 501.

148. Where a life policy provides that it shall be construed and governed by the laws of another state, the statutes applicable are considered as part of the written contract.—*New York Life Ins. Co. v. Orlopp*, 61 S. W. 336, 25 Tex. Civ. App. 284.

149. Where a life insurance policy delivered in Texas by an agent not authorized to withhold the same was issued in another state, in which the insurer was incorporated, after receipt of an application and payment of the first premium, the policy providing that losses would be paid after receipt of proof of loss at its office in such state on presentation and surrender of the policy, the law of such state applies, in determining its validity and construction, though a stipulation in the policy limited liability thereon until its delivery during life and good health of the insured, and the receipt of the first payment due, since, notwithstanding such limitation, the contract was completed and took effect at the time and place of its issue, and its performance was evidently contemplated in such state.—*Fidelity Mut. Life Ass'n v. Harris*, 57 S. W. 635.

150. Provision of an insurance contract relating to the law governing its construction held to have no application whatever to an action brought in this state predicated upon a breach of the contract by insured.—*Washington Life Ins. Co. v. Lovejoy*, 149 S. W. 398. See 28 Cent. Dig. Insurance, § 293.

laws of this state even though the contract may state that it was entered into outside of this state, the premium was payable outside and the losses were payable outside of this state.

Matter on Margin of or Slip Attached to Policy.—A clause limiting the liability of the insurer in case of suicide to the amount of premiums paid was held to be made a part of the policy by a provision that agreements, benefits and privileges stated on subsequent pages were made a part of the contract.¹⁵¹

Construing Together Policy and Application.—An application is made part of the policy by a clause therein that it is issued in consideration of the application.^{152 153}

Loans on Policies.—An agreement is valid that on non-payment of a paid up policy loan note the amount of paid up insurance guaranteed should be reduced in the same proportion as the debt bore to the cash surrender value.¹⁵⁴

Co-Operative Life Insurance—Loan Value on Policies—Statutory Regulations.—After three annual premiums have been paid the policy shall have a loan value and after three years from the date of issuance it shall be non-forfeitable. The usual elections are allowed after default at the end of three years. (Art. 4820, Rev. St. 1914.)

Loan Value on All Life Insurance Policies—Statutory Regulations.—A loan value shall be included after three years premiums have been paid, except in term and pure endowment insurance, in all policies. Also a table of loan values shall be inserted. (Art. 4741, Rev. St. 1914.)

THE PREMIUM

Companies Shall Not Discriminate—Statutory Regulations.—Life insurance companies are forbidden to discriminate in favor of individuals of the same class and of equal expectation of life in the

150—**Matter on Margin of or Slip Attached to policy.** (See 28 Cent. Dig. Insurance, §§ 305-307.)

151. A clause limiting liability in case of suicide to the premiums paid held to be made a part of the policy by a provision that agreements, benefits, and privileges stated on subsequent pages were made a part of the contract.—Grell v. Sam Houston Life Ins. Co., 157 S. W. 757, 28 Cent. Dig. Insurance, §§ 305-307.

152—**Construing Together Policy and Accompanying Papers.** (See 28 Cent. Dig. Insurance, §§ 308-311.)

153. Where a life insurance policy specifies that it is issued "in consideration of the statements and agreements in the application for the policy, which are hereby made a part of

this contract," the application constitutes a part of the contract.—Parish v. Mutual Benefit Life Ins. Co., 49 S. W. 153, 19 Tex. Civ. App. 457.

154. An application for life insurance is made part of the policy by a clause therein that it is issued in consideration of the application.—Grell v. Sam Houston Life Ins. Co., 157 S. W. 757. 28 Cent. Dig. Insurance, §§ 308-311.

173—**Loans on Policies.**

154. In a paid up policy loan note, an agreement that on non-payment the amount of paid up insurance guaranteed should be reduced in the same proportion as the debt bore to the cash surrender value is valid and in harmony with the policy indicated by Rev. St. 1911, Art. 4741.—Hartford Life Ins. Co. v. Benson, 187 S. W. 351.

amount of or payment of premiums charged or in other benefits. Neither are they or their agents permitted to offer rebates of premiums, or to offer any inducements under penalties provided in the Penal Code. (Art. 4954, Rev. St. 1914.)

Amount of Premiums.—An agent who solicits applications, collects premiums and delivers policies can bind the insurer as to the amount of the annual premium.^{156a}

Rebate from Premiums.—While a contract to receive the benefit of rebates is executory a party may recover the premiums paid thereunder.¹⁵⁵ It was held to be an offer of rebate where a party executing a note for the first premium of his policy was told that he would not be required to pay the note if he would assist in procuring other insurance.¹⁵⁶

Payment of Premiums—Statutory Regulations.—All premiums must be paid in advance but a grace of one month is allowed for payment. In default of premium payment after payments have been made for three years the owner shall have a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default. Term insurance however is excepted. (Art. 4741, Rev. St. 1914.)

Co-Operative Life Insurance Companies—Premiums—When to Be Paid and Notice of—Statutory Regulations.—Premiums may be paid annually, semi-annually, quarterly or monthly. A notice shall be mailed to each policy holder at least thirty days prior to the date when a premium is payable except in case of monthly payments, when ten days is given. (Art. 4819, Rev. St. 1914.) Local agents may be empowered to give notice and collect the premiums.

Payment of Premiums.—A payment by draft is valid when the draft is paid although the rules of the company forbid agents taking drafts for premiums.¹⁵¹ Where an assessment is payable thirty days after notice, payment within such thirty days is sufficient to keep the certificate in force even though it is made by the beneficiary after the death of the member.¹⁵³

In a case where the policy made full provision as to the time and notice of payment of the premium as well as the amount,

PREMIUMS. (SEE 25 CYC. 749.)

154—Rebate From Premiums. (See 23 Cent. Dig. Insurance, §§ 438-454.)

155. Plaintiff entering into an insurance contract whereby he was to receive the benefits of a rebate offered in violation of Vernon's Sayles' Ann. Civ. St. 1914, Arts. 4897, 4954, while the contract was executory, might recover the premiums paid thereunder.—Federal Life Ins. Co. v. Hoskins, 185 S. W. 607.

156. Defendant having executed a note for the first premium, an agreement with an agent that the defendant should not be required to pay the note

if he would assist in procuring other insurance, held an offer of rebate in violation of Rev. St. 1911, Art. 4954.—Security Life Ins. Co. of America v. Allen, 170 S. W. 131.

153—Amount of Premiums. (See 23 Cent. Dig. Insurance, §§ 394.)

156a. An insurance agent soliciting and obtaining applications, collecting premiums, and delivering policies has implied authority to state to applicants with binding effect on the insurer what the amount of the annual premium will be.—Illinois Bankers Life Ass'n v. Dodson, 189 S. W. 992.

absence of notice was no excuse for failure to pay the premium on the date specified.¹⁵⁹ Where a third party was instructed to pay insured's premium but the insurer returned such third party's check stating that the insured must furnish a certificate of good health and later the insured died without knowledge that the premium had not been paid it was held that the insurer was justified in returning the check and was not obliged to notify the insured of its non-acceptance.¹⁶⁷ Circumstances being such that a check could not be cashed at the time and the insurer received such check in lieu of cash for a premium and issued an unconditional receipt for the premium, such insurer will be deemed either to have accepted the check as payment or to have waived strict compliance with the terms of the policy.¹⁶⁰ A receipt for a premium is subject to explanation as other receipts and may be contradicted by parol testimony.¹⁶²

Subrogation of Agent.—An agent is subrogated to the insurer's right to recover a premium when he pays an applicant's premium, the latter agreeing to pay it when the policy is issued.¹⁶³

Notes for Premiums.—An agent has apparent authority to accept notes for less than the full amount of the first premium.¹⁶⁴ The

159.—Payment of Premiums. (See 28 Cent. Dig. Insurance, §§ 396-398.)

157. A premium on a policy was due January 18, 1899, and before that date the insured made arrangements with a mercantile company to pay the premium for him, but the company did not mail a check for the amount until February 15th; and on receiving it the insurance company notified the mercantile company that the check would not be accepted until the insured furnished a certificate of good health, whereon the mercantile company wrote, demanding a return of the check. The insured died the following November, without knowledge that the premium had not been paid. Held, that the insurance company was justified in returning the check to the mercantile company, and was not obliged to notify the insured of the non-acceptance of the check.—*Mullins v. Hartford Life Ins. Co.*, 63 S. W. 909, 26 Tex. Civ. App. 383.

158. Where the certificate provides that assessments shall be payable within 30 days of the date of notice, payment within such 30 days is sufficient to keep the certificate in force, though made by the beneficiary after the death of the member.—*Bankers' & Mutual Life Ass'n v. Stapp*, 14 S. W. 168.

159. Where a policy required plaintiff without notice to pay within 30 days from the first week day in December a mortuary premium and dues, the amount to be fixed by the notice if one was received, otherwise to be the same as the last preceding premium paid,

absence of notice was no excuse for plaintiff's failure to pay any premium on the date specified.—*Kray v. Mutual Reserve Life Ins. Co.*, 111 S. W. 421. See 28 Cent. Dig. Insurance, §§ 396-398.

160. Where, before the date on which a premium was payable in cash under the terms of a policy, cash could not have been obtained from a place where a check was payable, or the check be presented for payment, and the company received the check in lieu of cash, and issued an unconditional receipt for the premium, it will be deemed either to have accepted it as payment, or to have waived strict compliance with the terms of the policy in regard to the time and manner thereof.—*Northwestern Life Assur. Co. v. Sturdevant*, 59 S. W. 61.

161. Held to be valid, when the draft is paid although rules of insurance company forbid agents taking drafts for premiums.—*Piedmont and Arlington Life Ins. Co. v. Ray et al.*, 50 Tex. 511.

162. Is subject to explanation as other receipts and may be contradicted by parol testimony.—*Texas Mut. Life Ins. Co. v. Davidge*, 51 Tex. 244.

Subrogation of Agent.

163. An insurance agent who undertakes to procure a policy for an applicant, who agrees to pay the premium when the policy is issued, is entitled to be subrogated to the company's right to recover the premium upon himself paying the company the premium.—*Galles & Bowie v. Alarcon*, 145 S. W. 634.

fact that the insurer extended credit for and received another's obligation as payment of the first premium did not avoid a policy under the statutory provisions requiring payment in advance and against discrimination.¹⁶⁶ Where the maker of a note for a premium sought to recover over against the payee, the insurance agent, for the latter's failure to pay the premium, the burden is on the maker to allege and prove that the policy was not in force and that the insurer had made no arrangements to waive the provision requiring payment in cash.¹⁶⁶ (As to the plea of failure of consideration on a premium note, see Ann. 165.)

Actions for Premiums.—An action by an agent for the first premium on a policy delivered to the defendant, of which the plaintiff had the entire interest states a cause of action.¹⁷¹ In this case a charge making the defendant's receipt for the policy, apart from his acceptance of the policy, conclusive was not objectionable.¹⁷² (As to sufficiency of evidence, see Ann. 173.) Where the evidence showed the policy was in full force, that the agent had paid the

167.—*Notes for Premiums.* (See 28 Cent. Dig. Insurance, §§ 399-401.)

164. A life insurance agent held to have apparent authority to accept notes for less than the full amount of the first annual premiums.—*Security Life Ins. Co. of America v. Stephenson*, 136 S. W. 1137.

165. In an action on a note for a first premium of a life insurance policy, evidence held to establish failure of consideration.—*Struve v. Moore*, 136 S. W. 1175.

166. Where the maker of a premium note sought to recover over against the payee, an insurance agent, for the latter's failure to pay the premium, the burden was on him not only to allege and prove that the policy was not in force, but that the insurer had made no arrangement to waive the provision requiring payment in cash.—*Newman v. Norris Implement Co.*, 147 S. W. 725.

167. Rev. St. 1911, Art. 4741, requiring life policies to require all premiums to be paid in advance, and article 4954, prohibiting discrimination as to the premiums charged, held not to avoid a policy because the company extended credit for, and received another's obligation as, payment of the first premium.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

168.—*Actions for Premiums.* (See 28 Cent. Dig. Insurance, §§ 245, 403-407.)

168. A statement of a sub-insurance agent for plaintiff that he would correct the health record of defendant, who had been rejected, after which he should be at liberty to accept the policy, or not, held admissible against plaintiff in a suit on a note for premium on the original policy.—*Waggoner v. Burg*, 147 S. W. 342.

169. Where, in an action on a premium note given to an insurance agent, there was evidence that the policy was in force at time of trial, that the agent had paid the premium after suit brought, and that the insurer had waived the provision in the policy that it should not be in force until the first premium had been paid in cash, the maker was not entitled to judgment over against the agent, on judgment being rendered against him in favor of the indorsee, on the ground that, because of the agent's failure to pay the premium in cash before suit, the note was without consideration as between the parties.—*Newman v. Norris Implement Co.*, 147 S. W. 725.

170. Alleged fraud in obtaining a premium note held not sustained by proof of an agreement between defendant and the agent writing the policy that defendant would not be called upon to pay the note if he would assist the agent.—*Security Life Ins. Co. of America v. Allen*, 170 S. W. 131.

171. Action by agent for first premium, on a life policy delivered to defendant, of which plaintiff had the entire interest, held to state cause of action.—*Just v. Herry*, 174 S. W. 1012.

172. In insurance agent's action against defendant for first premium due on policy receipted for and accepted by defendant, charge held not objectionable as making defendant's receipt, apart from his acceptance of the policy, conclusive.—*Id.*

173. In insurance agent's action for first premium due on policy delivered to, receipted for, and accepted by defendant, alleged to be due under the agent's contract with his company, and his advance of a part of the premium, evidence held to sustain a verdict for him.—*Id.*

premium after the suit was brought and the insurer had waived the provision that the first premium must be paid in cash in advance, the maker of the premium note was not entitled to judgment over against the agent because the latter failed to pay the premium in cash before the suit was brought and the note was without consideration.¹⁶⁹ The statement of an agent that he would correct the health record of defendant who had been rejected, after which he would be at liberty to accept the policy or not is admissible against the plaintiff in a suit on a note for premium.¹⁶⁸ An agreement between the defendant and agent that defendant would not be called on to pay the note if he would assist the agent, rebutted the fraud alleged in obtaining the premium note.¹⁷⁰ The refusal of the insurer to change the beneficiary as provided for in the policy, in the absence of fraud is no defense to an action on a premium note.¹⁷⁴

Premium or Deposit Notes.—Where an agent accepts notes for his share of the premium and cash for the company's such notes become his individual property and are not subject to the provision of the policy for forfeiture for non-payment of a premium note, though the company acquired the notes from the agent.¹⁷⁵ There is an entire failure of consideration of notes in a case where a policy is obtained by fraud of the agent and the fraud is discovered before the contract is to begin.¹⁷⁶

Refunding or Recovery of Premiums Paid—(A) In General.—In the absence of any agreement a debtor is not liable for premiums paid by a creditor on a policy on the debtor's life taken out as security.¹⁸⁷ An applicant is entitled to a return of his premium where the agent's receipt so specifies if he receives no notice within a certain time of any action on his application.¹⁷⁹

(B) After the Premium Note Has Been Negotiated.—Where an applicant executed a note for a policy in a certain amount he was entitled to reject a policy for a less amount and to protection by the insurance company against liability on the note.¹⁷⁸ In such a

174. Refusal by an insurance company to change the beneficiary in the manner provided in a policy of life insurance, under which the risk had attached was not, in the absence of fraud, a defense to an action on a note given for a premium. *Harris v. Scrivener*, 78 S. W. 705; 1904 Id. 79 S. W. 827.

189.—**Premium or Deposit Notes.**

175. Where a life insurance agent presents a policy to an applicant, and he declines to accept it, being unable to pay the first premium in full, and the agent accepts notes for his commission and cash for the company's share of the premium, the notes become the individual property of the agent, and are not subject to a provision in the policy for a forfeiture for non-

payment of a premium note, though the company acquired the notes from the agent. *Judgment, National Life Ins. Co. v. Reppond*, 96 S. W. 778, reversed.—*Reppond v. National Life Ins. Co.*, 101 S. W. 786, 11 L. R. A. (N. S.) 981.

176. Where certain policies were issued to defendant through plaintiff's fraud in inserting certain false answers in the application without defendant's knowledge, and defendants subsequently discovered the fraud before any part of the contract of insurance had been performed by the insurance company, and before any real benefit had been received by him, there was an entire failure of consideration for notes given for the premium due on the policies.—*Curry v. Stone*, 92 S. W. 263.

case, in an action to recover the amount of certain premium notes on policies not accepted a sum returned should have been credited on the judgment obtained by the makers of the notes against the company, without a plea of payment pro tanto.¹⁷⁶ Where a rejected applicant, who had given the agent his note for the first premium, allowed the agent to apply to another company for insurance, his action did not cancel the first company's debt for the money received by its agent.¹⁷⁷ In this case it was held, incidentally, that a negro who executed his note to a foreign corporation's agent, was not charged with notice that the company's constitution and by-laws provided only for insurance of white people.¹⁷⁷ It is a question for the jury whether an insured is inexcusably negligent when he gives his note and accepts a policy covering a different period than that alleged to have been represented by the insurer's agent.¹⁸¹ The fact that the agent negotiated the note before the policy was accepted, it being understood that the note should be returned in case the policy was not accepted, and then himself disappeared, supported a finding that the promise was made with intent to defraud,¹⁸² and a complaint alleging these facts must be regarded as seeking rescission of the contract and not damages as the defendant did not authorize its agent to make the repre-

176—Refunding or Recovery of Premiums or Assessments Paid. (See 28 Cent. Dig. Insurance, §§ 457-467.)

177. That a rejected applicant for insurance who had given the agent his note for the first premium allowed the agent to apply to another company for insurance did not cancel the first company's debt for the money received by its agent.—*Reserve Loan Life Ins. Co. v. Benson*, 167 S. W. 266.

A negro who applied for insurance in an Indiana corporation and gave his note for the first premium to the agent was not charged with notice that the company's constitution and by-laws provided only for the insurance of white people.—*Id.*

178. Defendant S., having applied for a \$50,000 policy and executed a negotiable note for a part of the premium which the agent transferred, held entitled to reject a policy for \$20,000, and to protection by the insurance company against liability on the note.—*Security Life Ins. Co. of America v. Stephenson*, 136 S. W. 1137.

In an action to recover the amount of certain premium notes on policies not accepted a sum returned should have been credited on the judgment obtained by the makers of the notes against the insurance company, without a plea of payment pro tanto.—*Id.*

179. A receipt for an insurance premium, accompanying an application for insurance, provided that, if the applicant received no notice within 30 days of any action on the application, then

no insurance should be effected, and the premium should be returned. Held, that the applicant was entitled to a return of the premium after the expiration of 30 days without notice, though the application had been approved, and policy issued, but had miscarried in the mail.—*Mutual Life Ins. Co. of New York v. Elliott*, 53 S. W. 1014, 93 Tex. 144.

180. Insurer in action for recovery of premiums and for damages for breach of its contract held not entitled to complain of the form of the judgment rendered.—*Washington Life Ins. Co. v. Lovejoy*, 149 S. W. 398.

181. Whether insured, giving his note for and accepting a policy covering a different period than that alleged to have been represented by the insurer's agent, was inexcusably negligent, was a question of fact for the jury.—*Federal Life Ins. Co. v. Hoskins*, 185 S. W. 607.

182. In an action against a life insurance company to recover the amount of a note given by plaintiff to defendant's agent as premium on a policy which was accepted by plaintiff, the fact that defendant's agent, who procured the note on a promise that it should be surrendered in case plaintiff did not accept the policy, negotiated the note before the policy was tendered and at once disappeared, supported a finding that the promise was made with intent to defraud.—*Mutual Reserve Life Ins. Co. v. Seidel*, 113 S. W. 945. See 28 Cent. Dig. Insurance, §§ 457-467.

sentations and therefore could not be held to respond in damages.¹⁸⁴ After the sale of a premium note the insurer is liable to the insured for the amount of the same, on its breach of the contract of insurance, by reason of which assured elects to rescind it.¹⁸⁵

(C) **Because of Insolvency.**—Proof of insolvency long after the premiums sought to be recovered were paid on the ground of false representations by the company as to its solvency, does not entitle a party to recover.¹⁸⁶

(D) **Judgment and Interest.**—The insurer is not entitled to complain of the form of judgment rendered in an action for recovery of premiums.¹⁸⁷ An assignee of a policy who pays premiums thereon and recovers the amount so paid is entitled to interest on the same.¹⁸⁸

ASSIGNMENT OR OTHER TRANSFER OF POLICY

What Law Governs.—It was held that the assignment of certain policies in Texas to an assignee residing in another state were governed by the laws of Texas.¹⁸⁹

Right of Insured to Assign Policy.—Policies payable to insured, his executrix or assigns are assets in his hands belonging to him alone, which he has a right to transfer, with or without considera-

183. Where an insurance company sells a note given by assured for the first premium, it is liable to the insured for the amount thereof on its breach of the contract of insurance, by reason of which assured elects to rescind it.—*American Union Life Ins. Co. v. Wood*, 57 S. W. 685.

184. In an action against a life insurance company to recover the amount of a premium note a complaint alleging that such note was delivered to defendant's agent on the promise of such agent that the note should be surrendered to plaintiff in case he declined to receive a policy for which he had applied, and that such agent fraudulently negotiated the note to an innocent purchaser, must be regarded as seeking rescission of the contract of insurance, and not damages, though the complaint does not pray for rescission; and hence plaintiff may obtain rescission on account of such fraud, though defendant did not authorize its agent to make the representations, and hence could not be held to respond in damages.—*Mutual Reserve Life Ins. Co. v. Seidel*, 113 S. W. 945.

185. In a suit to recover annual premiums paid on the ground of false representations by the company as to its solvency, proof of insolvency long after the payment of the premiums

sought to be recovered does not entitle plaintiff to recover.—*Life Ass'n of America v. Goode*, 8 S. W. 639.

186. Where an assignee of an insurance policy pays premiums thereon, and recovers the amount so paid, he is entitled to interest from the time of each payment to the date of his judgment.—*Stevens v. Germania Life Ins. Co.*, 62 S. W. 824, 26 Tex. Civ. App. 156.

187. Where a creditor took out insurance on his debtor's life as security, the debtor was not liable for premiums paid by the creditor, in the absence of any agreement that the debtor should pay or be liable therefor.—*Stacy v. Parker*, 132 S. W. 532.

Evidence held insufficient to establish an agreement on the part of the debtor to pay premiums on insurance taken out by his creditor as security.—*Id.*

ASSIGNMENT OR OTHER TRANSFER OF POLICY. (SEE 25 CYC. 764.)

200—What Law Governs.

188. Assignment of certain policies in Texas to an assignee residing in Georgia held governed by the laws of Texas.—*Manhattan Life Ins. Co. v. Cohen*, 139 S. W. 51, 28 Cent. Dig. Insurance, § 469.

tion, in the absence of fraudulent intent to hinder or delay creditors.¹⁸⁹ A policy may be transferred by the insured to his creditor as security for debt as against the rights of the beneficiary where the right of change of beneficiary is reserved and the assignment is in writing and there is a proper insurable interest existing, as may be prescribed in the policy.¹⁹⁰

Consent of Beneficiary to Assignment by Insured.—The rule is that the beneficiary has a vested interest in a policy from its issuance, of which the insured has no right to deprive him,^{192 194} unless the policy contains a reservation that the insured shall have the right to change the beneficiary or assign the policy.¹⁹² In the latter event the interest of the beneficiary is subordinate to the right of change and a new beneficiary may be substituted without the consent of the old.¹⁹¹ It has been held that a provision in a policy requiring notice to the insured of "any assignment" refers to assignments by the beneficiary and is not a reservation to the insured of the right to change the beneficiary.¹⁹³

Validity of Oral Assignment.—A parol transfer or gift of a policy accompanied by a delivery thereof is effective to transfer the proceeds of the policy.¹⁹⁵

202—Right of Insured to Assign Life Policy. (See 28 Cent. Dig. Insurance, § 472.)

189. Life insurance policies payable to insured, his executrix, or assigns, were assets in his hands belonging to him alone, which he had a right to transfer, with or without consideration, in the absence of a fraudulent intent to hinder or delay creditors.—*Nixon v. Malone*, 95 S. W. 577; *New York Life Ins. Co. v. Same Id.*; *Mutual Life Ins. Co. v. Same, Id.* Modified 98 S. W. 380. See 28 Cent. Dig. Insurance, §§ 166-471.

190. A life insurance policy was payable to assured's daughter or her legal representatives or assigns, "subject to the right of assured to change the beneficiary," and stated that it was issued in favor of the beneficiary with the express understanding that, if the policy be not then assigned, the assured might change the beneficiary at any time by filing with the society a written request duly acknowledged; that any assignment of the policy must be in writing and subject to satisfactory proof of insurable interest existing at the death of assured to which extent only should the insurer be liable to the assignee. Held, that the policy authorized a transfer thereof by the insured to his creditor as security for the debt as against the rights of the beneficiary.—*McNeill v. Chinn*, 101 S. W. 465. See 28 Cent. Dig. Insurance, § 166, 471.

205—Consent of Beneficiary to Assignment by Insured. (See 28 Cent. Dig. Insurance, § 473.)

191. Under a life policy providing that the insured might change the beneficiary at any time during the continuance of the policy, the interest of the beneficiary was subordinate to that right, and a new beneficiary might be substituted without the consent of the old.—*Fuoss v. Dietrich*, 101 S. W. 291. See 28 Cent. Dig. Insurance, §§ 166, 471.

192. The beneficiary in an ordinary life insurance policy takes a vested interest, which cannot be destroyed by any act of the insured, unless the policy contains a reservation that the insured shall have the right to change the beneficiary, assign the policy, or otherwise divert the proceeds thereof.—*McNeill v. Chinn*, 101 S. W. 465.

193. A provision in a life insurance policy requiring notice to the insured of "any assignment" refers to assignments by the beneficiary, and is not a reservation to the insured of the right to change the beneficiary.—*Irwin v. Travelers' Ins. Co.*, 39 S. W. 1097.

194. The beneficiary in a life insurance policy has a vested interest therein from its issuance, of which the insured has no right to deprive him.—*Irwin v. Travelers' Ins. Co.*, 39 S. W. 1097.

208—Validity of Oral Assignment. (See 28 Cent. Dig. Insurance, § 478.)

195. A parol transfer or gift of a life insurance policy accompanied by a delivery thereof is effective to trans-

Form and Requisites of an Assignment in Writing.—In a case where an insured had a policy payable to his daughter, containing a right to change such beneficiary and to assign the policy, and he transferred his right in the policy to a third party as security for debt, authorizing the latter to pay the balance remaining after the debt was paid to his wife, it was held that such a transfer was an assignment for debt and changed the beneficiary from his daughter to his wife.¹⁹⁷ In this same case it was held that the provisions in the policy with reference to assignment of policy and change of beneficiary were for the benefit of the insurer and might be waived by it.¹⁹⁸

Validity of Assignment in General.—Actual delivery of the policy is not essential to the validity of an assignment and it has been held that the mere delivery of an assignment to even the assignee's agent was sufficient to pass title without payment of a consideration.¹⁹⁹ And, where the assignee was the assignor's adopted child actual delivery of the assignment was unnecessary to validate the assignment.²⁰⁰ The mere mailing of an assignment in compliance with the terms of the policy to the insurer is a sufficient delivery to the assignee.²⁰¹ It has been held that a provision for a particular manner of evidencing any change in the beneficiary is for the benefit of the insurer which alone can claim it.¹⁹⁸ So where a

fer the proceeds of the policy.—*Nixon v. Malone*, 95 S. W. 577; *New York Life Ins. Co. v. Same*, Id. 585; *Mutual Life Ins. Co. v. Same*, Id.; *Mutual Benefit Life Ins. Co. v. Same*, Id. Modified 98 S. W. 380.

206—Form and Requisites of Assignment in Writing.

196. A life insurance policy authorized a change of beneficiary by filing with the insurer a written request duly acknowledged, which change should take effect on its indorsement on the policy of the latter. The policy also authorized an assignment thereof by a written instrument in duplicate, one of which was furnished to the insurer. Held, that the provisions, with reference to the forms by which the policy might be assigned or the beneficiary changed, were for the benefit of the insurer, and might be waived by it.—*McNeill v. Chinn*, 101 S. W. 465.

197. Assured, having a policy payable to his daughter as beneficiary and containing a right to change such beneficiary and to assign the policy, executed an instrument transferring all right, title, and interest in the same to plaintiff in consideration of a loan. The transfer also declared, that, on assured's death, plaintiff, his heirs and assigns, were authorized to collect the policy, apply the proceeds, or so much as necessary, to the payment of the debt, and to pay the bal-

ance, if any, to his wife. Held, that such transfer operated as an assignment of the policy to plaintiff as security for the debt, and also as a change of beneficiary from assured's daughter to his wife.—*McNeill v. Chinn*, 101 S. W. 465.

212—Validity of Assignment in General. (See 28 Cent. Dig. Insurance, §§ 481, 482.)

198. Where a life policy provided that the insured might change the beneficiary during the continuance of the policy by filing with the company a written request, accompanied by the policy, the change to take effect upon the indorsement of the same on the policy by the company, and insured executed an instrument wherein he assigned all his interest in the policy to one other than the then beneficiary, the instrument was in effect, as against the old beneficiary, a substitution of a new beneficiary; the provision for a particular manner of evidencing any change in beneficiary being for the benefit of the company, which alone could claim it.—*Fuos v. Dietrich*, 101 S. W. 291.

199. Delivery of an assignment of certain policies to assignee's agent held sufficient to pass title without payment of the consideration or delivery of the policies.—*Manhattan Life Ins. Co. v. Cohen*, 139 S. W. 51. See 28 Cent. Dig. Insurance, §§ 475-477; 6 Cent. Dig. Bankr. 233.

policy provides a particular way for changing the beneficiary and an insured executed an instrument wherein he assigned all his interest to one other than the then beneficiary the instrument was in effect, as against the old beneficiary, a substitution of a new beneficiary.¹⁹⁸ It was held that an assignment which vested the absolute title and all benefit to be derived therefrom in the assignee, only providing that the proceeds should be withheld from such assignee until she became eighteen years old, such assignment being delivered to the insurer and reciting the further fact that if the assignee did not survive the assignor it should become null, was not a testamentary instrument to take effect only on the death of the assignor and hence it was not required to be executed as such instruments are as a condition to their validity.²⁰³ Where a policy provides that the assignment should be executed in duplicate and sent to the home office of the insurer such an assignment is not bad because the genuineness of the notary's signature is not attested by a clerk of a court of record.²⁰² An absolute assignment which does not recite the true purpose for which it was given may be explained by a surviving beneficiary even though such explanation contradicted the statement of the consideration stated in a second assignment.²⁰⁴

Rights and Liabilities of Assignee—(A) In General.—Where an assignor intended to and did in fact execute a valid assignment of a policy except that he did not conform to the exact rules of the insurer, as between the assignee and the administrator of the assignor the latter cannot object to the validity because of such failure to conform to such rules of the insurer.²⁰⁵ In a case where

200. Actual delivery of an assignment of an insurance policy to the assignee, who was the assignor's adopted child, was unnecessary to validate the assignment.—*Burges v. New York Life Ins. Co.*, 53 S. W. 602.

201. Mailing an assignment in duplicate of an insurance policy to the insurer, in compliance with the policy, is a sufficient delivery to the assignee.—*Burges v. New York Life Ins. Co.*, 53 S. W. 602.

202. An assignment of an insurance policy is not bad because the authority and genuineness of the signature of the notary before whom it was acknowledged was not attested by a clerk of a court of record, where the policy provided only that the assignment should be executed in duplicate, and both copies should be sent to the home office of the insurer.—*Burges v. New York Life Ins. Co.*, 53 S. W. 602.

203. An assignment of an insurance policy by the clear intentment of its language vested the absolute title thereto "and all dividend, benefit, and advantage to be derived therefrom" in the assignee, and only provided that the proceeds of the policy should be

withheld from her until she was 18. It was delivered to the insurer, and recited that it should become null if the assignor survived the assignee. Held, not a testamentary instrument, to take effect only on the death of the assignor, and hence not required to be executed as such instruments are as a condition to their validity.—*Burges v. New York Life Ins. Co.*, 53 S. W. 602.

204. Where an assignment of an insurance policy was absolute on its face, and did not recite the true purpose for which it was given, evidence of the surviving beneficiary that the assignment was so made because a prior assignment, reciting the terms of the pledge, was refused by an insurance company, was not objectionable on the ground that it contradicted the statement of the consideration in the second assignment.—*Clark v. Adam*, 69 S. W. 1016.

218—Rights and Liabilities of Assignee. (See 28 Cent. Dig. Insurance, §§ 418-492, 494-496.)

205. As between the assignee of an insurance policy and the administrator of the assignor, the validity of the

after a divorce the wife paid premiums on the policy under an assignment before divorce the husband could not compel the insurer to make a loan on the policy unless the wife's claim arising from such payment of premiums was satisfied or unless she consented to the loan as stipulated in the policy.²⁰⁸ Limitation can not run on the right of the assignee of a policy to recover premiums paid thereon until the death of the insured.²⁰⁷

(B) Transfer as Collateral Security.—The general rule is that an assignment of a policy to a creditor only gives him title to enough of the proceeds to satisfy his debt and disbursements with interest.²¹¹ The rule is the same with a creditor who acquires a policy by bill of sale.²¹⁰ Where a policy on the life of the husband, payable to the wife, is transferred by the wife to secure a debt of the husband alone it stands in the position of a surety and when the debt is barred by limitation it may be sued on by the wife.²¹² In this same case where the contract provided that the creditors should retain a certain amount of the husband's salary monthly and apply it on the debt, the policy is released as security after a lapse of time sufficient to extinguish the debt, had the creditor so applied the monthly salary, the wife not knowing that the creditor had not done so.²¹³ Where a husband and wife assigned as collateral a policy payable to the wife or to their children if the wife should die before her husband, the fact that the wife did die and that the children were minors, who would probably have lost the policy by non-payment of premiums had they not been paid by the assignee, will entitle such assignee to recover premiums paid on the strength of the assignment.²⁰⁸ And, where a tontine dividend accrued after the wife's death, it was held that the wife's death defeated the assignment and all rights predicated thereon, including the dividend.²⁰⁹

assignment cannot be objected to by the latter for failure to conform to the rules of the insurer in executing the same, if the assignor intended to, and did in fact, execute and deliver an otherwise valid assignment.—*Burges v. New York Life Ins. Co.*, 53 S. W. 602.

206. In an action to compel a company issuing to plaintiff an endowment policy to comply with the terms of the policy and make a loan to him, the divorced wife of plaintiff claimed the policy under an assignment executed during the marriage relation. The wife, subsequent to the assignment, paid premiums on the policy. Held, that plaintiff could not compel the company to make the loan, unless the wife's claim arising from the payment of premiums was satisfied, or unless she consented to the loan as stipulated in the policy.—*Hatch v. Hatch*, 80 S. W. 411, 35 Tex. Civ. App. 373.

207. Where the assignee of an insurance policy paid premiums thereon, which were a charge on the fund, limitations could not run against his right to recover the amounts so paid until the death of the insured.—*Stevens v. Germania Life Ins. Co.*, 62 S. W. 824, 26 Tex. Civ. App. 156.

222—(A) Transfer as Collateral Security. (See 28 Cent. Dig. Insurance, § 492.)

208. Where a husband and wife assigned as collateral a policy payable to the wife or to their children if the wife should die before her husband, the fact that the wife did die, and that the children were minors, who would probably have lost the policy by non-payment of premiums had they not been paid by the assignee, will entitle the assignee to recover premiums paid on the strength of the assignment.—*Stevens v. Germania Life Ins. Co.*, 62 S. W. 824, 26 Tex. Civ. App. 157

CANCELLATION, SURRENDER, ABANDONMENT OR RESCISSION OF POLICY

Right of Insured to Surrender.—Where policies are issued on an application containing false statements inserted by the insurer's agent, it is the duty of the insured to immediately disclose the same to the insurer and tender the policies for cancellation.²¹⁴

Validity of Surrender.—It has been held that a surrender by an insured of his policies is voidable after his death at the instance of his personal representatives under certain circumstances, as, where he was induced to do so, though knowing the effect of his act, by an insane delusion that his children were about to murder him for his insurance.²¹⁵

Remedies for Wrongful Cancellation.—There is a breach of contract between the insurer and insured when the former assigns its policies, transfers its assets, shifts to another company its obligations to insured, places it beyond its own power to perform such obligation, except so far as it could compel performance by such

209. An insurance policy was issued in favor of the wife of the insured if living at the time of his death, if not living, then to his children. The insured and his wife assigned the policy to plaintiff as collateral. The wife died before her husband. After the wife's death, a tontine dividend accrued on the policy. Held, that the wife's death defeated the assignment and all rights predicated thereon, including the dividend.—*Stevens v. Germania Life Ins. Co.*, 62 S. W. 824, 26 Tex. Civ. App. 156.

210. A creditor to whom his debtor transfers a life insurance policy by bill of sale absolute on its face, acquires no greater interest in the policy than such sum as will pay his debt and interest, and premiums paid by him and interest.—*Cawthorn v. Perry*, 13 S. W. 268.

211. An absolute assignment of a life insurance policy to a creditor only gives him title to enough of the proceeds to satisfy his debt and disbursements, with interest.—*Lewy v. Gilliard*, 13 S. W. 304.

212. A policy on the life of the husband, payable to the wife, being transferred to secure a debt of the husband alone, stands in the position of surety and, on the debt being barred by limitation, may be sued on by the wife.—*Washington Life Ins. Co. v. Gooding*, 49 S. W. 123, 19 Tex. Civ. App. 490.

213. A life policy payable to insured's wife, being assigned by her to secure his debt to his employers, under an agreement with them that they should retain a certain amount of his

salary monthly, and apply it on the debt, is released, as security, after lapse of time sufficient to extinguish the debt, had they so applied it; she not knowing that they had not.—*Washington Life Ins. Co. v. Gooding*, 49 S. W. 123, 19 Tex. Civ. App. 490.

CANCELLATION, SURRENDER, ABANDONMENT, OR RESCIS- SION OF POLICY. (SEE 25 CYC. 783.)

238—Right of Insured to Surrender in General.

214. Where certain policies were issued on an application containing false statements fraudulently inserted therein by the insurer's agent, it was the duty of insured, on discovering the fraud, to forthwith disclose the same to the insurance company and tender the policies for cancellation.—*Curry v. Stone*, 92 S. W. 263.

241—Validity of Surrender. (See 28 Cent. Dig. Insurance, § 520.)

215. Where insured, though knowing the effect of his act was induced, by an insane delusion that his children were about to murder him for his insurance, to surrender his policies in consideration of payment of the surrender value, such surrender was voidable after his death at the instance of his personal representatives.—*New York Life Ins. Co. v. Hagler*, 169 S. W. 1064.

other company, which entitled the insured to a recovery^{216 217} even though the assignee is solvent and able and willing to carry out the original contract. This right of action continues during the life time of the insured.²¹⁸ (For measure of damages in such a case, see Ann. 220.) Incidentally in such a case where the insurer relies on the law of another state as a defense it must plead and prove it.²¹⁹ However, the consolidation of the defendant company with another company without surrender of the former's corporate existence does not show a repudiation of the insured's policy so as to entitle him to a recovery for damages.²²¹ (As to facts showing that defendant had not pauperized itself by the consolidation so as to constitute a breach of the policy, see Ann. 222.)

Measure of Damages for Wrongful Cancellation.—The measure of damages for the insurer's breach of an ordinary life policy is the difference between what it would cost insured to mature the policy from the time of breach to the time of expectancy, had there been no breach, and what it would cost him to mature a like policy in a solvent company for the same period.²²³ It is not the amount of premiums paid, with interest thereon.²²³

Abandonment by Insured.—Where there was evidence that the time of payment of the premium had been extended and that before such time had expired the insured had applied to another

237—Remedies for Wrongful Cancellation. (See 28 Cent. Dig. Insurance, §§ 513-515.)

216. Evidence in an action to recover premiums and for damages for breach of its contract held sufficient to support a finding that the original insurer had transferred all of its assets to another company, and that the two companies had been consolidated; that the correspondence between plaintiff and the original insurer showed that plaintiff must look to a substituted company for all information touching his rights; that the insurer's president admitted to plaintiff that the insurer had gone out of business; and that the insurer had abandoned the performance of its contracts.—Washington Life Ins. Co. v. Lovejoy, 149 S. W. 398.

217. Where insurer assigned its policies, transferred its assets, shifted to another company its obligation to an insured, and placed it beyond its own power to perform such obligation, except so far as it could compel performance by such other company, there was a breach of its contract entitling the insured to a recovery, and that the assignee was solvent and able and willing to carry out the original contract did not prevent a breach.—Id.

218. On breach or repudiation of its contract by the insurer, the insured, during his lifetime, has a present

right of action for the recovery of damages.—Id.

219. Insurer relying upon law of another state as a ground of defense held required to plead and prove it.—Id.

220. The measure of damages in an action by an insured to recover premiums and damages for the insurer's breach of contract stated.—Id.

221. Consolidation of defendant insurance company with the P. company without surrender of defendant's corporate existence, etc., held not to show defendants' repudiation of a policy with plaintiff so as to entitle plaintiff to recover damages therefor.—Provident Savings Life Assur. Society of New York v. Ellinger, 164 S. W. 1024. 28 Cent. Dig. Insurance, §§ 513-515.

222. Defendant insurance company held not to have pauperized itself by consolidating with the P. Company so as to constitute a breach of the policy held by plaintiff.—Id.

223. In an action for an insurance company's breach of an ordinary life policy, the insured's measure of damages is the difference between what it would cost insured to mature the policy from the time of breach to the time of expectancy, had there been no breach, and what it would cost him to mature a like policy in a solvent company for the same period, and not the amount of premiums paid, with interest thereon.—Id.

company for insurance stating that he was going to abandon the first insurance but the policy in the second company showed that he carried insurance in the first and no notice was given of the maturity of the premium as extended, it was held that the taking out of the second policy with intention to abandon the former was not an abandonment per se, if the time had not expired as neither the insured nor insurer could terminate the policy in a manner other than as provided in the policy or in the statutes, without the consent of the wife who was the beneficiary.²²⁴ The old company had no knowledge of any intention on the insured's part to give up the policy and it was further held that abandonment was not shown, even if abandonment would have excused the first company's failure to give the required notice.²²⁵

Rescission by Insured or Beneficiary.—(A) In General.—Where the plaintiff executed two premium notes, the application stating that the premiums were to be payable semi-annually, and before the policy issued he wrote to the insurer that he did not want the policy, requesting it to return the notes, and after receiving the policy, repeated his request, saying he would surrender it, no objection being made to the fact that the policy made the premiums payable annually, and the policy was never returned, it was held that there was no rescission, so as to entitle the plaintiff to recover the amount of the two notes which he had been forced to pay to bona fide holders.²³¹ Where the agent of insurer, without authority, contracted with insured at the time he sold him insurance and as part of the consideration, that he should be appointed on the committee of reference of the insurer, it was held that this alone, such agreement not being ratified, constituted a breach of agreement which would entitle the plaintiff to rescind the contract.²³²

(B) By Reason of False Representations of Agent.—An appli-

245.—Abandonment by Insured or Beneficiary. (See 28 Cent Dig. Insurance, § 523.)

224. In an action by a widow on a life insurance policy, in which the defense was that it had been forfeited by default in payment, and had been abandoned, there was some evidence that the time of payment had been extended, and that, before the extended time had expired, insured had applied to and secured from another company a policy, which was collected, and had stated to such other company that he intended to abandon the policy sued on. Held that his taking out the second policy with intention to abandon the former was not an abandonment per se, if the time had not expired, as neither the insured nor the company could terminate the policy in a manner other than provided for in the policy or in the statutes, without the consent of the wife. Judgment 72 S. W.

23—Ins.

436, affirmed.—Washington Life Ins. Co. v. Berwald, 76 S. W. 442, 97 Tex. 111.

225. Premium on a life policy became due November 21st, and was extended one month. No notice of maturity of the premium as extended was given, as required by the policy. On December 14th insured took out a policy in a new company, the latter's agent stating that insured said he was going to drop the old policy. This was controverted by a relative of insured. The new policy recited that insured carried insurance in the old company. The old company had no knowledge of any intention on insured's part to give up the policy. Held not to show, abandonment of the policy by insured, even if abandonment would have excused the company's failure to give the required notice.—Washington Life Ins. Co. v. Berwald, 72 S. W. 436.

cant is not estopped to complain of the false representations of the agent of insurer unless he was inexcusably negligent in not informing himself,²²⁶ though he could have done so by the information at hand.²²⁷ In the same way when an applicant signs an application for a policy believing that it calls for the policy agreed upon, being induced to sign the same by the fraud of the agent, he is not estopped from showing that the policy signed was not the kind contracted for.²²⁸ And it was proper for the court to inform the jury that the signing of the application did not estop the insured from showing the kind of policy agreed on.²²⁹ Parol

246—Rescission by Insured or Beneficiary.

226. One applying for life insurance, who did not know the truth of matters concerning which an insurance agent made false representations, and relied on the representations of the agent, though he could have informed himself of the truth by means of information at hand, will not be estopped to complain of their falsity unless he was inexcusably negligent in not informing himself.—*Equitable Life Assur. Soc. v. Maverick*, 78 S. W. 560.

227. One applying for a life policy, relying upon the representations of a soliciting agent, is not estopped from complaining of the falsity of the representations unless inexcusably negligent in not informing himself, though he could have done so, by the information at hand.—*Mutual Life Ins. Co. v. Hargus*, 99 S. W. 580.

228. Where an applicant for a life policy relied on the representations of the agent of the insurer that the application which the insured signed called for the kind of policy agreed on and the insured was induced by fraud to sign it, in ignorance of the fact that it called for a policy of a different kind, the insured was not estopped, by reason of signing the application, from showing that the policy issued was not the kind contracted for.—*Mutual Life Ins. Co. v. Hargus*, 99 S. W. 580.

229. Where, in an action by an insured for the cancellation of a life policy, based on the fraudulent representations of the agent of the insurer soliciting the policy, it appeared from the application in connection with other facts attending the signing thereof by the insured that he would not have understood it to be for a policy different from the one agreed on, it was proper for the court to inform the jury that the signing of the application by the insured did not estop him from showing the kind of policy that was agreed on.—*Mutual Life Ins. Co. v. Hargus*, 99 S. W. 580.

230. A life policy provided that, on default in payment of premiums with-

out surrender, it should become a paid-up term policy for a certain length of time, when the contract should cease. Insured defaulted, and six months thereafter executed a note for the premium due, providing that, if not paid at maturity, the policy should become void. It was not shown that the beneficiary executed the note. Held, that on default the policy became a term policy, and insured could not reinstate the original policy without the consent of the beneficiary.—*Union Cent. Life Ins. Co. v. Wilkes*, 47 S. W. 546. Reversed, 49 S. W. 1038.

231. Plaintiff applied to defendant for a policy on his life and executed two negotiable notes in payment of the first year's premiums, his application stating that subsequent premiums were to be payable semi-annually. The policy sent to plaintiff required annual instead of semi-annual payments. Before its issuance, plaintiff wrote the agent at whose solicitation he had insured that he did not want the policy, requesting him to return the notes, and, on the receipt of the policy, repeated his request, saying that he would surrender it. No objection was made on account of the time at which the premiums were payable, nor was the policy ever returned, but plaintiff allowed it to lapse for nonpayment. Held, that there was no rescission, so as to entitle plaintiff to recover the amount of the two notes which he had been forced to pay to bona fide holders.—*New York Life Ins. Co. v. Miller*, 32 S. W. 550, 11 Tex. Civ. App. 536.

232. Plaintiff contracted with the agent of defendant insurance company for insurance, and also for appointment of the insured on the committee of reference of the insurance company, which agreement was a part of the insurance contract, and, if broken, the contract was to be void. Held, that an appointment of insured on such committee by the agent only, which was unauthorized by the company, and not ratified, constituted a breach of agreement, which entitled plaintiff to rescind the contract.—*American Union Life Ins. Co. v. Wood*, 57 S. W. 685.

evidence as to the transaction between the agent and applicant is admissible under such circumstances.²³³

Rescission by Insurer.—There can be no breach by the insurer by a failure to perform prior to the insured's death where the policy is payable to his wife at his death.

Actions for Rescission.—A petition is good as against a general demurrer in an action for cancellation of a policy and a premium note, which alleges that the agent agreed to furnish a certain kind of policy and insured was induced by the representations of such agent to sign an application for another kind and that insured was ignorant of that fact.²³⁶ Such a petition sufficiently charges that the negligence of the insured in signing the application was excusable.²³⁶ In a suit to avoid a policy on the ground of the false representations of the agent, it is not necessary for the plaintiff to allege that the agent knew of the falsity of such representations, as they were, in effect defendant's statements and their effect on the contract would be the same whether the agent knew their falsity or not.²³⁷ Neither, in such a case is it necessary for plaintiff to offer to pay defendant any part of the premium, nor could defendant be prejudiced by plaintiff's retention of the binding receipt or policy.²³⁵

233. Where an applicant for a life policy understood that he was applying for a policy requiring 15 annual premiums and the agent soliciting the insurance either through ignorance, or by fraudulent representations induced the applicant to believe that the application he signed was for such a policy, while, in fact, it was for another kind, parol evidence of the transaction between the applicant and the agent was admissible in a suit for cancellation of the policy.—*Mutual Life Ins. Co. v. Hargus*, 99 S. W. 580.

247—Rescission by Insurer. (See 28 Cent. Dig. Insurance, §§534—536.)

234. Where a policy was payable at insured's death to his wife, there could be no breach by the insurer by a failure to perform prior to insured's death.—*Provident Savings Life Assur. Society of New York v. Ellinger*, 164 S. W. 1024. See 28 Cent. Dig. Insurance, §§ 534-536).

249—Actions for Rescission.

235. In a suit to avoid a contract of insurance on the ground of fraudulent representations of the agent, and to cancel the policy, it was not necessary for plaintiff to offer, as a condi-

tion of relief, to pay defendant any part of the premium, nor could defendant be prejudiced by plaintiff's retention of the binding receipt or the policy.—*Equitable Life Assur. Soc. v. Maverick*, 78 S. W. 560.

236. A petition in an action by an insured for the cancellation of a life policy and a note given for the first premium which alleges that the soliciting agent agreed with the insured for the issuance of a policy fully paid up in 15 annual premiums, that insured was induced by the representations of the agent to sign an application which called for another kind of a policy and that insured was ignorant of that fact, sufficiently charges that the negligence of the insured in signing the application was excusable, as against a general demurrer.—*Mutual Life Ins. Co. v. Hargus*, 99 S. W. 580. See 28 Cent. Dig. Insurance, § 537.

237. In a suit to avoid a contract of insurance on the ground of false representations of the agent, it was not necessary for the plaintiff to allege that the agent knew the falsity of the representations, as they were, in effect, defendant's statements, and their effect on the contract would be the same whether the agent knew their falsity or not.—*Equitable Life Assur. Soc. v. Maverick*, 78 S. W. 560.

AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD OR BREACH OF WARRANTY OR CONDITION

Misrepresentation Must Be Material to Avoid Contract—Statutory Regulations.—Any provision in any contract or policy of insurance issued or contracted for in this state, which provides that the answers or statements made in the application for such contract, or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case. (Art. 4947, Rev. St. 1914.)

No Defense Based Upon Misrepresentation Valid, Unless—Statutory Regulations.—No defense based upon misrepresentation made in the applications for or in securing a contract of insurance, shall be valid, unless the defendant shall show on the trial that, within a reasonable time after discovering the falsity of such misrepresentations so made, it gave notice to the insured or to the beneficiaries under said contract, that it refused to be bound by such contract or policy. Ninety days is defined as a reasonable time. It is provided further that this article shall not be construed to render available any immaterial misrepresentation, nor to in any wise affect Article 4947. (Art. 4948, Rev. St. 1914.)

Shall Not Constitute Defense, Unless Shown—Statutory Regulations.—Any provision in a policy which provides that the same is void or voidable if any misrepresentations or false statements be made in proofs of loss or of death, shall be of no effect. Such provisions shall not constitute any defense unless it is shown upon the trial that the false statements made in such proofs of loss or death were fraudulently made and misrepresented a fact material to the question of the liability of the insurer upon the contract sued on and that such insurer was thereby misled and caused to waive or lose some valid defense to the policy. (Art. 4949, Rev. St. 1914.)

Defense Based on Misrepresentation in Application Not Valid After Two Years—Statutory Regulations.—It is also provided that no defense based upon misrepresentation made in the application upon the life of any person in this state shall be valid in any suit brought on such contract two years or more after the date of its issuance, when the premiums have been duly paid and received without notice is given by the insurer to the insured of its inten-

tion to rescind on account of misrepresentation unless it is shown on the trial that such misrepresentation was material to the risk and intentionally made. (Art. 4951, Rev. St. 1914.)

Companies Shall Not Misrepresent Policies—Statutory Regulations.—Life insurance companies or their officers or agents must not issue or circulate any estimate, illustration, circular or statement misrepresenting the terms of any policy issued by it or benefits or advantages promised thereon. (Art. 4958, Rev. St. 1914.)

Policy Shall Not Be Defeated—Statutory Regulations.—A recovery upon life, accident or health insurance policy shall not be defeated because of misrepresentation in the application which is an immaterial fact and which does not affect the risks assumed. (Art. 4959, Rev. St. 1914.)

Interpretation of Statutory Provisions.—Article 4947 of the Revised Civil Statutes, providing that misrepresentations shall not be a defense in an action on a policy unless material and shown to have actually contributed to the contingency or event on which the contract becomes payable, is held to apply to every policy or contract of insurance issued or contracted for within this state, whether by an assessment or other company.^{233 239}

Representations—(A) In General.—Where an insured who knows that it is material that his application state his age, being unable to give it, refers the agent to his father, he is bound by his father's answer.²⁴¹

(B) Materiality.—It has been held that Articles 4741 and 4959 of the Revised Statutes of 1914 apply to contracts of life insurance

AVOIDANCE OF POLICY FOR MISREPRESENTATIONS, FRAUD, OR BREACH OF WARRANTY OR CONDITION. (SEE 25 CYC. 796).

230—Statutory Provisions. (See 28 Cent. Dig. Insurance, § 539.)

233. Rev. Civ. St. 1911, Art. 4947, providing that misrepresentations shall not be a defense in an action on a policy, unless material and shown to have actually contributed to the contingency or event on which the policy became payable, applies to every contract or policy of insurance issued or contracted for within the state, whether by an assessment or other company.—*National Life Ass'n v. Hagelstein*, 158 S. W. 353. See 28 Cent. Dig. Insurance, § 539.

239. Acts 31st Leg. c. 108, regulating insurance, did not repeal acts 28th Leg. c. 69 (Rev. Civ. St. 1911, 4947), making false representations no defense unless material to the risk, which latter statute is applicable to foreign assessment companies doing business in Texas.—*Id.*

240. Where a contract of insurance

is entered into, to be performed in the State, in determining the effect to be given to the policy the laws of the state will govern; and where statements in the application are false, and where warranted to be true, no recovery can be had on the policy though under the law of the state in which it was issued, false representations not actually contributing to the contingency on which the policy is payable do not vitiate the policy, and such false statements did not contribute to the loss.—*Sieders v. Merchants Life Ass'n of United States*, 51 S. W. 547. Reversed, 54 S. W. 753.

253—Representations. (A) In General. (See 28 Cent. Dig. Insurance, §§ 538-542.)

241. Insured, knowing that it is material that his application for insurance state his age, and being unable to give it, and having referred the company's agents to his father therefor, is bound by the statement made by his father and inserted in the application.—*Mutual Reserve Life Ins. Co. v. Jay*, 101 S. W. 545.

despite Sections 4951, 4947 and 4948, and a life policy will not be avoided for immaterial misrepresentations.²⁴² The Supreme Court in an early case held that a provision of the Missouri statutes, reading, "No defense based upon misrepresentations made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material," was broad enough to include policies issued by assessment insurance associations.²⁴³

(C) Effect of Misrepresentations.—The rule is that a misrepresentation made innocently and in the belief of its truth will not avoid a policy, but a false statement made willfully and with the intent to deceive and which is relied upon by the insurer, will do so.²⁴⁴ It has been held that an informal unwritten examination, not based on a written application, and stopped by the examiner as useless, comes within the meaning of a question whether the applicant has been examined by any other company and a policy refused.²⁴⁵

Warranties—(A) In General.—The use of the word "warranty" does not necessarily create a warranty in law.²⁴⁶ In determining whether a stipulation in an application that the statements made to the medical examiner are "warranted" to be full, complete and true and without suppression of any fact tending to influence the company in issuing a policy, is a warranty the court must look to the policy, the application and the report of the medical examiner.²⁴⁹ The Supreme Court held in an early case that where the statements in an application for a life policy are made warranties, it is essential to the validity of the policy that the statements are true without reference to the question of their materiality.²⁴⁷ An insurer which makes every statement in the application, whether material or otherwise, a warranty, is held to a very strict rule when

255—(E) Materiality. (See 28 Cent. Dig. Insurance, § 548.)

242. Acts 31st Leg. c. 108, §§ 22, 68, appearing as Vernon's Sayles Ann. Civ. St. 1914, §§ 4741, 4959, apply to contracts of life insurance, despite sections 4951, 4947, and 4948, and a life policy will not be avoided for immaterial misrepresentations.—*Guarantee Life Ins. Co. v. Evert*, 178 S. W. 643.

243. A provision of a statute reading "No defense based upon misrepresentations made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material" (Rev. St. Mo. Par. 5549) is broad enough to include policies issued by assessment insurance associations. *Judgment Sleders v. Merchants Life Ass'n of United States*, 51 S. W. 547, reversed.—*Sleders v. Merchants' Life Ass'n of United States*, 54 S. W. 753, 93 Tex. 194.

256—(C) Effect of Misrepresentations. (See 28 Cent. Dig. Insurance, §§ 540, 549.)

244. To avoid a policy for misrepresentations the false statement must have been made willfully and with the intent to deceive, and relied upon by the insurer; and a misrepresentation made innocently and in the belief of its truth will not avoid the policy.—*American Nat. Ins. Co. v. Anderson*, 179 S. W. 66.

245. An informal unwritten examination, not based on a written application, and stopped by the examiner as useless, is within the meaning of a question whether "any proposition or negotiation or examination for life insurance has been made in this or any other company on which a policy has not been issued." *Key, J., dissenting.*—*Mutual Life Ins. Co. of New York v. Nichols*, 24 S. W. 910; affirmed in 26 S. W. 998.

endeavoring to avoid payment.²⁴⁶ The inquiries or declarations must be so plain that any applicant can readily understand them, and, where any ambiguity exists, the construction most favorable to the insured will obtain.²⁴⁶ Where an application provided that the statements made by the insured were warranted to be true and "without suppression of any fact which would tend to influence the company in issuing a policy," and stipulated that the insured warranted that he had reviewed all answers made to questions in the application and that the answers were true, it was held that the quoted words did not modify the warranty and make the answers of the insured mere representations.²⁴⁸

(B) Practical Application of General Doctrine.—A warranty in an application stating that the applicant had never applied for insurance "which had not been issued" is not broken by the fact that a policy had been issued in another company but which had never been delivered, owing to a controversy between the company and its agent, it being held that the word "issued" did not include delivery.²⁵⁰ In a case where the representations in the application were made the basis of the contract and it was agreed the association would not be liable in case they were untrue, the certificate also, containing a provision of similar effect, it was

264—Warranties. (A) In General. (See 28 Cent. Dig. Insurance, §§ 558, 559, 562-566.)

246. An insurer which makes every statement in the application, whether material or otherwise, a warranty, is held to a very strict rule when endeavoring to avoid payment of the policy because of answers to inquiries or declarations which it has framed, and the inquiries or declarations must be so plain that any applicant can readily comprehend them, and, where any ambiguity exists, the construction most favorable to insured will obtain.—*Mutual Life Ins. Co. v. Ford*, 130 S. W. 769, writs of error denied. 131 S. W. 406.

247. Where the statements in an application for a life policy are made warranties, it is essential to the validity of the policy that the statements are true, without reference to the question of their materiality.—*National Life Ins. Co. v. Reppond*, 96 S. W. 778, judgment reversed *Reppond v. National Life Ins. Co.*, 101 S. W. 786, 11 L. R. A. 981.

248. An application for life insurance provided that the statements made by the insured in the application were warranted to be true, and "without suppression of any fact . . . which would tend to influence the company in issuing a policy" under the application, and stipulated that the insured warranted that he had reviewed all answers made to questions asked in

the application, and that the answers were true. Held, that the quoted words did not modify the warranty and make the answers of the insured mere representations.—*National Life Ins. Co. v. Reppond*, 96 S. W. 778, judgment reversed *Reppond v. National Life Ins. Co.* 101 S. W. 786, 11 L. R. A. 981.

249. In determining whether a stipulation in an application for life insurance that the statements made or to be made to the medical examiner are "warranted" to be full, complete, and true, and without suppression of any fact tending to influence the company in issuing a policy, is a warranty, the court must look to the policy, the application, and the report of the medical examiner; the use of the word "warranty" not necessarily creating a warranty in law. Judgment, *National Life Ins. Co. v. Reppond*, 96 S. W. 778, reversed.—*Reppond v. National Life Ins. Co.*, 101 S. W. 786, 11 L. R. A. 981.

250. A warranty, in an application for a life insurance, stating that the applicant had never applied for insurance "which had not been issued," is not broken by the fact that the applicant had applied to another company for insurance, and the company wrote out and sent to its representative a policy to be delivered to applicant, but which was never delivered, because of a controversy between the company and its agent, as the word "issued" does not include delivery.—*Kansas Mut. Life Ins. Co. v. Coalson*, 54 S. W. 388, 22 Tex. Civ. App. 64.

held that a statement in the application that the insured did not and had never used narcotics was a warranty, which if untrue, would avoid the policy, though such statement was made through mistake and in good faith.²⁵¹

(C) Distinction Between Warranties and Representations.—A warranty enters into and forms a part of the contract itself, defining the limits of the obligation beyond which no liability arises; a representation made before or at the time of the contract, presents the elements on which the risk to be assumed is to be estimated.²⁵³ Under a policy providing, as required by Article 4741 of the Revised Civil Statutes, that statements in the application, in the absence of fraud, should be representations and not warranties, a statement as to a material matter fraudulently made would be construed as a warranty.²⁵² Where there is a conflict between the policy and application immaterial misrepresentations cannot be construed as warranties and hence would not avoid the policy.²⁵⁴

(D) Fulfillment or Breach.—Answers in an application when operating as affirmative warranties need only be substantially true.²⁵⁵ In an early case it was held that a breach of warranty defeats a policy without reference to its materiality or bearing on the particular risk.²⁵⁷ And, even before this it was held that a warranty in an application of the truth of answers made to the medical examiner will not avoid the policy for untruth in the

^{251.} Representations in an application for a life certificate were made the basis of the contract of insurance, and it was agreed that the association would not be liable in case they were untrue. The certificate accepted by him contained a provision of similar effect. Held, that a statement in the application that the insured did not and never had used narcotics was a warranty, which, if untrue, would avoid the policy, though such statement was made through mistake, and in good faith.—*National Fraternity v. Karnes*, 60 S. W. 576.

²⁵²—**(B) Distinction Between Warranties and Representations.** (See 28 Cent. Dig. Insurance, § 560.)

^{253.} Under a policy providing, as required by Rev. St. 1911, Art. 4741, subd. 4, that statements in the application, in the absence of fraud, should be representations, and not warranties, a statement as to a material matter fraudulently made would be construed as a warranty.—*American Nat. Ins. Co. v. Anderson*, 179 S. W. 66.

^{254.} A "warranty" enters into and forms a part of the contract itself, defining the limits of the obligation beyond which no liability arises; a "rep-

resentation" made before or at the time of the contract, presents the elements on which the risk to be assumed is to be estimated.—*Id.*

^{254.} In view of the conflict between the policy and application, held, that immaterial misrepresentations could not be construed as warranties, and hence would not avoid the policy.—*Guarantee Life Ins. Co. v. Evert*, 178 S. W. 643.

²⁵⁷—**(C)—Fulfillment or Breach.** (See 28 Cent. Dig. Insurance, § 567.)

^{255.} Answers in an application for life insurance when operating as affirmative warranties need only be substantially true.—*Kansas City Life Ins. Co. v. Blackstone*, 143 S. W. 702.

^{256.} Where a life insurance policy provided that the representations and answers made in the application, which was made a part of the policy, were warranties, and the policy provided that the contract between the parties was completely set forth in the policy and the application therefor, taken together, and the policy contained what purported to be a copy of the application, alleged answers to questions not shown in the application copied in the policy were immaterial.—*Metropolitan Life Ins. Co. v. Gibbs*, 78 S. W. 398, 34 Tex. Civ. App. 131.

answers as "written" in the absence of express stipulations, or of suspicion or knowledge of the applicant that the answers are incorrectly written.²⁵⁸ In a case where the policy contained what purported to be a copy of the application, alleged answers to questions not shown in the application copied in the policy were immaterial.²⁵⁹

Warranties—Matters relating to Person Insured—(A) As to Health and Physical Condition of Applicant—(1) In General.—The Supreme Court has said that a false answer to a question constituting a warranty as to whether the applicant had ever had any of certain enumerated diseases will constitute a breach of the contract though such disease or ailment is not material to the risk, unless the same was not inherent but temporary, and due to extraordinary and exceptional outside causes.²⁶⁰ For example, the court may find an answer to be true where the applicant says he does not have headaches, though the evidence shows that when he is overworked he is subject to headaches.²⁷³ Where it appears that the disease was a trifling one, that the insured had been entirely cured and that his death was not attributed thereto, a policy will not be avoided.²⁶⁰ In a case where the applicant stated that he had had a certain ailment eighteen months before on one examination and two years before on a subsequent examination it was held that the parties did not contemplate that the statement should be literally true, in order that the contract should be a valid one and hence his statement was not treated as a warranty.²⁷⁶ An applicant is not bound to go into the nature of an ailment he may have had where the information is not required.²⁷⁴ It is only required that he answer the question literally so that when an ap-

257. A breach of warranty defeats a life policy without reference to its materiality or bearing on the particular risk.—*Pacific Mut. Life Ins. Co. v. Terry*, 84 S. W. 656.

258. A warranty in an application for insurance of the truth of answers made to the company's medical examiner will not avoid the policy for untruth in the answers as "written," in the absence of express stipulations, or of suspicion or knowledge of the applicant that the answers are incorrectly written.—*Equitable Life Assur. Soc. v. Hazlewood*, 12 S. W. 621.

291.—**Health and Physical Condition.** See 28 Cent. Dig. Insurance, §§ 681-690, 694-696.)

259. A false answer by an applicant for insurance to a question, constituting a warranty, as to whether he ever had any of certain enumerated diseases and ailments will constitute a breach of the contract, though such disease or ailment is not material to the risk, unless the same was not inherent but temporary, and due to extraordinary

and exceptional outside causes, such as excessive work or heat. 28 S. W. 837, reversed.—*Mutual Life Ins. Co. of New York v. Simpson*, 31 S. W. 501, 88 Tex. 333.

260. A Minnesota statute provided that no misrepresentations in the negotiation of a policy of insurance by the insured should be deemed material, or defeat or avoid the policy, unless made with actual intent to deceive or defraud, or unless the matter misrepresented increases the risk of loss. Held, that a representation by insured that he had never had any urinary disease, and had not personally consulted a physician for five years, whereas in fact he, not long before applying for his policy, had been afflicted with a urinary disease, and had been treated therefor by a physician, would not avoid his policy in a Minnesota company, as matter of law, where it appeared that the disease was a trifling one, and that insured had been entirely cured, and that his death was not attributable thereto.—*Northwestern Life Ass'n v. Findley*, 68 S. W. 695.

plicant was asked whether she had suffered "abortions," her answer "No," was not false where she had suffered but one abortion.²⁷⁰ (As to misstatement of insured's health being material to the risk, see Ann. 272, and as to such misstatement not being excused by his ignorance, see Ann. 273.)

(2) **As to Having Consulted a Physician.**—As a general rule, where the statements in the application are made warranties, the applicant must name all the physicians who have treated him within the time stated and must set out all the diseases and ailments which he has suffered; otherwise the policy will not be enforceable.^{261 262 263 264 265 266} It is immaterial that the applicant did not summon the physician, objected to his being sent for, and neglected to take his medicine.²⁶² It is, however, held material to the risk that the applicant does not name the right physician.^{263 264} In one case the Supreme Court held that where an application recited that the statements made by the applicant to the examiner were warranted to be complete and true, without suppression of any fact tending to influence the insurer in issuing the policy and should be the basis of the contract, the parties meant that applicant should in good faith answer truthfully and fully all the questions propounded to him, not intentionally suppress any fact, material to the risk, and the statements amounted to representations only, and the applicant's failure to name one of the physicians who at-

261. Where a life policy made the application a part thereof, and the answers contained therein warranties, false answers that insured had never consulted a physician, except in childbirth, and not for 10 years, and that she had never had liver disease, constituted a breach of warranty, voiding the policy, without regard to their materiality.—*Flippen v. State Life Ins. Co.*, 70 S. W. 787.

262. Where insured stated that she had never had a physician, except in childbirth, and it was proved that she was examined and treated by a certain doctor prior thereto, and that she permitted him to examine and prescribe for her, but neglected to take his medicine, it was immaterial that she did not summon the doctor, and objected to his being sent for.—*Flippen v. State Life Ins. Co.*, 70 S. W. 787.

263. Where a life insurance policy made the statements in the application warranties, and insured did not give the name of a physician who had treated him three years before for typhoid fever, but stated to the medical examiner that he had had malarial fever about three years before, for which he had been treated by a different physician, and had not had typhoid, there was a material misstatement, avoiding the policy.—*National Life Ins. Co. v. Reppond*, 81 S. W. 1012. See Cent. Dig. vol 28, cols. 1317-1321, §§ 691, 692.

264. An application for a life policy

made the statements therein warranties. Insured, in response to the question requiring him to give the names of the physicians who had treated him within five years, gave the name of only one physician. The application further stated that the insured had been affected with a disease within five years, which lasted a specified number of days, and was attended by the physician mentioned, while in fact he had been attended by another physician and that insured had had another disease and had been attended by the health physician of a city. Held insufficient to notify the insurer that any other physician than the one named and the health physician had attended the insured during the preceding five years, and the policy was not enforceable.—*National Life Ins. Co. v. Reppond*, 96 S. W. 778, judgment reversed, *Reppond v. National Life Ins. Co.*, 101 S. W. 786, 11 L. R. A. (N. S.) 981.

265. Where a life policy made the statements in the application warranties, and insured did not give the name of the physician who had treated him within five years when answering the question calling on him to give the name and address of each physician consulted during the past five years, there was a misstatement avoiding the policy.—*National Life Ins. Co. v. Reppond*, 96 S. W. 778, judgment reversed *Reppond v. National Life Ins. Co.*, 101 S. W. 786, 11 L. R. A. (N. S.) 981.

tended him within the preceding five years was not a breach of a warranty defeating the policy.²⁶⁶

(3) **As to Good Health of Applicant at the Time of Delivery of Policy.**—It is held a good defense to a suit on a policy that the insured is not in sound health at the time of delivery of such policy as required by its provisions.^{268 271} However, if the insured is given credit for the first premium before he became in bad health so as to operate as a constructive delivery of the policy, his subsequent illness would not defeat a recovery.²⁶⁷

(B) **As to Family History of the Applicant.**—Failure to include half-brothers and half-sisters in stating the number of brothers and sisters living and dead does not invalidate a policy.²⁸¹ Neither will the fact that the applicant included himself as one of the brothers in the family invalidate the policy.²⁸⁰ Where an applicant's statement as to the ages of his sisters constituted a warranty and it appeared that his statements were untrue the contract is not enforceable,²⁸² even though the statement of the ages were wrong but a few years.²⁷⁸ The failure of an applicant to name a brother who was born and died before he himself was born, does not con-

266. Where an application for life insurance recited that the statements made by applicant to the company's medical examiner were warranted to be complete and true, and without suppression of any fact tending to influence the company in issuing the policy, and that they should be the basis of the contract, the parties meant that applicant should in good faith answer truthfully and fully all the questions propounded to him, and not intentionally suppress any fact, material to the risk, and the statements amounted to representations only, and the applicant's failure to name one of the physicians who attended him within the preceding five years was not a breach of a warranty defeating the policy. *Judgment, National Life Ins. Co. v. Reppond*, 96 S. W. 778, reversed.—*Respond v. National Life Ins. Co.*, 101 S. W. 786, 11 L. R. A. (N. S.) 981.

267.—If insured was given credit for the first premium before he became in bad health, so as to operate as a constructive delivery of the policy, his subsequent illness would not defeat a recovery on the policy.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

268. Where a life insurance policy by its terms was not to take effect as an obligation of the insurer unless the insured was in good health at the time of its delivery, and the insured was at that time affected with a mortal disease, which subsequently produced his death, the insurer incurred no liability under the policy.—*Metropolitan Life Ins. Co. v. Betz*, 99 S. W. 1140. See 28 *Cent. Dig. Insurance*, §§ 681-690, 694-696.

269. In an action for life insurance, the validity of which was governed by the laws of Pennsylvania, based on an application which warranted the truth of answers therein that the applicant had last consulted or been prescribed for by a physician about three years before, and had not consulted or been prescribed for by any other physician for 10 years, where the undisputed evidence showed that about two years before another physician treated him once, and prescribed again for an attack of catarrhal bronchitis, and a third physician treated him for about a month, found him emaciated, coughing freely, and confined to his bed, and considered him not sound physically, there could be no recovery, though a statute of such state provides that only untrue statements material to the risk shall forfeit a policy or be ground for defense, since such false answers were material to the risk, and hence avoided the contract.—*Fidelity Mut. Life Ass'n v. Harris*, 57 S. W. 635.

270. Applicant for life insurance having suffered but one abortion, her answer "No" to the question whether she had suffered "abortions" was not false.—*Mutual Life Ins. Co. of New York v. Crenshaw*, 116 S. W. 375. See 28 *Cent. Dig. Insurance*, §§ 681-690, 694-696.

271. That insured was not in sound health at time of delivery of a life insurance policy as required by its provisions held a good defense to suit thereon.—*American Nat. Ins. Co. v. Anderson*, 179 S. W. 66.

stitute a breach of warranty.²⁷⁷ (As to statement of applicant being substantially false so as to forfeit policy, see Ann. 279.)

(C) **As to Residence.**—In one case it was held that the statement of applicant that he was born at a certain town was substantially true when he was in fact born seven miles from such town.²⁸³ This view was ascertained from the form of the printed application. In another case where the application warranted the literal truth of the statements therein and made them a part of the policy, a statement that the insured resided at a certain town, when he in fact resided in the country twelve miles from there, avoided the contract.²⁸⁴ (As to statement of applicant being held substantially false so as to avoid policy, see Ann. 285.)

(D) **As to Occupation.**—The fact that applicant stated that he

272. Misstatement as to insured's health made in his application held material to the risk.—Id.

273. Misstatement as to insured's health made in his application held under Rev. St. 1911, Art. 4751, subd. 4, and Article 1947, not excused by his ignorance.—Id.

274. An applicant for life insurance who, in answer to a question whether he had ever had an illness, stated that he had had throat trouble, was not bound to state more particularly the nature of the trouble, no further question being asked.—*Mutual Reserve Fund Life Ass'n v. Sullivan*, 29 S. W. 190.

275. Where an applicant for insurance is asked whether he has headache, and answers "No," a finding by the court that his answer was true, though when overworked he was subject to headaches, is proper.—*Mutual Life Ins. Co. of New York v. Simpson*, 28 S. W. 837.

276. An application for insurance provided that all statements made therein were material, and, if any untrue statement was made, the insurance should be void. The assured, in answer to a question, stated that he had been treated for biliousness 18 months previous thereto. On a subsequent examination he stated that it was "about two years ago." Held, that the parties did not contemplate that the statement should be literally true, in order that the contract should be a valid one, and hence it should not be treated as a warranty.—*Provident Sav. Life Assur. Soc. of New York v. Oliver*, 53 S. W. 594, 22 Tex. Civ. App. 8.

283.—Family History. (See 28 Cent. Dig. Insurance, § 693.)

277. Where an application for insurance contains, under a heading "Family Record of the Applicant," a tabulated form to be filled out, containing a column for brothers, "living" and "dead," a failure of the applicant to state, in the "dead" column, the name

of a brother who was born and died before he was himself born, and of whom he had no knowledge, is not a breach of warranty.—*Mutual Life Ins. Co. of New York v. Baker*, 31 S. W. 1072, 10 Tex. Civ. App. 515.

278. An application for life insurance recited that the applicant agreed that his statements to the medical examiner were true, and were offered to the company as a consideration of the contract. The policy stipulated that the insurance was granted in consideration of the statements and agreements in the application, "which are made a part of the contract." The applicant stated to the medical examiner that he had five sisters, aged, respectively, 52, 50, 47, 45 and 36 years, but their ages were in fact, respectively, 49, 46, 44, 36, and 33 years. Held, that the provisions of the policy constituted a warranty of the truth of the statements in the application, and that the discrepancy forfeited the contract.—*Kansas Mut. Life Ins. Co. v. Pinson*, 63 S. W. 531, 94 Tex. 553.

279. A statement by an applicant for a life insurance policy as to his family history held substantially false, so as to justify forfeiting the policy.—*Kansas City Life Ins. Co. v. Blackstone*, 143 S. W. 702. See 28 Cent. Dig. Insurance, § 693.

280. Where, as a part of the family history, application called for number of brothers, answer which apparently included the applicant as one of the brothers in the family held not to invalidate the policy.—*Blackstone v. Kansas City Life Ins. Co.*, 174 S. W. 821.

281. Failure of applicant for life insurance to include half-brothers and half-sisters in stating number of brothers and sisters living and dead, held not to invalidate the policy.—Id.

282. Where an applicant's statement as to the ages of his sisters constituted a warranty by the contract of insurance, and it appears that such statements are untrue, the insurance is not enforceable.—*Kansas Mut. Life Ins. Co. v. Pinson*, 64 S. W. 818.

had never been engaged in or connected with the manufacture of liquors did not invalidate the policy, though, when a boy he had worked about his father's still.²⁸⁶ (As to statement being held substantially false so as to forfeit policy, see Ann. 287.)

(E) **As to Habits.**—The word "use" in a question to an applicant, "Do you use liquors?" is held to mean habit, practice or custom.²⁸⁹ Therefore, a negative answer was not false because the applicant had drunk liquor, however slight the use.²⁸⁹ Where the instruction and form of questions in the application indicated that the information sought was the applicant's habit or practice and the applicant stated that he took a drink once a month, proof of occasional excesses did not show a breach of the warranty.²⁸⁸

(F) **As to Other Existing Insurance.**—Under the rules that the language of the application would be strictly construed against the insurer and where the words admit of two constructions the one most favorable to the insured would be used to prevent a forfeiture, where there was room in a policy to conclude from the question in the application as to other insurance that fraternal and accident insurance were not intended to be included, the applicant's

285—Residence. (See 28 Cent. Dig. Insurance, § 673.)

283. In view of form of printed application for insurance, statement that applicant was born and resided at B. held substantially true, though he was born and resided seven miles from B. on a farm.—*Blackstone v. Kansas City Life Ins. Co.*, 174 S. W. 821.

284. In an application for insurance warranting the literal truth of the statements therein, and made a part of the policy, which provided for forfeiture for breach of warranty, a statement that the insured resided at K., when he in fact resided in the country 12 miles from K., will avoid the contract.—*Hutchison v. Hartford Life & Annuity Ins. Co.*, 39 S. W. 325.

285. A statement by an applicant for a life insurance as to his place of birth and residence, held substantially false so as to justify forfeiting the policy.—*Kansas City Life Ins. Co. v. Blackstone*, 143 S. W. 702. See 28 Cent. Dig. Insurance, § 673.

286—Occupation. (See 28 Cent. Dig. Insurance, § 674.)

288. Representation that applicant had never been engaged in, or connected with, manufacture of liquors held not to invalidate policy, though, when a boy, he had worked about his father's still.—*Blackstone v. Kansas City Life Ins. Co.*, 174 S. W. 821.

287. A statement by an applicant for a life insurance as to occupation held substantially false so as to justify forfeiting the policy.—*Kansas City Life Ins. Co. v. Blackstone*, 143 S. W. 702. See 28 Cent. Dig. Insurance, § 674.

287—Habits. (See 28 Cent. Dig. Insurance, § 676.)

288. In an application for a life policy, insured was asked as to what was his "practice" as regarded the use of liquor, and whether he had ever been a "free drinker," and if so, to what degree, and whether he had ever had delirium tremens; and the answers were made warranties. The company's instructions to its medical examiner stated that, in reporting over indulgence in drink, he should draw the line at a limit of a daily allowance equivalent to 1 1/2 ounces of absolute alcohol. Held, that the instruction and form of the questions indicated that the information sought was the applicant's habit or practice in the respect inquired about, and hence, an applicant having stated that he took a drink once a month, proof of occasional excesses did not show a breach of the warranty.—*Equitable Life Assur. Soc. v. Liddell*, 74 S. W. 87.

289. The word "use" in a question to an applicant for life insurance, "Do you use liquors?" means habit, practice, or custom, and a negative answer was not false because the applicant had drunk liquor, however slight the use.—*Pacific Mut. Life Ins. Co. v. Terry*, 84 S. W. 656.

290. Where in answer to a question, "Do you ever drink wine?" etc., the applicant answered "Not at all," a finding that the answer was true is warranted by the evidence that he occasionally drank to excess, though he did not drink habitually.—*Mutual Life Ins. Co. of New York v. Simpson*, 28 S. W. 837. Reversed 31 S. W. 501.

failure to include them would not forfeit the policy.^{291 292 293} Where the application stated that insured had a policy in another company called the "Mutual Reserve," evidence that he had a policy in the "Mutual Reserve Fund Life Association," which was void because the premium had not been paid, did not show breach of warranty in the absence of allegation or proof that the latter company was the same mentioned in the application.²⁹⁴

FORFEITURES OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION PRECEDENT

Grounds for Forfeiture—(A) In General—Notice and Proceedings to Give Effect.—Time is of the essence of the contract when a policy provides that it shall be forfeited for non-payment of premiums before a stipulated date, and the failure to so pay terminates the policy ipso facto.²⁹⁵ Failure to pay a premium note at

301—Other Existing Insurance.

291. An application of an old line insurance company requested information as to other insurance carried by the applicant, and made his answer thereto a warranty. He answered that he had been accepted for insurance in the same company for \$1000 10-payment income policy, and was insured in other companies and associations as follows: "\$5,000 Equitable of New York and in no others." Held, that under the rule that the language of the application would be strictly construed against the insurance company, and, when the words admitted of two constructions, the one most favorable to the insured would be used to prevent a forfeiture, insured was entitled to assume that the question only called for other insurance in companies of a like kind as that to which the application was to be made, and that there was therefore no breach of warranty in his failure to disclose an accident policy and certificate in fraternal assessment orders and local societies.—*Mutual Life Ins. Co. v. Ford*, 131 S. W. 406, denying writs of error 130 S. W. 769. See 28 Cent. Dig. Insurance, §§ 660-669.

292. Where there was no room for insured in a life policy to conclude from the question in the application for insurance as to other insurance that fraternal and accident insurance were not intended to be included, his failure to include them vitiated the policy, but where he could reasonably conclude that such insurance was not intended, the omission did not render the contract void.—*Mutual Life Ins. Co. v. Ford*, 130 S. W. 769, writs of error denied 131 S. W. 406.

293. Where an application for a life policy in a regular insurance company contained the printed statement, "I have been accepted for insurance under

the following policies in this company," and the statement, "I am insured in other companies and associations as follows," the insured properly concluded that the information called for was insurance in regular insurance companies, and not insurance in fraternal orders, and accident insurance and his failure to disclose his fraternal and accident insurance did not vitiate the policy making the answers warranties.—*Id.* See 28 Cent. Dig. Insurance, § 680.

294. Where an application for life insurance stated that assured held a policy in another company, called the "Mutual Reserve," evidence that assured had a policy in the "Mutual Reserve Fund Life Association," which was void because the premium had not been paid, did not show breach of warranty, in absence of allegation or proof that the latter company was the same mentioned in the application.—*Kansas Mut. Life Ins. Co. v. Coalson*, 54 S. W. 388, 22 Tex. Civ. App. 64.

FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WAR- RANTY, COVENANT, OR CON- DITION PRECEDENT. (SEE 25 CYC. 821.)

310—(A) Grounds in General—Notice and Proceedings to Give Effect to Forfeiture. (See 28 Cent. Dig. Insurance, §§ 703, 761, 780, 826, 840, 904.)

295. When an insurance policy provides that it shall be forfeited for non-payment of premiums before a stipulated date, time is of the essence of the contract and the failure to so pay terminates it ipso facto.—*Equitable Life Assur. Society of United States v. Ellis*, 147 S. W. 1152, affirming judgment 137 S. W. 184.

maturity forfeits a policy and no action on the part of the insurer is necessary to declare such forfeiture where the insurer's receipt and premium note so provide.²⁹⁶

(B) Assignment of Policy.—Where the insurer waives the requirements of a policy as to the form of an assignment by insured to secure a debt, no one else can attack the form.²⁹⁷

(C) Non-Payment of Premium or Assessment—(1) In General.—Failure to pay the premium when due ordinarily forfeits the policy.³⁰⁰ Where thirty days grace is allowed on a policy which provides that the annual premium must be paid by five o'clock on a certain day or else it is forfeited, such a policy remains in force until midnight of the last day of grace, there being no limitation in the clause allowing grace requiring the insured to pay the premium by five o'clock of any particular day.³⁰⁷ In a case where the assignee did not pay the last premium due because of the insurer's failure to present the receipt for payment in accordance with its custom, his failure to discover the non-payment for some years, the insured being still alive and the policy being merely filed away, does not bar him on the ground of laches.³⁰⁹ To prevent forfeiture of a policy which provides that unless the premium is paid each year at the proper date the liability of the company terminated, a tender of such premium must be repeated as often as under the terms of the policy it is due.³¹⁰ Where the policy provides for a six months grace preceding the death of the insured, the failure of the insured who had been a policy holder for over five years to pay an assessment within thirty days as provided in

^{296.} Under the provisions of insurer's receipt and of a note given to extend a policy until default in payment of the note when all rights thereunder should cease and the policy be ipso facto null and void, failure to pay the note at maturity forfeited the policy, and no action on the part of the insurer was required to declare such forfeiture.—*Security Life & Annuity Co. of America v. Underwood*, 150 S. W. 293.

(D) Assignment of Policy. (See 28 Cent. Dig. Insurance, §§ 883-889.)

^{297.} Insurer having waived the requirements of a life policy as to the form of an assignment of the policy by insured to secure a debt, no one else could attack the form.—*Clark v. Southwestern Life Ins. Co.*, 113 S. W. 335. See 28 Cent. Dig. Insurance, § 887.

(E) Nonpayment of Premiums or Assessments.

349—Default as Ground of Forfeiture in General. (See 28 Cent. Dig. Insurance, §§ 891, 895-902, 913.)

^{298.} Under a life policy: providing that failure to pay, when due, "any

moneys required to be paid," shall render the policy void, and a premium note executed at the same time reciting that, if not paid at maturity, the policy shall become void, failure to pay works an absolute forfeiture.—*Laughlin v. Fidelity Mut. Life Ass'n*, 28 S. W. 411.

^{299.} A failure to pay the premium note due on an insurance policy, which provides that a failure to pay the premium notes when due shall render the policy null and void, without notice to the parties interested or other action on the part of the company, will render the policy void without any formal cancellation of the policy.—*Union Cent. Life Ins. Co. v. Chowning*, 23 S. W. 117.

^{300.} A failure to pay a premium when due held to forfeit a policy.—*Equitable Life Assur. Society of United States v. Ellis*, 137 S. W. 184, judgment affirmed, 147 S. W. 1152. See 28 Cent. Dig. Insurance, §§ 891, 895, 913.

^{301.} Under a life policy providing that failure to pay a premium note shall render the policy void, failure to pay a premium note, the receipt for which contained a similar provision, avoided the policy.—*National Life Ins. Co. v. Reppond*, 81 S. W. 1012.

the policy, would forfeit such policy in case his death did not occur within six months thereof.³⁰⁶

(2) **By Default in Payment of Note.**—In general the non-payment of a note executed for the first premium will defeat recovery on the policy where the payment of the note is a condition precedent to the life thereof.³⁰⁸ It is held that a provision in an extension note, given for a premium due, and in the insurer's receipt, for forfeiture on account of default in payment is valid and enforceable,^{298 299 301 302 303 304 305} and such forfeiture can be without notice.²⁹⁹ Of course, the forfeiture may be waived.³⁰³

302. Where a premium note provided that, if it was unpaid at maturity, the policy should cease, and the whole amount of the note should be collectible without restoration of the policy, except that, if the note was collected after maturity, and satisfactory evidence of good health was furnished, the policy might be restored, insured's failure to pay the note at maturity was a termination of the insurance in the absence of waiver.—*National Life Ins. Co. v. Manning*, 86 S. W. 618.

303. Where a life policy provides that failure to pay premium notes shall render the policy void, the failure to pay a premium note, receipt for which contains a similar provision, avoids the policy, unless waived.—*National Life Ins. Co. v. Reppond*, 96 S. W. 778, judgment reversed *Reppond v. National Life Ins. Co.*, 101 S. W. 786, 11 L. R. A. 981. See 28 Cent. Dig. Insurance, §§ 891-904.

304. A provision in an extension note, given for premium due, and in the insurers receipt, for forfeiture on account of a default in payment, is valid and enforceable.—*Security Life & Annuity Co. of America v. Underwood*, 150 S. W. 293.

305. Under provisions of a policy and of an extension note, held, that policy was avoided by a default in the payment of an extension note.—*Id.*

306. A life policy provided that after it had been in operation 5 years it should be payable to the beneficiary on the death of the insured, though the latter had omitted to pay any assessments for a period not exceeding 6 months before his death and also that the assessments on the policy should be payable within 30 days after the date of the assessment, and that a failure to pay such assessment during such time would forfeit the policy. Held, that the failure of insured who had been a policy holder over 5 years, to pay an assessment within 30 days, would forfeit the policy in case his death did not occur within 6 months thereof, since the 6-months grace was only allowed in case of death.—*Mut-Reserve Fund Life Ass'n v. Lovenberg*, 59 S. W. 314.

307. Where an insurance policy provided for an annual premium to be paid at or before 5 o'clock p. m. on the 1st day of October, but did not expressly provide that a failure to so pay would work a forfeiture, and where both in the policy and in the notice indorsed on the premium receipt were clauses to the effect that, should any subsequent premium be not paid when due, the policy would determine, except that 30 days grace during which the policy would be in force would be allowed for the payment of any premium after the first, the policy remained in force until midnight of the last day of grace, and payment of the premium could be made at any time in the period embraced within the 30 days of grace, there being no limitation, in the clauses allowing grace requiring the assured to pay the premium at or before 5 o'clock of any particular day.—*Aetna Life Ins. Co. v. Wimberly*, 108 S. W. 778, judgment reversed 112 S. W. 1038, 102 Tex. 46. See 28 Cent. Dig. Insurance, §§ 891, 895-902, 913.

308. The nonpayment of a note executed for the first premium of a life insurance policy, the payment of which note is, under the policy, a condition precedent to the life thereof, will defeat recovery thereon.—*Union Cent. Life Ins. Co. v. Hughes*, 70 S. W. 1010.

309. Where the assignee of an insurance policy did not pay the last premium due because of the insurer's failure to present the receipt for payment in accordance with its custom, the assignee's failure to discover the nonpayment for some years, it appearing that the insured was still alive, and the policy had been merely filed away, does not bar him on the ground of laches.—*Mutual Life Ins. Co. of New York v. Davis*, 154 S. W. 1184. See 28 Cent. Dig. Insurance, §§ 891, 895-902, 913.

310. Where a policy provided that unless the premium was paid each year at the proper date, the liability of the company terminated and in 1862 the insured tendered premium to the company's agent and again in 1865, at both of which times the tender was refused, no further tenders being

Statutory Provisions Against Forfeiture.—It is held that a statute of New York or any other state in regard to notice before forfeiture will not apply where the policy holder resides in Texas, even though the premiums and policy itself are payable in the foreign state.³¹¹ Under the old law which prohibited forfeiture without notice for default it was held that it applied to semi-annual as well as annual premiums.³¹² It was further held that a statute changing the law as to requirement of notice before forfeiture for default, as it existed under a previous statute, could not affect a policy issued while the previous statute was in force unless such policy by its terms expired at the end of each year unless the premium for the following year was paid.³¹³

Notice of Time for Payment—(A) In General.—Notice of time for payment of the premium is not required under the statute of this state but it was required under the statutes of 1876, 1892, and 1899 of the State of New York before the policy could be forfeited for non-payment. Under Article 4950 of the Revised Civil Statutes of 1914, all policies payable to any citizen of Texas are governed by the laws of Texas. In general, the statute of the state where the policy is issued requiring notice before forfeiture for default in the payment of premium, which is in force at the time of the issuance of the policy becomes part of the policy.³¹⁷ The receipt of such notice by the insured is not necessary to its sufficiency.³¹⁸ Nor is it necessary that the full middle name of the insured, as given in the application, be contained in the address of the notice.³¹⁴ A notice sent fifteen days before the premium is

made up until the suit was brought in 1872 when insured offered to deduct premiums since 1862, it was held that the forfeiture of the policy was not prevented by the tenders but transferred through failure to pay accruing and accrued premiums since the tenders. To have prevented a forfeiture the tender should have been repeated as often as under the terms of the policy the premium was due.—*Manhattan Life Ins. Co. v. LePert*, 52 Tex. 504.

350—Statutory Provisions.

311. A statute of New York, providing that no life insurance corporation doing business in that state shall declare a policy forfeited or lapsed within one year from the failure to pay a premium, unless a notice stating the amount of the premium, etc., shall have been duly addressed and mailed to the last known post office address "in this state" of the insured, applies only to contracts made in New York with persons having a known post office address therein, and cannot therefore, be applied where the insured lives in Texas, and the policy is delivered there, though the premiums and policy itself are payable in New York. Judgment 79 S. W. 367, reversed.—
24—Ins.

Metropolitan Life Ins. Co. v. Bradley, 82 S. W. 1031, 98 Tex. 230. See 28 Cent. Dig. vol. 28, cols. 1572-1574, §§ 892, 893.

312. Laws 1876, ch. 341, § 1, which forbids the forfeiture of any insurance policy by reason of the nonpayment of "any annual premium or interest, or any portion thereof," without notice to insured, applies as well to policies providing for the payment of semi-annual premiums.—*Germania Life Ins. Co. v. Peetz*, 47 S. W. 687.

313. A statute changing the law as to requirement of notice to an insured as a condition precedent to the forfeiture of the policy for nonpayment of premiums, as it existed under a previous statute, cannot affect a policy issued while the previous statute was in force unless the policy by its terms expired at the end of each year unless the premium for the next year was paid.—*Germania Life Ins. Co. v. Peetz*, 47 S. W. 687.

352—Notice of Time for Payment. (See 28 Cent. Dig. Insurance, §§ 905-913, 1032, 1033.)

314. Under the New York statute prohibiting forfeitures of life policies for nonpayment of premiums unless written notice shall have been duly

due is not sufficient where the statute of the foreign state where the policy is issued requires thirty.³¹⁵ Nor will the fact that the insured paid part of the premium by his note withdraw the policy from the operation of the New York statute.³¹⁶ A clause in the policy requiring the premium to be paid at the insurer's office in New York is waived where such insurer for a long time notifies the insured to pay the premiums at a certain Texas bank.³¹⁹ Where premium notes were not paid and they contained a provision that if they were not paid all benefits were forfeited under the policy, and no notice was given of their maturity it was held that the beneficiary could recover since the acceptance of the notes and cash constituted a renewal of the policy which could not be lapsed without notice to the insured of the time when the notes became due, under the New York law requiring notice before forfeiture for default.³²¹ It was also held in the same case that the renewal of the policy by giving the notes and cash did not change it to a term policy and hence would not relieve it from the operation of the statute requiring notice before forfeiture, term policies of one year or less being excepted.³²⁰

addressed to the insured, a notice, directed to insured, giving only the initial of his middle name, instead of the full name, which was given in his application, was sufficient, in the absence of evidence that there was any other person of a similar name in the city in which insured lived.—*Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404. See Cent. Dig. vol. 28, cols. 1593-1597, §§ 908-911.

315. Though a policy of life insurance was issued by a New York company to a citizen of Texas, containing a provision to the effect that, if any of the premiums were not paid when due, the policy would become void, and that notice that each premium would be due at the date named in the policy was given by the policy, and that any other notice required by any statute was thereby expressly waived, the statute of New York enacted in 1876 (requiring notice to be mailed to the assured at least 30 days before the premium was due, in order to cause a forfeiture) applied, and a notice sent 15 days before the premium was due was insufficient.—*New York Life Ins. Co. v. Smith*, 41 S. W. 680.

316. The transaction whereby assured paid the company part cash, and gave his note for the balance of the premium, did not withdraw the policy from the operation of the statute of 1876.—*New York Life Ins. v. Smith*, 41 S. W. 680.

317. A statute of the state where an insurance policy is issued, requiring notice to the insured as a condition precedent to the forfeiture of the policy for nonpayment of the premiums, which is in force at the time of the

issuance of the policy, becomes part of the policy.—*Germania Life Ins. Co. v. Peetz*, 47 S. W. 687.

318. Under laws N. Y. 1892, ch. 690, § 92, providing that no life insurance company can declare forfeiture of a policy for nonpayment of a premium, unless a notice requiring payment thereof is duly addressed and mailed by the company to the insured at his last known post office address, the receipt of such notice by the insured is not essential to its sufficiency.—*New York Life Ins. Co. v. Scott*, 57 S. W. 677, 23 Tex. Civ. App. 541.

319. Where an insurance company, for a long time, notifies the insured to pay the premiums at a certain Texas bank, a clause in the policy requiring all premiums to be paid at the company's office in New York City is waived.—*Manhattan Life Ins. Co. v. Fields*, 26 S. W. 280.

320. Laws N. Y. 1892, ch. 690, § 92, prohibits any life policy not issued on monthly or weekly payments, or being a term policy of one year or less, from being declared forfeited or lapsed for nonpayment of premiums, unless notice is given at least 15 days before it is payable. A life policy provided that it should be governed by the laws of New York, and it was regularly declared lapsed for failure to pay a premium, but was afterwards reinstated on a payment of a part of the premiums and the execution of notes for the balance, which contained a provision that all benefits should be forfeited if the notes were not paid at maturity. The notes were not paid when due, but notice of their maturity was not given to the insured, and he

(B) **Necessity.**—Where it has been the custom of the insurer to make demands for premiums a policy which had been assigned to a creditor of insured cannot be forfeited for non-payment of the last premium where no demand had been made by the insurer.³²² It has been held that a provision in a policy contemplating the mailing of notices of accruing premiums but which does not prescribe the consequences of a failure to give such notice, does not operate to continue the policy in force indefinitely or for another year, in case of such failure.³²³ At most it entitled the insured to a reasonable time after the day fixed by the policy in which to pay the premium.³²³ The policy cannot be enforced for failure to give such notice where the premium was repeatedly demanded of the insured by the agent and the insured died without paying.³²³ A policy issued under the laws of New York must follow the statute of that state as regards the verbiage of its notice,³²⁴ and must

afterwards tendered the amount of the notes and future payments, which were refused by the company. Held, that such renewal contract did not change the policy to a term policy, and hence it was not relieved from the operation of the statute.—*New York Life Ins. Co. v. Orlopp*, 61 S. W. 336, 25 Tex. Civ. App. 284.

321. Laws N. Y. 1892, ch. 690, § 92, prohibits any life policy not issued on monthly or weekly payments, or being a term policy of one year or less, from being declared forfeited or lapsed for nonpayment of premiums, unless notice is given at least 15 days before it is payable. A life policy provided that it should be governed by the laws of New York, and it was regularly declared lapsed for failure to pay a premium, but was afterwards reinstated on a payment of a part of the premium and the execution of notes for the balance, which contained a provision that all benefits should be forfeited if the notes were not paid at maturity. The notes were not paid when due, but notice of their maturity was not given to the insured, and he afterwards tendered the amount of the notes and future premiums, which was refused by the company. There was no evidence of the construction placed on the statute by the New York courts. Held, that the beneficiary could recover on the policy, since the acceptance of the notes and cash constituted a renewal of the policy, which could not be lapsed without notice to insured of the time when the notes became due.—*New York Life Ins. Co. v. Orlopp*, 61 S. W. 336, 25 Tex. Civ. App. 284.

322. In an action on a life policy issued on the lives of, and to, plaintiff and his wife, it appeared that the laws of the state where defendant was located provided that no policy should be forfeited for nonpayment of premiums, unless a notice in writing,

stating the amount due, should have been mailed by the company to insured, and that such a notice had been mailed by defendant, addressed to plaintiff and his wife jointly, and received by plaintiff. Held, that plaintiff could not avail himself of his failure to deliver the notice to his wife, or to inform her of its receipt, and claim that the policy was not forfeited because she had not received notice.—*Mullen v. Mutual Life Ins. Co.*, 32 S. W. 911, reversed 34 S. W. 605.

353—(A) **Necessity.** (See 28 Cent. Dig. Insurance, §§ 905-907, 1032, 1033.)

323. A provision of a life insurance policy contemplating the mailing of notices of accruing premiums to the assured, but not prescribing the consequences of a failure to give such notice, does not operate to continue the policy in force indefinitely or for another year, in case of such failure, but, at most, entitles the insured to a reasonable time after the day fixed by the policy in which to pay the premium; and the policy cannot be enforced for failure to give such notice where the premium was repeatedly demanded of the insured by the collecting agent and insured died without paying or tendering it.—*Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404.

324. Under a New York statute prohibiting a life insurance company from declaring a forfeiture of a policy for nonpayment of the premium when due, unless a notice has been mailed to the insured, stating, among other things, that if the premium is not paid at maturity "the policy and all payments thereon will become forfeited and void, except as to the right to the surrender value or paid-up policy," as provided in the statute, a notice merely declaring that if the pre-

refer to the insured's right to surrender value or paid-up policy, otherwise the notice is insufficient to authorize a forfeiture.³²⁴ When a note is given for the premium the same statutory notice under the laws of New York must be given and given at the same time previous to its maturity as for the regular premium.³²⁵ The insurer must give notice of the time of maturity of a premium as fixed by an agreement for an extension thereof,³²⁶ under the New York statute. Even though the New York statute provides that the notice shall be mailed to the last known postoffice address of the insured "in this state," meaning New York, a policy issued by a New York company to a resident of Texas could not be forfeited unless the notice was mailed the insured at his last known address in Texas, though the policy provided that the policy was governed by the laws of New York.³²⁷

Extension of Time of Payment—(A) In General.—It was held that evidence that premium receipts were sent to the collecting agents with instructions to present them until paid, until they were recalled by the insurer and the day before the insured's death they were recalled, after having been presented and not paid, did not tend to show that an extension of the time of payment had been applied for by the insured or given, under a rule of the insurer providing for a thirty days extension on application, nor that the agents had power to grant an extension.³²⁸

mium is not paid at maturity "the policy lapses," without referring to insured's right to surrender value or paid-up policy, was insufficient to authorize a forfeiture.—*Security, Trust & Life Ins. Co. v. Hallum*, 73 S. W. 554.

325. Laws N. Y. 1897, ch. 218, § 92, prohibits any life policy not issued on monthly or weekly payments, except term policies for one year or less, from being declared forfeited or lapsed for nonpayment of premiums within one year of the maturity thereof, unless notice is given at least 15 days before the premium is payable. A premium on a life policy which provided that it should be governed by the laws of New York was partly paid in cash, and the balance was included in a note accepted by the company, payable in six months, without grace, which provided that all claims to further insurance should be forfeited if the note was not paid when due. Held, that the statute, which was to be liberally construed, required 15 days' notice of the maturity of the note, and that an attempted forfeiture of the policy for nonpayment, in the absence of such notice, was ineffectual.—*New York Life Ins. Co. v. English*, 67 S. W. 884, 95 Tex. 391.

326. Under the statute, the company is required to give notice of the time of maturity of a premium as fixed by an agreement for an extension thereof.

—*Washington Life Ins. Co. v. Berwald*, 72 S. W. 436.

327. A statute of New York provided that no life insurance company doing business in the state should, within one year after default in the payment of any premium, declare forfeited or lapsed any policy thereafter issued or renewed, unless a written or printed notice had been duly addressed and mailed to the insured at his last known post office address "in this state." A life policy issued by a New York company to a resident in Texas provided that it should be governed by the laws of New York. Held, that the company could not declare the policy forfeited unless notice of the premium had been mailed the insured at his last known address in Texas.—*Washington Life Ins. Co. v. Berwald*, 72 S. W. 436.

328. Owing to the custom of the insurer to make demand for premiums, an insurance policy, which was assigned to the insured's creditor, cannot be forfeited for nonpayment of the tenth and last premium, where a demand was not made by the insurer.—*Mutual Life Ins. Co. of New York v. Davis*, 154 S. W. 1184. See 28 Cent. Dig. Insurance, §§ 905, 1032, 1033.

329—Extension of Time for Payment.

329. Evidence that premium receipts were sent to the collecting agents of an insurance company, with instructions to present the same for pay-

(B) By Agent or Broker.—Although a provision in a policy that only the three executive officers should have power to waive forfeitures or make agreements for the extension of premiums, if the insurer actually authorizes some other officer or agent to extend a premium it will be bound by his act in doing so.³³¹ A cashier of the insurer was held authorized to extend the time of the payment of the annual premium.³³² An extension of the time of payment was not shown by the fact that the collector of the insurer called on insured for the premium after it was due, and, on being told the insured was out but had the money to pay the premium, refused to wait and said he would call again.³³³

Sufficiency of Payment or Tender to Prevent Forfeiture—(A) In General.—Where an agent accepts, in payment of an overdue premium, cash and notes, if the company did not authorize such act it was its duty to repudiate it.³³⁵ If it retains the cash and notes it will be held to have ratified the act of the agent.³³⁵ A tender to a bank designated by the insurer, even though the bank is insolvent, will prevent a forfeiture, unless the insurer has notified the insured to cease paying at such bank.³³⁴ Where an insured gave his note for the whole second annual premium exercising his right under the policy to make his payments either annually semi-annually or quarterly, payments made on the note after maturity could not be treated as quarterly payments for the purpose of keeping the policy in force for a part of the year.³³³ In this same case, where the note,

ment, and, if not paid, to hold them and present them from time to time, until recalled by the company, and that they were so presented, and not paid, and were returned in response to a direction of the company the day before insured's death, did not tend to show that an extension of the time of payment had been applied for by insured, or given, under a rule of the company providing for a 30-days extension on application, nor that the agents had power to grant an extension.—*Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404.

335—(A) By Agent or Broker.

330. The fact that the collector of a life insurance company called on insured for the premium after it was due, and, on being told that insured was out, but had the money to pay the premium, refused to wait, and said he would call again, did not tend to show an extension of time of payment.—*Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404.

331. Notwithstanding a provision in a life policy that only the president, vice president, or secretary shall have power to waive forfeitures or make agreements for the extension of premiums, if the company actually authorizes some other officer or agent to

extend a premium, it will be bound by his act in doing so.—*Washington Life Ins. Co. v. Berwald*, 72 S. W. 436.

332. A cashier of an insurance company held authorized to extend the time for the payment of an annual premium on a policy.—*Equitable Life Assur. Society of United States v. Ellis*, 137 S. W. 184, judgment affirmed 147 S. W. 1152. See 28 Cent. Dig. Insurance, §§ 915, 1034.

330—Sufficiency of Payment or Tender to Prevent Forfeiture—In General.
(See 28 Cent. Dig. Insurance, §§ 913, 916-923, 924.)

333. A life insurance policy provided that the premiums might be paid annually, semiannually, or quarterly, at insured's option, and specified the amounts to be paid in each instance. Held that, insured having given his note for the whole second annual premium, he exercised his option to pay that premium annually, so that payments made on the note after maturity could not be treated as quarterly payments for the purpose of keeping the policy in force for a part of the year.—*National Life Ins. Co. v. Manning*, 86 S. W. 618.

334. A tender of a premium to the bank, where insured had been notified to pay it, on the day before it fell due,

given after default, provided that if it was not paid at maturity the policy should determine, but if it was collected after maturity and satisfactory evidence of insured's good health was furnished, the policy might be restored, it was held that the note being based on a sufficient consideration the insured was bound by its terms and after default was only entitled to a restoration on furnishing evidence of good health.³³⁵ The insurer has no right to require the insurer to accept less than the full cash part of the premium.³³⁷

(B) To Agent or Broker.—Where the policy provided that it should be void on non-payment of a premium note, and it was shown that the insurer did not receive any part of the premium in money, that the agent indorsed the notes executed in payment of the premium to the insurer, which notes were never paid, the policy became void.³³⁸

Excuses for Non-Payment.—Where a member of a mutual company, knowing that his first payment was applied on the membership fee and not on the first bi-monthly call, retains his certificate without objection until after forfeiture for non-payment of such call, he will not be heard to complain that such application

prevents a forfeiture of the policy, though the bank has made an assignment, and its business is being carried on by its assignee, if the company has not notified the insured to cease paying the bank.—*Manhattan Life Ins. Co. v. Fields*, 26 S. W. 280.

335. Where an insurance agent, accepts, in payment of an overdue premium, a certain amount in cash and a note for the balance, if the insurance company did not authorize such act it was its duty to repudiate the same, and, where it retained the cash and the note, it will be held to have ratified such act.—*New York Life Ins. Co. v. Smith*, 41 S. W. 680.

336. A policy provided that insured might restore the insurance after forfeiture for nonpayment of premium at any time within a month, without furnishing evidence of good health, on payment of the premium with 6 per cent. interest. After default, insured, however, elected to give a note for the premium, instead of paying the same within a month, which provided that, if it was not paid at maturity, the policy should determine, but that, if the note was collected after maturity, and satisfactory evidence of good health of insured was furnished, the policy might be restored. Held that, the note being based on a sufficient consideration, insured was bound by its terms, and after default was only entitled to a restoration on furnishing evidence of good health.—*National Life Ins. Co. v. Manning*, 86 S. W. 618.

337. Where the cash part of a quarterly premium due in June and

payable in advance was unpaid, the insured had no right to require the company to apply thereon a distribution of less than the full cash part of the premium, paid sometime in August under an independent "board contract," since he had no right to require the acceptance of less than the full cash part of the premium.—*Security Life & Annuity Co. of America v. Underwood*, 150 S. W. 293. See 28 Cent. Dig. Insurance, §§ 913, 916-922, 924.

361—(A) To Agent or Broker.

338. A life policy stipulated that it should be void on nonpayment of a premium note. The agent of the insurer testified that in settling for the first premium the insured gave him an order on his employer for a specified sum and executed notes for the balance, each payable to the agent; that the agent took the notes for the account of the insurer, and not for his personal account. A third person testified that he was present when the first premium was settled, and that insured paid the agent some money, and that the agent told insured to give him some money to pay the insurer for the policy for a year. The insurer did not receive any part of the premium in money, and the agent indorsed the notes to the insurer, which notes were never paid. Held, that the policy became void.—*National Life Ins. Co. v. Reppond*, 96 S. W. 778, judgment reversed *Reppond v. National Life Ins. Co.*, 101 S. W. 786, 11 L. R. A. 981. See 28 Cent. Dig. Insurance, § 923.

was wrongful.³³⁹ In a case where the plaintiff after paying several special assessments which he claimed were unauthorized, stopped making further payments, without protest against such assessments or demand that they should be applied on the regular bi-monthly calls, and failed to pay eight bi-monthly assessments due between the date of his last payment and the insured's death, he waived any irregularity in the special calls and should be treated as having elected voluntarily to abandon the policy.³⁴¹ The failure of the plaintiff in such a case to pay an extra assessment because he believed it unauthorized did not excuse his subsequent failure to pay a regular bi-monthly assessment, for the non-payment of which the policy was forfeited.³⁴⁰

Rights of Insured After Default—(A) Reinstatement—Statutory Regulation.—The statute provides that in the event of default in premium payments the value of the policy shall be applied to the purchase of other insurance. (Art. 4741 (9) of the Rev. Civ. Statutes of 1914.) It further provides that if such insurance shall be in force and the original policy shall not have been surrendered to the company and cancelled, the policy may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company and payments of arrears of premiums with interest. All Texas policies must contain this provision.

(1) **Case Law.**—If the renewal contract is obtained through the fraud of the lapsed member it is vitiated.³⁴² Where a policy provides that it is incontestable after five years except for non-payment of premiums, if it is thereafter forfeited on that ground, it

339.—Excuses for Nonpayment. (See 28 Cent. Dig. Insurance, §§ 925-930.)

339. Where a member of a mutual insurance company, with knowledge that his first payment was applied on the advance premium or membership fee, and not as an advance payment of the first bimonthly call, retains his certificate, without objection, until after forfeiture for nonpayment of such call, he cannot be heard to complain that such application was wrongful.—*Smith v. Covenant Mut. Ben. Ass'n.* 43 S. W. 819, 16 Tex. Civ. App. 593.

340. Where the directors of an insurance association were authorized by its bylaws to levy extra assessments at such dates and in such sums as its executive committee might deem necessary, plaintiff's failure to pay an extra assessment so levied, because he believed the same was unauthorized after notice that, if he did not pay it, the policy would be forfeited, did not excuse his subsequent failure, without complaint or demand for explanation from the insurer, to pay a subsequent regular bimonthly assessment for the nonpayment of which the policy was forfeited.—*Kray v. Mutual Reserve*

Life Ins. Co., 111 S. W. 421. See 28 Cent. Dig. Insurance, §§ 925-930.

341. Where plaintiff after paying several special assessments on a policy on B's life, which assessments were claimed to be unauthorized, stopped making further payments, and without any protest against such assessments or demand that the payment thereof should be applied on regular bimonthly calls, failed to pay eight bimonthly assessments due between the date of his last payment and B's death, plaintiff waived any irregularity in the special calls, and should be treated as having elected voluntarily to abandon the policy.—*Id.*

342.—Rights of Insured After Default. (A) Reinstatement. (See 28 Cent. Dig. Insurance, §§ 932, 933.)

342. Where a life policy provided that if it lapsed it could be reinstated at the option of the association and approval of certain officers, if the insured is in good health, if such option is brought into action by the fraud of the lapsed member it would vitiate the contract renewing the policy.—*Ash v. Fidelity Mut. Life Ass'n.* 63 S. W. 944, 26 Tex. Civ. App. 501.

is again contestable.³⁴³ Further, after reinstatement it is subject to forfeiture for false statements made in procuring its revival.³⁴³ In a case where a committee upon satisfactory evidence of good health may reinstate a delinquent member under the by-laws of the company, a receipt given for a payment and received after delinquency conditioned "that said member is now and has been during the past twelve months in continuous good health," operates as a waiver of the satisfactory evidence required under the by-laws.³⁴⁴ Where the receipt to the delinquent member states that it is only taken on condition that he is in good health and he is not in fact in good health the payment does not reinstate the policy.³⁴⁵ The beneficiary is bound by the act of the insured in executing a note containing a new forfeiture condition to obtain a reinstatement.³⁴⁶ In an early case it was held that where an application for reinstatement stated that the declarations therein were made to revive the policy and as a basis of reinstatement, such declarations were warranties and whether material or not, their falsity rendered the renewal contract invalid.³⁴⁶

(2) Reinstatement of Policy After Death.—The beneficiary cannot recover, unless there is a waiver, where the insured dies within five weeks after the payment of the back premium, the policy providing for reinstatement upon such payment but also stipulating that the insurer should not be liable for death within such times after reinstatement.³⁴⁰ Where the policy provides for reinstatement

³⁴³. Where a life policy provided that it should be incontestable after five years, except for nonpayment of premiums, if it is thereafter forfeited on that ground on reinstatement it is again contestable, and subject to forfeiture for false statements made in procuring its revival.—*Ash v. Fidelity Mut. Life Ass'n*, 63 S. W. 944, 26 Tex. Civ. App. 501.

³⁴⁴. The bylaws of an insurance company authorized the executive committee, "upon satisfactory evidence of good health," etc., to reinstate a delinquent member. A receipt, given for a payment received after delinquency, was conditioned "that said member is now, and has been during the past 12 months, in continuous good health," etc. Held, that this was a waiver of "satisfactory evidence," etc., as a condition precedent to reinstatement.—*Mutual Reserve Fund Life Ass'n v. Bozeman*, 52 S. W. 94, 21 Tex. Civ. App. 490.

³⁴⁵. Where insured under a life policy forfeits his policy by nonpayment of assessments, and afterwards pays such assessments and takes a receipt which contains the provision that the assessment is only taken on condition that the insured is in good health, and the latter is not in good health, such payment does not reinstate the policy.—*Mutual Reserve Fund Life Ass'n v. Lovenberg*, 59 S. W. 314.

³⁴⁶. Where an application for reinstatement of a lapsed life policy stated that the declarations therein were made to obtain a revival of the policy and as a basis of reinstatement, such declarations are warranties, and, whether material or not, their falsity renders the renewal contract invalid.—*Ash v. Fidelity Mut. Life Ass'n*, 63 S. W. 944, 26 Tex. Civ. App. 501.

³⁴⁷. Where a policy provided that insured should have the right to restore the same after forfeiture at any time within a month without furnishing evidence of good health, on payment of the premium in default, with 6 per cent. interest, such provision contemplated payment by "insured" during his lifetime, so that a payment of interest, after insured's death, though within the time specified, was insufficient to restore the insurance.—*National Life Ins. Co. v. Manning*, 86 S. W. 618.

³⁴⁸. After a policy has lapsed by its terms for nonpayment of premium, the beneficiary is bound by the act of insured in executing a note containing a new forfeiture condition to obtain a reinstatement.—*Wichita Southern Life Ins. Co. v. Roberts*, 186 S. W. 411.

³⁴⁹. Where a life policy provided for reinstatement upon payment of back premiums, but that the insurer should not be liable for death occur-

ment at any time within a month after forfeiture without furnishing evidence of good health, on payment of the premium in default and interest, such a provision contemplates payment by the insured during his life time.³⁴⁷ It was held that such a payment after the insured's death even though within the time specified, was insufficient to restore the insurance.³⁴⁷

(B) Paid Up Policy or Value.—To be entitled to paid up insurance the insured must surrender his policy within six months after default in the payment of premiums, if the policy so provides, three premiums having been paid as stipulated in such policy.³⁵⁰ After default the non-payment of a past due premium note will prevent a policy becoming a paid up term policy as provided for after three years.³⁵¹

(C) Insurance for Limited Term or Amount.—A court should treat policies, containing a provision that, in case of default, they should automatically be turned into policies for term insurance, as term insurance, where they were canceled under a contract voidable because of insured's insanity, after vacating their surrender.³⁵²

Remedies for Relief Against Forfeiture.—The insured has the choice of several remedies after forfeiture by the insurer. He may tender the premiums when due, wait until the policy matures and then sue for the benefits, or, when notified that the insurer has elected to forfeit the policy he may acquiesce and sue for damages.³⁵³ He can also institute proceedings to have the issue

ring within five weeks from reinstatement, the beneficiary cannot recover unless there was a waiver, where the insured died within five weeks after the payment of the back premiums.—*American Nat. Ins. Co. v. Gallimore*, 166 S. W. 17.

348—(B) Paid-up Policy or Value. (See 28 Cent. Dig. Insurance, §§ 194, 232, 233.)

350. An insurance policy provided that it should be void if default was made in the payment of any premium, but that if not less than three premiums had been received by the company and default was made in any subsequent premium, the company would issue a paid up policy, providing the original policy was surrendered within six months from the default. Held that where the insured did not surrender his policy within six months after default, he was not entitled to paid up insurance.—*Equitable Life Assur. Soc. v. Evans*, 64 S. W. 74, 25 Tex. Civ. App. 583.

351. A life policy provided that after three years, on default of payment of premiums, without surrender, it should become a paid up term policy, if all notes given for premiums had been paid at maturity. Nonpayment of premium notes was to avoid

it, and three years from its date it was to be incontestable except for certain causes, among which was the nonpayment of premium notes. Held, that on default in the payment of a premium the policy did not become a paid up term policy if at the time a past due premium note was unpaid. Judgment 47 S. W. 546, reversed.—*Union Cent. Life Ins. Co. v. Wilkes*, 49 S. W. 1038, 92 Tex. 468.

347—(C) Insurance for Limited Term or Amount. (See 28 Cent. Dig. Insurance, §§ 935, 938.)

352. Where policies, containing a provision that, in case of a failure to pay premiums, they should automatically be turned into policies for term insurance, were canceled under a contract voidable because of insured's insanity, the trial court, on vacating the surrender, should treat the policies as term insurance under such provision.—*New York Life Ins. Co. v. Hagler*, 169 S. W. 1064.

Remedies for Relief Against Forfeiture.

353. On the alleged termination of a policy by insurer, insured in general may tender the premiums when due, wait till the policy matures and then sue for the benefits, or when notified that the insurer has elected to for-

as to whether or not the policy has been in fact forfeited, or is still in force, judicially determined.³⁵³

ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY

Application of Doctrines of Estoppel and Waiver.—In general, whether the insurer waives forfeitures for non-payment of premiums does not depend on anything the insured does or on whether he has been misled, a waiver being necessarily based on a new agreement or estoppel.³⁵⁴ Further, where a forfeiture is once waived because of the course of dealings between the parties, it cannot later be interposed to defeat recovery.³⁵⁵

What Conditions May Be Waived.—A forfeiture for non-payment of premium or of a premium note may be waived by the insurer.³⁵⁶ A stipulation for forfeiture in the policy itself on non-payment of premiums may be waived by the insurer as being for its benefit alone.³⁵⁷ A clause exempting the insurer from liability until the actual payment of the premium may also be waived.³⁵⁸

Estoppel of Insurer.—An insurer is estopped to assert forfeiture for non-payment of an assessment of which the insured had no notice where the agent had stated the annual cost would be so much, the insured had paid it and the insurer had issued the policy without informing him to the contrary.^{359a}

felt the policy may acquiesce and sue for damages, or he may institute proceedings to have the issue as to whether or not the policy has been in fact forfeited, or is still in force, judicially determined.—*Royal Fraternal Union v. Lundy*, 113 S. W. 185. See 28 Cent. Dig. Insurance, § 1927.

ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY. (SEE 25 CYC. 858.)

371—Application of Doctrines of Estoppel and Waiver. (See 28 Cent. Dig. Insurance, §§ 943-946.)

354. Whether an insurance company waives forfeiture for nonpayment of premium does not depend on anything the insured does or on whether he has been misled; a waiver being necessarily based on a new agreement or estoppel.—*Equitable Life Assur. Soc. of United States v. Ellis*, 147 S. W. 1152, affirming judgment 137 S. W. 184. See 28 Cent. Dig. Insurance, §§ 943-946.

355. Where a forfeiture of an insurance policy is once waived because of the course of dealings between the parties, it cannot later be interposed to defeat recovery.—*Mutual Life Ins. Co. of New York v. Davis*, 154 S. W. 1184. See 28 Cent. Dig. Insurance, §§ 943-946.

372—What Conditions May Be Waived. (See 28 Cent. Dig. Insurance, § 941.)

356. A clause in a policy of life insurance exempting the insurer from liability until actual payment of premium may be waived.—*Metropolitan Life Ins. Co. v. Gibbs*, 78 S. W. 398, 34 Tex. Civ. App. 131.

357. A stipulation in an insurance policy for forfeiture on nonpayment of premiums before a stipulated date is for the benefit of the insurer and may be waived by him.—*Equitable Life Assur. Society of United States v. Ellis*, 147 S. W. 1152, affirming judgment 137 S. W. 184.

358. A forfeiture of a policy for nonpayment of premium or of a premium note may be waived by the insurer.—*Security Life & Annuity Co. of America v. Underwood*, 150 S. W. 293.

359a. If an insurance agent states that the insurance will cost a stated sum per year, and applicant relying thereon, pays such amount, and the company issues the policy without informing him that the sum is not a full year's premium, the company is estopped to assert forfeiture for nonpayment of an assessment of which insured had no notice.—*Illinois Bankers' Life Ass'n v. Dodson*, 189 S. W. 992.

Powers of Officers or Agents Respecting Waiver—(A) In General.—A soliciting agent is held to be without authority to waive any of the conditions of a policy.³⁵⁰ However, an agent of insurer in charge of its loan and extension department in New York was held to have general authority to waive a forfeiture for non-payment of premiums.³⁵⁹ Article 4968 of the Revised Civil Statutes of 1914 expressly denies to any soliciting agent the power to waive, change or alter any of the terms or conditions of the application or policy.

(B) Effect of Provisions of Policy.—Where the superintendent of the loan department of the insurer offered a loan on a policy after lapse, his offer was held to be the act of the insurer and constituted a waiver of such forfeiture even though the policy provided it could be waived only by specified officers.³⁶³ In a case where the local agent, with the permission of the general agent, had for years past accepted notes for premiums from the insured which were collected by the general agent and at the death of the insured the notes on a certain policy were practically unpaid, it was held that the local agent was authorized to waive the provision of the policy that the premium should be first paid in cash,³⁶¹ although such agent was expressly denied the power to alter or discharge the contract in the policy. Even though a policy expressly provided that it should not become operative until it was delivered to the insured in good health and that no agent had any authority to alter the contract, it was held that an agent, not a mere clerk, but vested with a discretion to withhold delivery of a policy if he finds the insured not in good health, and having au-

375—Powers of Officers or Agents Respecting Waiver. (See 28 Cent. Dig. Insurance, §§ 948-951, 956-965.)

359. An agent of insurance company in charge of its loan and extension department at its headquarters in New York held to have general authority to waive a forfeiture for non-payment of premiums.—*Equitable Life Assur. Society of United States v. Ellis*, 152 S. W. 625, 105 Tex. 526.

360. A soliciting agent held without authority to waive any of the conditions of an insurance policy.—*Kansas City Life Ins. Co. v. Blackstone*, 143 S. W. 702.

376—(A) Effect of Provisions of Policy. (See 28 Cent. Dig. Insurance, §§ 952-955.)

361. A policy of life insurance provided that it should not go into effect until the first premium had been actually paid during the lifetime and good health of the assured, and that agents could not alter or discharge the contract, or receive for premiums anything except cash. The local agent accepted notes for the premium, and

at the death of assured the notes were practically unpaid. The general agent of defendant for several years prior to the date of the policy in question had permitted local agents to receive notes for premiums, and assured had previously taken out like policies in defendant company through the same local agent, and had given notes, which were collected by the general agent. Held, that the local agent was authorized to waive the provision that the premium should be first paid in cash.—*Provident Sav. Life Assur. Soc. of New York v. Oliver*, 53 S. W. 594, 22 Tex. Civ. App. 8.

362. Provision in application for life policy that no statement made by or to the person soliciting the application, or to any other person, shall be binding on the company, unless the same be reduced to writing, and approved by the officers of the company at its home office, has no bearing on the question of waiver of forfeiture from engagement in prohibited occupation by receipt of premium by general agent with knowledge of such change in employment.—*Northwestern Mut. Life Ins. Co. v. Freeman*, 47 S. W. 1025, 19 Tex. Civ. App. 632.

thority to collect the premium, who delivered the policy and collected the premium knowing at the time that the insured was not in good health, bound the insurer by his acts and the contract of insurance was completed.³⁶⁴ A provision in the application that no statement made by or to the soliciting agent or to any other person shall be binding on the company unless it be reduced to writing and approved by the insurer has no bearing on the question of waiver of forfeiture from engagement in a prohibited occupation by receipt of premium by general agent with knowledge of such change in employment.³⁶²

Knowledge or Notice of Facts in General.—The rule is that where the insurer issues a policy knowing that answers in the application on which it is issued are false, it is estopped to claim that the policy is void because of such falsity.³⁶⁶ The insurer is charged with notice of a former written application and examination of insured, forwarded to its general agent, and not accepted.³⁶⁵

Knowledge of or Notice to Officers or Agents.—It was held in an early case that a provision that the agent's knowledge of the falsity of the representations made by the insured shall not estop the insurer from claiming a forfeiture for breach of warranty is binding on the insured.³⁷⁶ The insurer is not charged with notice of an examination made by its local examiner for another company so as to estop it setting up such examination in proof of the falsity of the insured's statement made before another ex-

363. Offer of loan on policy after lapse, by the superintendent of the department of the company at its home office, held to be the act of the company and to constitute a waiver notwithstanding provision that policy could be varied only by specified officers.—*Equitable Life Assur. Society of United States v. Ellis*, 147 S. W. 1152, affirming judgment 137 S. W. 184.

364. A life policy provided that it should not become operative "until the first payment is made hereon and the policy is actually delivered to the insured herein named while in good health." Another clause provided that "it is mutually agreed that agents or collectors have no authority to alter or discharge any contract in relation to this insurance, or to waive any forfeiture thereof." Held, that if an agent, not a mere clerk, but vested with a discretion to withhold delivery of a policy if he finds the insured not in good health, and having authority to collect the premium, delivers the policy and collects the premium knowing at the time that the insured is not in good health, the insurance company is bound by his acts, and the contract of insurance is completed.—*Northwestern Life Ass'n v. Findley*, 68 S. W. 695.

377—**Knowledge or Notice of Facts in General.** (See 28 Cent. Dig. Insurance, §§ 942, 966, 967, 975-997.)

365. —A company is charged with notice of a former written application and examination of insured, forwarded to its general agent, and not accepted.—*Mutual Life Ins. Co. of New York v. Nichols*, 24 S. W. 910; affirmed in 26 S. W. 998.

366. Where a life insurance company issues a policy knowing that answers in the application on which it is issued are false, it is estopped to claim that the policy is void because of such falsity.—*Mutual Reserve Fund Life Ass'n v. Sullivan*, 29 S. W. 190.

378—**Knowledge of or Notice to Officers or Agents.** (See 28 Cent. Dig. Insurance, §§ 968-997.)

367. In an application for life insurance, the insured was asked by the medical examiner if she had had any other serious illness. She, after having told him about an attack of "la-grippe" she had had, and of which he was cognizant, was advised by him to answer "No" which she did. The policy provided that the answers to the medical examination should be warranties, and that no agent had power to modify the policy. Held,

aminer in another place.³⁶⁸ The knowledge of a banker, having only claims for premiums on a policy for collection and for a renewal contract to obtain the signature of the insured, of the falsity of statements made by the insured in the contract, not acquired while acting in the business of the insurer, could not be imputed to such insurer.³⁷⁰ In a case where an applicant was advised by the examiner to answer "no" to a certain question as to whether she had had any serious illness, after being told by her that she had had la grippe, the policy providing that the answers should be warranties and no agent had power to modify the policy, it was held that the insurer was estopped to assert the falsity of insured's answer.³⁶⁷ The knowledge of an agent of an insurer, who has authority to deliver a policy and collect the premium that at the time of the delivery by him of the policy, insured was not in good health, is knowledge of the insurer.³⁶⁹ Where the agent knew the insured was not in good health and that the answers in the application were materially false, the application providing that false answers would vitiate the contract, and continued to collect the premiums, his knowledge was notice to the company and it was liable.³⁷¹ And it was immaterial that the insured knew the statements in the application were false and he made them to deceive the company and obtain the policy.³⁷² Where the applicant, who is the regular physician of the association is taken by the agent to another physician who signed the medical examination certificate prepared by the applicant without making an

that the company was estopped to assert the falsity of insured's answer.—*Mutual Life Ins. Co. of New York v. Blodgett*, 27 S. W. 286.

368. A company is not charged with notice of an examination made by its local medical examiner for another company, so as to estop it to set up said examination in proof of the falsity of insured's statement made before another examiner, in another place.—*Mutual Life Ins. Co. v. Nichols*, 24 S. W. 910.

369. Knowledge of an agent of a life insurance company, who had authority to deliver a policy and collect the premium, that, at the time of the delivery by him of the policy, insured was not in good health, was knowledge of the company.—*Security Mut. Life Ins. Co. v. Calvert*, 100 S. W. 1033, judgment reversed. 105 S. W. 320. See 28 Cent. Dig. Insurance, §§ 968-974.

370. Where a banker, only having claims for premiums on a life policy for collection, and a renewal contract to obtain the signature of the insured, his knowledge of the falsity of statements made by assured in the contract, not acquired while acting in the business of the company, could not be imputed to the insurance company.—*Ash v. Fidelity Mut. Life Ass'n*, 63 S. W. 944, 26 Tex. Civ. App. 501.

371. Where an application for a policy of life insurance was made a part of the contract, and provided that false answers would vitiate the contract, and the answers in regard to health of the insured were materially false, but the agent writing the insurance, who was required to assure himself as to insured's health, knew the facts, and knew the true condition of plaintiff's health, and continued to collect the premiums, the knowledge of the agent was notice to the company, and it was liable on the policy.—*Sun Life Ins. Co. v. Phillips*, 70 S. W. 603.

372. It was immaterial that the insured knew the statements were false, and made them to deceive the company, and obtain the policy.—*Sun Life Ins. Co. v. Phillips*, 70 S. W. 603.

373. Where the organizer of a life association takes an applicant, who is a regular physician of the association, to another physician, who signs a medical examination certificate prepared by the applicant without making an examination, facts known by such physician regarding the risk will not estop the association from relying on the false warranties of the insured as a defense to an action on the certificate.—*National Fraternity v. Karnes*, 60 S. W. 576.

examination, the facts known by such physician in regard to the risk will not estop the insurer from relying on the false warranties as a defense.³⁷³ However, the knowledge of the agent as to the falsity of the warranties will estop the association on that ground.³⁷⁴ Where in such case the applicant stated there was nothing in his physical condition tending to shorten his life, except as set out, when the contrary was true, the association would not be estopped from relying thereon as a defense by the fact that the applicant called the agent's attention to his physical condition.³⁷⁵

Insertion of False Answers in Application By Agent or Under His Direction.—After the agent's fraud has been discovered by the insured it will not be imputed to the insurer but the latter will be entitled to plead such fraud and the insured's concealment thereof as a defense.³⁷⁷ It has been further held that the application and policy as constituting the contract may be so far severed where the application has been altered by the insurer or through its negligence that the insurer may be concluded from any defense reserved to it therein without affecting the policy, or the part of the transaction which is to the interest of the beneficiary.³⁷⁸

Form and Requisites of Express Waiver.—(A) **Waiver in Writing.**—A letter from the insurer to the insured stating that a note would be accepted as settlement of premium does not alter the legal effect of provisions in such note and policy that the policy would cease on non-payment of note at maturity.³⁷⁹ And in the

374. Where the organizer of a life association takes an applicant to a physician for examination, who is not the regular examining physician of the association, his knowledge of the falsity of warranties in the application of insured, which comes to him through such examination, will estop the association from resisting payment of the certificate on the ground of such false warranties.—*National Fraternity v. Karnes*, 60 S. W. 576.

375. Where an applicant for a life certificate falsely states that there is nothing in his physical condition tending to shorten his life which is not set out in his application, when his shoulder was in a serious condition as a result of a shot wound and an operation, which was not disclosed, the association is not estopped from relying thereon as a defense to the policy by the fact that the applicant called the agent's attention to the arm, and showed his use thereof.—*National Fraternity v. Karnes*, 60 S. W. 576.

376. A provision that the agent's knowledge of the falsity of representations made by the insured shall not estop the insurer from claiming a forfeiture for breach of warranty is binding on the insured.—*Hutchison v. Hartford Life & Annuity Ins. Co.*, 39 S. W. 325.

378.—**Insertion of False Answers in Application by Agent or Under His Direction.** (See 28 Cent. Dig. Insurance, §§ 999-1015.)

377. Where an insurance company was induced to issue certain policies by the fraudulent statements of its agent in the application, such fraud, after having been discovered by insured, would not be imputed to the insurance company, but the latter would be entitled to plead such fraud, and insured's concealment thereof, in defense of its liability on the policy.—*Curry v. Stone*, 92 S. W. 263. See 28 Cent. Dig. Insurance, §§ 999, 1000, 1011.

378. A contract of life insurance, consisting of an application and policy, may be so far severed that where the application has been altered either by the company or through its negligence, it may be concluded from any defense reserved to it therein without affecting the policy, or the part of the transaction which is to the interest of the beneficiary.—*Kansas Mut. Life Ins. Co. v. Coalson*, 54 S. W. 383, 23 Tex. Civ. App. 64.

379.—**Form and Requisites of Express Waiver.** (A) **Waiver in Writing.** (See 28 Cent. Dig. Insurance, § 1019.)

379. A letter of insurer to insured that a note would be accepted "as settlement of premium" did not alter the

same case it was held that a formal notice that if a policy were in force on the annual premium date a certain premium would be payable, with a statement on the back that it was not a waiver of default, sent out by a subordinate employee, did not waive the right to forfeit the policy on non-payment of the note.³⁸⁰

(B) Construction and Operation of Express Waiver.—A waiver by the insurer of a ground of forfeiture is not a waiver of another ground of which it has no knowledge.³⁸¹

Implied Waiver in General.—A suit on a premium note waives a provision in the policy that it shall be void for non-payment of such note.³⁸² The general rule is that waiver of a forfeiture for non-payment of premiums may result from any unequivocal acts by the insurer, after knowledge of the forfeiture, without any action by the insured.³⁸⁹ By a denial of liability the insurer waives its right to demand of payment and is estopped from contending because of the beneficiary's failure to demand payment as required a judgment against it was erroneous in including the statutory penalty and attorney's fees.³⁸² Forfeiture for non-payment of premiums is waived without any agreement to that effect by negotiations with the insured after knowledge of such forfeiture,³⁹⁰ as by offer of a loan on the policy to pay the premium.³⁹¹ Such an offer of a loan was held not conditional on the insured furnishing

legal effect of provisions in note and policy that on nonpayment of note at maturity, the policy would cease.—*Wichita Southern Life Ins. Co. v. Roberts*, 186 S. W. 411.

^{380.} Formal notice that if a policy were in force on annual premium date, a certain premium would be payable, with statement on the back that it was not a waiver of default, sent out by a subordinate employee, did not waive right to forfeit policy on non-payment of note.—*Id.*

^{387—(B) Construction and Operation of Express Waiver.} (See 28 Cent. Dig. Insurance, § 1025.)

^{381.} A waiver by an insurance company of a ground of forfeiture is not a waiver of another ground of which it has no knowledge.—*Kansas City Life Ins. Co. v. Blackstone*, 143 S. W. 702. See 28 Cent. Dig. Insurance, § 1025.

^{382—Implied Waiver in General.} (See 28 Cent. Dig. Insurance, §§ 1026, 1027, 1030, 1035, 1040, 1057.)

^{382.} Where an insurance company, upon a beneficiary's offer to furnish proofs of death of an insured, denied its liability on the policy, it thereby waived its right to demand of payment, and was estopped from contending that, because of the beneficiary's failure to demand payment as required, a

judgment against it was erroneous in including the statutory penalty and attorney's fees.—*Aetna Life Ins. Co. v. Wimberly*, 108 S. W. 778, judgment reversed 112 S. W. 1038, 102 Tex. 46. See 28 Cent. Dig. Insurance, §§ 1026-1030, 1035, 1040, 1057.

^{383.} A provision that a life policy shall be void on failure to pay a premium note is waived by suing on such a note.—*National Life Ins. Co. of United States of America v. Reppond*, 81 S. W. 1012.

^{389.} Waiver of a forfeiture of a life policy for nonpayment of premiums may result from any unequivocal acts by the insurer, after knowledge of the forfeiture, without action by insured.—*Equitable Life Assur. Society of United States v. Ellis*, 152 S. W. 625, 105 Tex. 526.

^{390.} The forfeiture of an insurance policy for nonpayment of a premium is waived without any agreement to that effect by negotiations or transactions with the insured after knowledge of the forfeiture.—*Equitable Life Assur. Society of United States v. Ellis*, 147 S. W. 1152, affirming judgment 137 S. W. 184. See 28 Cent. Dig. Insurance, §§ 1026, 1027, 1035.

^{391.} Offer of loan on policy for purpose of paying premium, made after policy had lapsed, held not conditional on insured furnishing certificate of good health so as to negative recognition of the continued validity of the policy.—*Id.*

a certificate of good health so as to negative recognition of the continued validity of the policy.³⁹¹ Where such offer of a loan was made by the superintendent of a department of the company through the cashier of the local agency it was considered as made direct to insured,³⁹² and was operative for a reasonable time during which the insured might adjust the premium.³⁹²

Failure to Assert Forfeiture or to Cancel or Rescind Policy.—Statutory Regulations.—The statute provides that in all suits on policies no defense based on misrepresentations in the application or in securing the policy shall be valid unless it is shown that within a reasonable time after discovering such misrepresentations, which must be material, the insurer gave notice to the insured or beneficiary that it refused to be bound by such policy, ninety days being considered a reasonable time. (Art. 4948, Rev. Stat. 1914.)

Case Law.—Under the statute (Art. 4849, Rev. St., 1914) an insurer who does not give such notice of refusal to be bound under the policy issued for alleged misrepresentations in the application within the ninety days stated is barred from asserting such misrepresentations as a defense.^{397 398 399 395} In an early case it was held that where the insurer was informed about six months before the insured's death that she was in bad health when insured and did not then cancel the policy, it was estopped from afterwards denying liability.³⁹⁶ The Supreme Court has held that a waiver of a forfeiture does not result from silence of the insurer.³⁹⁴

392. A waiver by an insurance company of a forfeiture for nonpayment of premiums by an offer of a loan is operative for a reasonable time thereafter during which insured may adjust the premium.—Id.

393. In determining whether company waived forfeiture, offer of loan with which to pay premiums after a lapse, made by a superintendent of a department of the company and transmitted to the insured by the cashier of a local agency, held to be considered as if made direct to insured by the superintendent.—Id.

390—Failure to Assert Forfeiture or to Cancel or Rescind Policy. (See 28 Cent. Dig. Insurance, §§ 1037, 1038.)

394. A waiver of the forfeiture of a life policy held not to result from silence of insurer.—*Equitable Life Assurance Soc. of United States v. Ellis*, 137 S. W. 184, judgment affirmed 147 S. W. 1152. See 28 Cent. Dig. Insurance, §§ 1037, 1038.

395. An insurance company having failed to give notice of its election not to be bound within a reasonable time after discovering misrepresentations held absolutely barred from the defense of misrepresentations under the express provisions of Rev. St. 1895,

Art. 3096bb, added by Acts 28th Leg. ch. 69.—*National Life Ass'n v. Hagelstein*, 156 S. W. 353. See 28 Cent. Dig. Insurance, § 1037.

396. Where a life insurance company was informed about June, before insured's death in January, 1911, that she was in bad health when insured, and did not then cancel the policy, it was estopped from afterwards denying liability.—*American Nat. Ins. Co. v. Fawcett*, 162 S. W. 10. See 28 Cent. Dig. Insurance, § 1037.

397. An insurer which did not within the 90 days allowed by *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4948*, give notice that it would not be bound by the contract, thereby lost any right to defend on the ground of misrepresentations in application for, or in obtaining, the policy.—*American Nat. Ins. Co. v. Burnside*, 175 S. W. 169.

398. Under *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4948*, insurer not giving prescribed notice of refusal to be bound by the contract held barred from defending action on policy because of alleged misrepresentation.—*American Nat. Life Ins. Co. v. Rowell*, 175 S. W. 170.

399. Under *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4948*, held, that the defense that the insured made mis-

Demand, Acceptance or Retention of Premiums or Assessments—

(A) **In General.**—A demand for payment of an overdue premium is not a waiver of forfeiture for non-payment at maturity where policy provided that the full premium should be considered as earned.⁴¹⁰

(B) **Notes.**—A general custom of the insurer not to treat policies as forfeited by non-payment of premium notes at maturity, upon which the insured relied, will not prevail over the written terms of a contract between the parties.⁴¹¹ Neither is the acceptance after maturity of payment of a premium note, which was given when the premium was due for the purpose of extending payment of the same, and which provided for a forfeiture of the policy if not paid at maturity, a waiver of the right to assert forfeiture.⁴¹² It is held though that the insurer by accepting part cash and part the assured's note for the balance of the premium after the maturity thereof, waived any forfeiture of the policy for non-payment at maturity.⁴¹⁴ Where a premium note provides though that if it is unpaid at maturity the policy should cease and the whole amount of the note should be considered earned, without restoration of the policy, the acceptance by the insurer of a part payment on the note after default was insufficient to establish a waiver of the forfeiture of the policy.⁴⁰⁵ And the fact that the premium notes are

representations in his application came too late when raised more than 90 days after discovery thereof.—*Guarantee Life Ins. Co. v. Evert*, 178 S. W. 643.

392—Demand, Acceptance or Retention of Premiums or Assessments. (See 28 Cent. Dig. Insurance, §§ 1041-1056, 1059-1070.)

400. An agent of the company who knew the assured received premiums from him for several years, and delivered the company's receipts, renewing the policy for another year, and reciting that it was not intended to waive any forfeiture for intemperance, etc., there was no evidence that assured's intemperance was unknown to the company, or was or could have been concealed from it. Held proper to charge that, if the company accepted premiums with knowledge of his habits, the forfeiture was waived.—*Aetna Life Ins. Co. v. Hanna*, 17 S. W. 35.

401. On facts stated, held, that letters of an insurer amounted to a waiver of forfeiture of a policy for non-payment of premiums, but that its letter written after a premium was due, but before the right to forfeiture accrued thereon, was not a waiver of a forfeiture of nonpayment of such premium.—*Security Life & Annuity Co. of America v. Underwood*, 150 S. W. 293. See 28 Cent. Dig. Insurance, §§ 1041, 1058.

402. Where, after the expiration of the days of grace within which a premium on a life policy could be paid, the insurer offered to make a loan with which to pay premiums without reinstatement the forfeiture was waived.—*Equitable Life Assur. Society of United States v. Ellis*, 152 S. W. 625, 105 Tex. 526.

403. Forfeiture of life policy for failure to seasonably pay a premium and provisions for manner of reinstatement are waived by an authorized agent receiving and retaining it with knowledge.—*First Texas State Ins. Co. v. Capers*, 183 S. W. 794.

404. The fact that the collector of a life insurance company called on insured for the premium after it was due, and, on being told that insured was out, but had the money to pay the premium, refused to wait, and said he would call again, did not tend to show a waiver of forfeiture, where the premium was never collected.—*Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404.

405. Where a premium note provided that, if it was unpaid at maturity, the policy should cease, and the whole amount of the note should be considered earned, without restoration of the policy, the acceptance by insured of a part payment on the note after default was insufficient to establish a waiver of the forfeiture of the policy.—*National Life Ins. Co. v. Manning*, 86 S. W. 618.

held after they become overdue, and their payment demanded does not tend to prove a waiver of forfeiture.⁴¹²

(C) By An Agent.—Where an authorized agent receives and retains a premium with knowledge that it is past due and of provisions for manner of reinstatement the forfeiture of the policy on such grounds is waived.⁴⁰⁸

(D) With Knowledge of Habits and Occupations of Insured.—Where the premium receipt renewing the policy for another year recited that it was not intended to waive any forfeiture for intemperance and there was no evidence that the insured's intemperance was unknown to the insurer it was held proper to charge that if the company accepted premiums with knowledge of his habits, the forfeiture was waived.⁴⁰⁰ The general agents of the insurer, receiving premiums from the insured, with knowledge that he is engaged in an occupation which renders his policy void, waive such forfeiture.⁴⁰⁷

(E) By the Offer of a Loan.—The offer of a loan with which to pay premiums, without reinstatement, after the expiration of the days of grace within which the premium could be paid, waived the forfeiture.⁴⁰²

(F) By a Future Assessment.—The receipt of a future assessment does not reinstate a policy where the premium receipt so provides, after forfeiture, for non-payment of premiums.⁴⁰⁹

(G) Incomplete Reinstatement.—Where the insurer accepts a

^{408.} After insured's death, resulting from being voluntarily engaged in a fight, the insurer's local agent demanded a premium of the beneficiary's representative, and stated that its payment was necessary to validate the policy; whereupon he was paid the amount of the premium. He testified that he did not forward such amount to insurer, as he had previously advanced the premium, and had charged the amount against insured as a personal debt. Held, the question as to whether insurer waived the forfeiture by receiving the premium should have been submitted to the jury, as it might have believed that the agent, after collecting the premium, attempted to protect insurer by claiming the debt was due him.—*Morris v. Travelers' Ins. Co.* 43 S. W. 898.

^{407.} Recovery on a life policy can be had, though insured had engaged in an occupation which the policy declared should render it void; the general agents of the company, authorized to collect the premiums, though having no express authority to issue policies, or pass on application, or waive conditions of policies or applications, having received premiums with knowledge of the change in employment.—*Northwestern Mut. Life Ins. Co. v. Freeman*, 47 S. W. 1025, 19 Tex. Civ. App. 632.

^{406.} A life policy stipulated for for-

feiture by nonpayment of premiums for 30 days. A premium due in June was not paid after notice required by law as a condition to forfeiture, but a premium due in September was received and placed to the insured's credit by the company's agent, who notified him that the policy had lapsed for nonpayment of the June premium, and that its payment and a health certificate were necessary to reinstatement. In October, two weeks before death, while sick, insured sent the amount of premium to the agent, but no health certificate, and was notified that it could not be reported until the certificate was furnished. Held, that the forfeiture by such nonpayment was not waived by such receipt of premiums.—*New York Life Ins. Co. v. Scott*, 57 S. W. 677, 23 Tex. Civ. App. 541.

^{409.} Where insured under a life policy forfeits the policy by nonpayment of assessments, which he afterwards pays, and receives a receipt that it is only taken on condition that he is in good health, and he is in bad health, and it also provides that the receipt of future assessments by the insurer shall not be considered a waiver of the condition of such receipt, the receipt of a future assessment does not reinstate the policy.—*Mutual Reserve Fund Life Ass'n v. Lovenberg*, 59 S. W. 314.

premium but notifies insured that his policy has lapsed and he must furnish a health certificate and pay up back premiums to be reinstated, the payment of the over-due premium will not prevent forfeiture where the certificate is not furnished.⁴⁰³

(H) What Is Necessary to Show Waiver of Forfeiture.—The fact that the collector called on the insured for an over-due premium and on being told that the insured was out but that he had the money to pay the premium, stated that he would call again did not tend to show waiver of forfeiture, where the premium was never collected.⁴⁰⁴ (As a letter of insurer not being a waiver of forfeiture, see Ann. 401.) Where the collection of overdue premium after death of insured by agent who did not forward same to the company because he had already advanced it himself was testified to, the question as to whether the insurer waived the forfeiture by receiving the premium should have been submitted to the jury, as it might have been believed that the agent was protecting the insurer by claiming the debt was due him.⁴⁰⁵

Estoppel By Consent to Assignment of Policy.—Under Article 4953, of the Revised Civil Statutes of 1914, providing that the policy shall constitute the entire contract between the parties, and that the application be made a part thereof, an insurer consenting to the assignment of a policy by the insured was held estopped to contest payment of the renewed policy to the assignee on ground of material false statements in the application.⁴¹⁵

Provisions of Policy Against Forfeiture.—It is held that a renewal of a policy, containing a clause providing for incontestability after one year, revives such clause, giving it effect from the

410. A demand for payment of over-due premium is not a waiver of forfeiture for nonpayment at maturity, where the policy provided that the full premium should be considered as earned.—*Laughlin v. Fidelity Mut. Life Ass'n*, 28 S. W. 411.

411. A general custom of an insurance company not to treat policies as forfeited by nonpayment of premium notes at maturity, upon which assured relied, will not prevail over the written terms of a contract between the parties.—*Union Cent. Life Ins. Co. v. Chowning*, 28 S. W. 117.

412. Where the contract of insurance provides that, if the premium notes are not paid at maturity, the full amount of the annual premium shall be considered as earned and payable without reviving the policy, the fact that such premium notes are held after they become overdue, and their payment demanded, does not tend to prove a waiver of forfeiture.—*Union Cent. Life Ins. Co. v. Chowning*, 28 S. W. 117.

413. Acceptance after maturity of payment of a premium note, which

was given when the premium was due for the purpose of extending payment of the same, and which provided for a forfeiture of the policy if not paid at maturity, is not a waiver of the right to assert a forfeiture. Judgment 47 S. W. 546, reversed.—*Union Cent. Life Ins. Co. v. Wilkes*, 49 S. W. 1038, 92 Tex. 468.

414. An insurance company by accepting part cash and part assured's note for the balance of the premium after the maturity thereof, waived any forfeiture of the policy for nonpayment at maturity.—*New York Life Ins. Co. v. Smith*, 41 S. W. 680.

393.—**Consent to Assignment of Policy.** (See 28 Cent. Dig. Insurance, § 1039.)

415. Under Rev. St. 1911, Art. 4953, the insurer, consenting to assignment of life policy by insured held estopped to contest payment of renewed policy to assignees, on ground of material false statements in application for insurance.—*State Mut. Life Ins. Co. v. Rosenberry*, 175 S. W. 757.

date of renewal.⁴¹⁶ Such an incontestability clause though including fraud is held not contrary to public policy.⁴¹⁸ Even though the incontestability clause is of uncertain and doubtful meaning the policy is rendered incontestable for false warranties after the expiration of the time stated.⁴¹⁷ Under the statutory regulation that all policies shall be incontestable not later than two years from date except for non-payment of premiums, a policy providing for incontestability after one year from date, providing the premiums are paid, was not contestable four years later on the ground that it was obtained by fraudulent representations of the insured as to his health and habits.⁴²⁰ In a case where a clause providing for incontestability after one year was held to include a prior clause that it should not take effect until the first premium was paid during insurability it was no defense that the insured had never been insurable, where the first year's premium was paid, insured did not die during that year and no steps were taken to avoid the policy.⁴¹⁹

RISKS AND CAUSES OF LOSS

Provisions of Policy as to Liability.—Under the statute (Art. 4752, Rev. St., 1914), which has been held constitutional,^{420a} requiring companies to state in a single provision the sum payable on the insured's death, except as pertains to suicide or stated hazardous occupations; a clause of a policy, following schedule stating amount of insurance, which provided that half only should be payable if death occurred within six months, was held void.^{420b}

400—Provisions of Policy Against Forfeiture. (See 28 Cent. Dig. Insurance, § 1086.)

416. A renewal of a life insurance policy, containing a clause providing that it shall be incontestable after one year, revives such clause, giving it effect from the date of renewal.—*State Mut. Life Ins. Co. v. Rosenberry*, 175 S. W. 757.

417. A clause in a life policy that, if the terms of the contract are complied with, it shall be incontestable after one year from its date, though uncertain and of doubtful meaning, renders the policy incontestable for false warranties, after the expiration of one year.—*Franklin Ins. Co. v. Villeneuve*, 60 S. W. 1014.

418. Clause of a life policy providing for incontestability after one year, though including fraud, held not contrary to public policy.—*American Nat. Ins. Co. v. Briggs*, 156 S. W. 909. See 28 Cent. Dig. Insurance, § 1086.

419. A clause making a policy incontestable after one year held to include a prior clause that it should not take effect until the first premium was paid during insurability, and so where premiums were properly paid and insured did not die during the year, and

no steps were taken to avoid it, it was no defense that insured had never been insurable.—*Id.*

420. Under Rev. St. 1911, Art. 4741, a life policy providing, "This policy shall be incontestable after it has been in force one year, providing premiums have been duly paid," was not contestable four years after it was issued, on the ground that it was obtained by fraudulent representations of the insured as to his health and use of alcoholic drinks.—*Southern Union Life Ins. Co. v. White*, 188 S. W. 266.

RISKS AND CAUSES OF LOSS. (SEE 25 CYC. 374.)

438—Provisions of Policy as to Liability.

430a. *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4742, subd. 3*, requiring life insurance companies to state in single provision sum payable on insured's death, except as pertains to suicide or stated hazardous occupations, is not violative of either state or federal Constitution.—*American Nat. Ins. Co. v. Hawkins*, 189 S. W. 330.

420b. Under *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4742, subd. 3*, requiring life insurers to state in single

Suicide—(A) In General.—The insurer may lawfully stipulate against liability for the death of the insured by his own hand, whether sane or insane.⁴²³ The burden of proving suicide as a defense remains on the defendant throughout,⁴²⁴ and it is not shifted by the verdict at the coroner's inquest.⁴²⁴ In a case where a certificate provided that after the certificate had been in force for five years it should thereafter be incontestable for any cause except for non-payment of premiums but in another clause of such certificate it was provided that the insurer would not be liable if the insured died by his own hand, it was held that suicide after five years would not relieve the insurer from liability.⁴²² (See Ann. 421 for facts sustaining the defense of suicide.) Where the policy provided that the policy became void if the insured committed suicide within two years while sane or insane, an instruction to find for the defendant was not erroneous, where the contingency provided for occurred.⁴²⁵

(B) Effect of Insanity.—In a case where the contract warranted that the insured would not die by his own act within a certain

provision sum payable on insured's death, clause of life policy, following schedule stating amount of insurance, which provided that half only should be payable if death occurred within six months, held void.—*American Nat. Ins. Co. v. Hawkins*, 189 S. W. 330.

444—Suicide. (See 28 Cent. Dig. Insurance, §§ 1152-1161.)

421. Deceased, an insolvent, one year before his death, took out a policy of \$10,000, borrowing the money to pay the premium. The night before his death he was found sick in bed, but apparently cheerful. The next morning he was found unconscious. The physician who was with him testified he died of morphine poison. In his room was an unlabeled bottle, and some empty papers in which powders had been folded. On the table was a note asking his employer to telegraph to a certain person at his home, with the words: "I have ceased to be a man. I have broken a sworn vow." There was some evidence that he might have died from apoplexy. Held, that recovery on the policy, as against the defense of suicide, could not be sustained.—*Mutual Life Ins. Co. v. Hayward*, 34 S. W. 801, 12 Tex. Civ. App. 392.

422. On the face of a certificate of life insurance was a clause providing that, if the certificate should be in force for five years, it should thereafter "be incontestable" for any cause except for non-payment of dues; and on the second page, among the "provisions, requirements and benefits," referred to as a part of the contract, appeared a clause that, if insured died by his own hand, whether voluntarily or involuntarily, sane or insane, the company would not be liable. Held, that

suicide by insured, after the policy had been in force five years, would not relieve the company from liability.—*Mutual Reserve Fund Life Ass'n v. Payne*, 32 S. W. 1063.

423. A life insurance company may lawfully stipulate against liability for the death of insured by his own hand, whether sane or insane.—*Mutual Reserve Fund Life Ass'n v. Payne*, 32 S. W. 1063.

424. In an action on a life insurance policy, the burden of proving suicide as a defense remains on defendant throughout, and is not shifted by the verdict at the coroner's inquest.—*Mutual Life Ins. Co. v. Hayward*, 27 S. W. 36.

425. In an action on a life policy, the burden of proof is on the company to show that insured came to his death by suicide.—*Mutual Life Ins. Co. of New York v. Simpson*, 28 S. W. 837, reversed 31 S. W. 501.

426. In an action on a life insurance policy, providing that if the insured, within two years from the date of the policy, "shall commit suicide, while sane or insane, the policy shall become void," it appeared that the insured, within the time limited, while possibly insane, took a glass dish, and with sharp edges cut his arm, severing an artery, and cut a gash in the left breast, and then cut his throat, causing his death. The proof of loss stated that the cause of death was suicide. There was no evidence that the wounds were inflicted involuntarily, and not for the purpose of self-destruction, or that insured was at the time unconscious. Held, that an instruction to find for defendant was not error.—*Parish v. Mutual Benefit Life Ins. Co.*, 49 S. W. 153, 19 Tex. Civ. App. 457.

time, and it was shown that he took his own life designedly within such time, but at the time his reasoning faculties were so impaired that he was unable to understand the consequences and effect of his act or he was impelled thereto by an irresistible insane impulse, it was held that the plaintiff could not recover.⁴²⁷

(C) **Time When Liability for, Begins.**—In a case where a policy was issued with a rider for preliminary short-term insurance to the date of the principal policy, on the same terms as the policy, the "first policy year within the meaning of the suicide clause," began at the date of the issuance of the policy with the short-term insurance.⁴²⁸

EXTENT OF LOSS AND LIABILITY OF INSURER

Amount Payable on Death—(A) Statutory Regulations.—Under the statute, no policy shall contain a provision for any mode of settlement at maturity of less value than the amounts insured on the face of the policy, plus dividend additions, less any indebtedness to the company on the policy, and less any premium that may by the terms of the policy be deducted. (Art. 4742, Rev. St., 1914.) It is further provided, however, that any company may issue a policy promising a benefit less than the full benefit in case of death of the insured by his own hand, while sane or insane, or by following stated hazardous occupations. (Id.)

(B) **Case Law.**—Under the statute just quoted, a provision, that if the insured should die of heart disease within one year from its date liability would be limited to one-fourth of the principal amount named, was held not enforceable and presented no defense to claim for full amount.⁴²⁹

Deductions and Offsets.—Where the insured dies within the thirty

446—(A) **Effect of Insanity.** (See 28 Cent. Dig. Insurance, §§ 1159-1161.)

427. In a suit on a life policy, where the application, which was made a part of the policy, contained the clause, "I also warrant and agree that I will not die by my own act within the period of two years from the issuance of said policy," and deceased designedly took his life within that period, plaintiff could recover if, when deceased took his life, his reasoning faculties were so impaired that he was unable to understand the consequences and effect of his act, or was impelled thereto by an irresistible insane impulse.—*Mutual Life Ins. Co. of New York v. Walden*, 26 S. W. 1012.

445—**Time When Liability for, Begins.**

428. Where a policy was issued with a rider for preliminary short-term in-

surance to the date of the principal policy, on the same terms as the policy, the "first policy year, within the meaning of the suicide clause," began at the date of the issuance of the policy with the short-term insurance.—*American Nat. Ins. Co. v. Thompson*, 186 S. W. 254.

EXTENT OF LOSS AND LIABILITY OF INSURER. (SEE 25 CYC. 381.)

515—**Amount Payable on Death.** (See 28 Cent. Dig. Insurance, §§ 1300-1302.)

429. Under Rev. Civ. St. Art. 4742, subd. 3, provision, that if insured should die from heart disease within one year from its date liability would be limited to one-fourth of principal sum named, held not enforceable and to present no defense to claim for full amount.—*First Texas State Ins. Co. v. Bell*, 184 S. W. 277.

days grace allowed for the payment of each premium the beneficiary can recover the amount of the policy, less any indebtedness accrued thereon.⁴³¹ The provision in the policy for deducting the unpaid current year's premium in case of the insured's death makes unnecessary the payment of such premium by the beneficiary after such death.⁴³¹ Notes given for a premium with interest are proper charges against the amount of a policy where such policy provides that any indebtedness on account thereof including any balance of the years premium should be deducted in any settlement of the policy.⁴³² (See Ann. 430 for facts showing when the current year provided in the policy begins.)

NOTICE AND PROOF OF LOSS

Necessity of Proofs of Death.—Where a policy requires proofs of death as a condition precedent to recovery, there can be no recovery where no proofs were made, and there was no waiver of the conditions, nor excuse shown.^{433 434 435}

523.—Deductions and Offsets. (See 28 Cent. Dig. Insurance, §§ 1307, 1308.)

430. Under a policy providing for the deduction of the balance of dues for the current year of insured's death, held that the current year commenced on October 1st, not on January 1st, though insured, after paying a quarterly premium, thereafter paid actual premiums for one year from January 1st, and hence, insured having died in December, the company was entitled to deduct the balance of the premium for the year ending the following October.—Fidelity Mut. Life Ins. Co. of Philadelphia, Pa. v. Zapp, 160 S. W. 139. See 28 Cent. Dig. Insurance, §§ 1307, 1308.

431. Where an insurance policy provided for an annual premium to be paid on or before the 1st of October, but allowed 30 days grace in making such payment, during which time the policy should remain in full force, and allowed the insurance company to deduct from the face of the policy, upon approval of the proofs of death of the insured during its continuance, any indebtedness to the company on account thereof, or any unpaid premium for the current year, the beneficiary, in case the insured died at any time within the 30 days allowed, whether the premium was paid before the expiration of such days or not, had the right to recover the amount of the policy, less any indebtedness accrued thereon and the first year's premium, the provision for deducting the unpaid current year's premium in case of the insured's death making unnecessary the payment of such premium by the beneficiary after such death.—Aetna Life

Ins. Co. v. Wimberly, 108 S. W. 778, judgment reversed, 112 S. W. 1038, 102 Tex. 46. See 28 Cent. Dig. Insurance, §§ 1307, 1308.

432. Under a life policy providing that any indebtedness on account thereof including any balance of the year's current premium, would be deducted in any settlement of the policy, notes given for a premium, with interest, are a proper charge against the amount of the policy.—Southwestern Ins. Co. v. Woods Nat. Bank, 107 S. W. 114. See 28 Cent. Dig. Insurance, §§ 1307-8.

NOTICE AND PROOF OF LOSS. (SEE 25 CYC. 883.)

536.—Necessity of Statement or Proof of Death. (See 28 Cent. Dig. Insurance, § 1323.)

433. Where a life policy required proofs of death as a condition precedent to recovery, there can be no recovery, where no proofs were made, and there was no waiver of the conditions.—American Nat. Ins. Co. v. Gallimore, 166 S. W. 17.

434. Under a life insurance policy making it a condition precedent to recovery that proofs of death be furnished as required therein, a failure to furnish such proofs, without claiming or showing any excuse, defeats a recovery.—American Nat. Life Ins. Co. v. Rowell, 175 S. W. 170.

435. Where a life insurance policy makes it a condition precedent to recovery thereon that proofs of death be furnished in accordance with the provisions of the policy, and there is a failure to furnish such proof, and no waiver of the provision is claimed, nor excuse shown, there can be no

Sufficiency.—Certain affidavits were held to constitute sufficient proofs of death of the insured.⁴³⁶

Effect of Statements and of Proofs in General.—Where the attorney for the beneficiary sent the coroner's finding of suicide with the proofs of death to the insurer it was not held an admission by the beneficiary, who knew nothing of the coroner's investigation or report of the fact of suicide.⁴³⁷

Estoppel or Waiver as to Proofs or Defects and Objections—

(A) In General.—After receipt of proof of death the insurer is charged with notice of any discrepancies between the statements therein and those in the application and it will not be heard to say that its agents had forgotten what the application contained.⁴³⁸

(B) Denial of Liability.—In general, where an insurer denies liability and refuses to furnish blanks for proof of death it cannot defend on the ground of failure to furnish such proofs.⁴³⁹ If the insurer contends that it has fully discharged its liability and refuses to accept proofs of loss or it is shown that it would have ignored them had they been received it is unnecessary for insured to show that proofs of loss have been furnished the insurer.⁴⁴¹ The fact that the applicant for proofs of loss had not been appointed the insured's administrator and was not authorized to receive payment, did not prevent the refusal of the insurer's agent to furnish such blanks on the ground that there was no liability on the policy, from operating as a waiver of proofs of death.⁴⁴⁰

recovery on the policy.—*Metropolitan Life Ins. Co. v. Wagner*, 109 S. W. 1120. See 28 Cent. Dig. Insurance, § 1323.

542—Proofs of Death—Sufficiency. (See 28 Cent. Dig. Insurance, § 1347.)

436. Affidavits held to constitute sufficient proofs of death of assured.—*National Life Ass'n v. Parsons*, 170 S. W. 1038.

550—Effect of Statements and of Proofs in General. (See 28 Cent. Dig. Insurance, §§ 1359-1361.)

437. The sending to insurer by the beneficiary's attorney with the proofs of death of the coroner's finding of suicide is not an admission by the beneficiary, who knew nothing of the coroner's investigation or report of the fact of suicide.—*De Garcia v. Cherokee Life Ins. Co. of Rome, Ga.*, 180 S. W. 153.

558—Estoppel or Waiver as to Notice and Proofs or Defects and Objections.

(A) Implied Waiver in General. (See 28 Cent. Dig. Insurance, §§ 1382-1390, 1406.)

438. An insurance company, on receipt of proof of death, is charged with notice of any discrepancies between the statements therein and those contained in the application and will not

be heard to say that its agents had forgotten what the application contained.—*Security Mut. Life Ins. Co. v. Calvert*, 100 S. W. 1033, judgment reversed 105 S. W. 320. See 28 Cent. Dig. Insurance, §§ 1382-1390.

559—(B) Denial of Liability. (See 28 Cent. Dig. Insurance, §§ 1391, 1392.)

439. A life insurance company which denied liability and refused to furnish blanks for proof of death cannot defend an action on the policy for failure to furnish proof of death.—*American Nat. Ins. Co. v. Bird*, 174 S. W. 939.

440. The fact that witness, at the time he requested blanks on which to make proofs of death in order to perfect a claim on a life insurance policy, had not been appointed insured's administrator, and was not authorized to receive payment, did not prevent the refusal of insurer's agent to furnish blanks for proof of death on the ground that there was no liability on the policy from operating as a waiver of proofs of death.—*Metropolitan Life Ins. Co. v. Gibbs*, 78 S. W. 398.

441. It is unnecessary for insured to show that proofs of loss have been furnished to the company, where it contends that it has fully discharged its liability, and refuses to accept such proofs, or it is shown that it would

ADJUSTMENT OF LOSS

Settlement Between Parties.—In general, all that is required to validate a compromise on a policy is that the beneficiary understand the settlement and that the insurer act in good faith in disputing the claim.⁴⁴²

Necessity of Consideration.—There is no consideration where the beneficiary relinquishes part of the insurance on a contention of the insurer not made in good faith or on the belief that it was well founded or presented a doubtful question, that the policy was void.⁴⁴³ Where there is no consideration for the release of liability it is immaterial whether such release was fraudulently obtained or whether insured knew of its contents or failed to exercise reasonable diligence in ascertaining its import.⁴⁴⁴

RIGHT TO PROCEEDS

Policy Payable to Insured, His Representatives or Estate.—The proceeds of a life insurance policy payable to the executor, administrator or assigns of the insured, becoming a part of his estate at his death, may be disposed of by his will.⁴⁴⁷ But where the policy is payable to the heirs of the insured it does not form part of his estate to be used in payment of his debts.⁴⁴⁸ It is held that the word "heirs" in a policy is sufficient to enable parties proving

have ignored them had they been received.—*Woodall v. Pacific Mut. Life Ins. Co.*, 79 S. W. 1090.

reasonable diligence in ascertaining its import, or not.—*Woodall v. Pacific Mut. Life Ins. Co.*, 79 S. W. 1090.

ADJUSTMENT OF LOSS.

579—**Settlement Between Parties.** (See 28 Cent. Dig. Insurance, §§ 1417, 1419.)

442. All that is required to validate a compromise on a life policy is that the beneficiary understand the settlement and that the insurer act in good faith in disputing the claim.—*McDonald v. Aetna Life Ins. Co. of Hartford, Conn.*, 187 S. W. 1005.

443. There is no consideration for the acceptance by the beneficiary of a life policy of a part only of the insurance, and the relinquishment of the balance, where made in settlement, on a contention of the insurer's agent, not made in good faith or on the belief that it was well founded or presented a doubtful question, that the policy was void.—*Northwestern Nat. Life Ins. Co. v. Blasingame*, 85 S. W. 819.

444. Where there is no consideration for the release of liability by insured, it is immaterial whether such release was fraudulently obtained by the insurer, or whether insured knew of its contents or failed to exercise

RIGHT TO PROCEEDS. (SEE 25 CYC. 886.)

583—**Policy Payable to Insured, His Representatives, or Estate.**

445. Where a will directs payment of testator's debts, and bequeaths a life insurance policy, payable to testator, "his executors, administrators or assigns," to his widow and child, and the estate becomes insolvent during administration, the creditors may resort to the insurance fund for the payment of their claims.—*Dulaney v. Walsh*, 37 S. W. 615.

446. A policy which is payable to the heirs of assured does not form part of his estate to be used in the payment of his debts.—*Mullins v. Thompson*, 51 Tex. 7.

447. The proceeds of a life insurance policy payable to the executor, administrator, or assigns of the insured, becoming a part of his estate on his death, may be disposed of by his will; Rev. St. Art. 5334, expressly recognizing the right of every competent person to devise any part of his estate.—*Fletcher v. Williams*, 66 S. W. 860.

heirship to take the proceeds of a policy as against creditors.⁴⁴⁸ The heirs of the insured were entitled to the proceeds of a policy payable to the heirs or assigns, it not having been assigned.⁴⁴⁹ In a case where a will directs payment of testator's debts and bequeaths a life insurance policy payable to him, "his heirs, administrators or assigns," to his widow and child, the creditors may resort to the insurance fund for the payment of their claims in case the estate becomes insolvent during administration.⁴⁴⁵

Policy Designating Beneficiary.—(A) Rights of Persons Designated in General.—A partner cannot recover on a policy of a deceased partner after dissolution of the partnership, except for premiums paid out of the partnership assets, as against the estate of the insured.⁴⁵⁰ A wife cannot claim the proceeds of a policy of which another is beneficiary where there was enough other insurance to satisfy a contract made with her husband before his death.⁴⁶⁰

(B) Vested Interest of Beneficiary.—The Supreme Court held in an early case that in the case of a policy permitting the insured after a stated period to withdraw the entire equity in the accumulations that belonged to such policy in cash, the insured could not make such withdrawal where his wife and children were the sole beneficiaries.⁴⁶¹ And it was immaterial that the insured had paid

448. The word "heirs" in a policy is sufficient to enable parties proving heirship to take the proceeds of a policy as against creditors.—*Mullins v. Thompson*, 51 Tex. 7.

449. An insurance policy payable to the heirs or assigns of insured could have been assigned but not being so assigned, the heirs were entitled to it on the death of insured.—*Mullins v. Thompson*, 51 Tex. 7.

585.—**Policy Designating Beneficiary. (A) Rights of Persons Designated in General.** (See 28 Cent. Dig. Insurance, §§ 1461-1468.)

450. Where a partner obtains a policy of insurance on his life, payable to himself and his partner, or their administrators or assigns, the premium on which is paid out of the partnership assets, and afterwards, on the dissolution of the partnership, conveys all his interest in the firm property to his partner, and afterwards dies, the continuing partner having no interest in the life of insured at the time of the latter's death, cannot recover on the policy, as against the estate of the insured, but has a right to reimbursement from the proceeds of the policy for the premiums paid by the firm.—*Cheeves v. Anders*, 28 S. W. 274.

460. In an action by the beneficiary of an insurance policy, the proceeds of which were claimed by the wife of the insured, under an agreement whereby the wife agreed to convey the homestead to enable the husband to pur-

chase other incumbered property, the husband agreeing to take out sufficient insurance to pay the incumbrances, the carrying of insurance in favor of his estate and an only child, coheir with the wife, constitutes a partial performance of the agreement, and where all of the husband's insurance amounts to more than the incumbrances, the wife cannot claim the proceeds of a policy of which another is a beneficiary.—*Jones v. Jones*, 146 S. W. 265.

586.—**(B) Vested Interest of Beneficiary.**

461. An insurer insured the life of I., "hereinafter called 'the insured,' * * * for the term of his natural life," and agreed to pay the amount of said insurance "to the assured, under this policy, to-wit, A. M. I., wife, and M. C. C., daughter, of said I., and his other children, * * * after proof of the death during the continuance of this policy of the said person whose life is insured." It was provided that upon the completion of a stated period without the termination of the policy "by lapse or death" the accumulations apportioned to the policy should secure "to the assured" one of five benefits, at the option of the assured, one of which was "to withdraw the entire equity in the accumulations that belong to this policy in cash." Held that, after the expiration of such term, I. could not elect to withdraw said "equity," as his wife and children were the sole beneficiaries.—*New York Life Ins. Co. v. Ireland*, 17 S. W. 617.

the premium and had possession and control of the policy and that his wife and children had no knowledge of it.⁴⁶²

(C) Change of Beneficiary.—In general the holder of a policy has the power to direct that his children shall share in the proceeds thereof, if he plainly designates the funds to be shared, the persons who shall partake of the same and the amount of proportion each person shall receive.⁴⁶⁴ An insurer is bound by an endorsement on the policy of a different beneficiary, even though the request to do so was not made on the form provided by it.⁴⁶³

(D) Death of Beneficiary.—A policy payable to the wife of the insured if living, and if not living, to his heirs, administrators and assigns, became, on the death of the insured after that of his wife, a part of his estate.⁴⁶⁵

(E) Rights of Creditors.—Under the statute of a foreign state limiting the amount of insurance which the wife may be entitled to as against his creditors it was held that the creditors were only entitled to such proportion of the insurance as the premiums in excess of the amount stated, made when the insured was insolvent, bear to the entire amount of premiums paid.⁴⁶⁶ It was further held in this case that the right of creditors to such excess insurance does not depend on whether the present claims of creditors are those they held when he paid such premiums or whether the present creditors then held claims against him, where the indebtedness had been shifted

462. It was immaterial that I. had paid the premium, and had possession and control of the policy, and that his wife and children had no knowledge of it.—*New York Life Ins. Co. v. Ireland*, 17 S. W. 617.

557—(C) *Change of Beneficiary.* (See 28 Cent. Dig. Insurance, § 1469.)

463. Where an insurer agreed to and made an indorsement on the policy, naming the first beneficiary's sister as the beneficiary, it was bound by it, even though the request to do so was not made on the form provided by it.—*American Nat. Ins. Co. v. Burnside*, 175 S. W. 169.

464. The holder of a life insurance policy has the power to direct that his children shall share the proceeds thereof, if he plainly designates the funds to be shared, and the persons who shall partake of the same, and the amount or proportion each person shall receive.—*Clausen v. Jones*, 45 S. W. 183, 18 Tex. Civ. App. 376.

558—(D) *Death of Beneficiary.* (See 28 Cent. Dig. Insurance, §§ 1472-1474.)

465. A life policy payable to the wife of assured if living, and, if not

living, then to his executors, administrators, and assigns, became, on the death of assured after that of his wife, a part of his estate, to be administered according to the terms of his will.—*Schumacher v. Schumacher*, 75 S. W. 50.

559—(E) *Rights of Creditors.*

466. *Mansf. Dig. Ark. § 4623*, authorizing insurance on one's life for the benefit of his wife, which shall be payable to her free from the claims of his creditors, provided that such exemption shall not apply where the amount of premium annually paid out of the funds of the husband shall exceed \$300 limits the amount only which one insolvent or financially embarrassed may so expend in premiums; and creditors of insured, who pays a greater amount of annual premium, which is a reasonable provision according to his condition in life, are entitled, as against the wife, to such proportion only of the insurance as the payments in excess of \$300 per year, made when he was insolvent or financially embarrassed, bear to the entire amount of premiums paid.—*Red River Nat. Bank v. De Berry*, 105 S. W. 998. See 28 Cent. Dig. Insurance, §§ 1479, 1481, 1482.

frequently.⁴⁶⁷ The right to dower of the wife in such a case, in the absence of special conditions is not to be considered on the question of whether his financial condition is such that under this foreign statute he may not, as against creditors, pay more than the specified amount of premiums.⁴⁶⁸

Policy for Benefit of Creditor.—The rule is that the creditor who insures the debtor's life as security is entitled in the event of the latter's death to recover the amount of his debt with interest at six per cent and the amount of premiums paid by him.⁴⁶⁹ ⁴⁷⁰ The creditor's right to the proceeds is superior to the right of the widow and minor children who claim the proceeds in lieu of homestead and other exemptions, the estate being insolvent,⁴⁷¹ and this is the case although the probate court sets aside a certain portion of the insurance in lieu of the exemptions stated.⁴⁷² To the extent of the creditor's claim the proceeds are not subject to the jurisdiction of the probate court.⁴⁷³ The creditor need not show an assignment to

^{467.} The right of creditors of insured to insurance on his life in favor of his wife, derived from premiums in excess of \$300 per year, the amount limited by Mansf. Dig. Ark. § 4623, in case of one not free from financial embarrassment, does not depend on whether the present claims of creditors are those they held when he paid such premiums, or on whether the present creditors then held claims against him, he having at all times been so largely indebted to some one or other that he would have proved insolvent had he been forced to meet his liabilities, and such continuing indebtedness having been merely shifted from one creditor to another, or from one form of indebtedness to another.—*Red River Nat. Bank v. De Berry*, 105 S. W. 998.

^{468.} In the absence of special conditions of ill health, imminence of death, or other possible facts, the right to dower of the wife of one who effects insurance on his life in her favor is not to be considered on the question of whether his financial condition is such that under Mansf. Dig. Ark. § 4623, he may not, as against his creditors, pay more than \$300 annual premiums.—*Red River Nat. Bank v. De Berry*, 105 S. W. 998.

591.—Life Policy for Benefit of Creditor.

^{469.} Where, after an account stated, the creditor insured the debtor's life as security, the creditor, in the event of the debtor's death, could only recover on the policies the amount of his debt and interest at 6 per cent. and the amount of premiums paid by him.—*Stacy v. Parker*, 132 S. W. 532.

^{470.} A debtor procured his life to be insured for the benefit of a creditor, to whom the policy was made payable.

The application was signed by both debtor and creditor, and the premiums were paid by the creditor. Held, that the creditor was entitled out of the proceeds of the policy only to the amount of his debt and disbursement.—*Goldbaum v. Blum*, 15 S. W. 564.

^{471.} In an action by an administratrix against a life insurance company and another on a policy, the proceeds of which have been paid to the latter under a clause making the same payable to him as creditor "as his interest may appear, otherwise to the executors or assigns of the insured," where plaintiff claims the creditor had no interest therein at the death of the insured, the burden is on her to show to what extent the debt had been paid.—*Andrews v. Union Cent. Life Ins. Co.*, 44 S. W. 610, judgment reversed 50 S. W. 572, 92 Tex. 584.

^{472.} The fact that a deceased husband was insolvent, and the probate court has, in lieu of homestead and other exempt property, set aside to the surviving wife and minor children a certain portion of the proceeds of her husband's life insurance policy, confers no rights superior to those of a creditor to whom the policy was made payable as his interest might appear.—*Andrews v. Union Cent. Life Ins. Co.*, 44 S. W. 610, judgment reversed 50 S. W. 572, 92 Tex. 584.

^{473.} Where a life insurance policy is payable to a creditor of insured as his interest may appear, otherwise to insured's executor, and the creditor holds the policy as collateral, his right to the proceeds thereof is superior to the right of the widow and minor children of insured, who claim the proceeds in lieu of homestead and other exemptions, the estate being insolvent. To the extent of the creditor's claim the proceeds of the policy are not sub-

himself where the policy is payable to him and he holds it as collateral as in such case he is the absolute owner.⁴⁷⁴ Where the plaintiff claims that the creditor had no interest in the policy at the death of the insured the burden is on him to show to what extent the debt had been paid.⁴⁷¹

Assignee of Policy Before Loss.—A transfer of a policy by a debtor to a creditor, having no insurable interest in the former's life, operates only as a mortgage to secure the debt, interest and premiums subsequently paid.⁴⁷⁵ A wife is, after divorce, entitled to a lien on a policy on the life of her husband assigned to her during their marriage, for premiums paid by her.⁴⁷⁷ In a case where a policy payable to insured's estate was assigned to his partner to the extent of such an interest as the partner might have when the policy became a claim and the insurer before issuing the policy notified the insured and his partner that it did not issue policies based on the insurable interest of a partner in the life of a co-partner, it was held that the interest of the co-partner on the death of the insured was the amount which the insured then owed him.⁴⁷⁶

Where the Beneficiary Has No Insurable Interest the Heirs May Recover.—The heirs of the insured can recover on a policy in preference to a beneficiary where the latter has no insurable interest and his father paid the first premium and was to pay the premiums thereafter.⁴⁷⁸

Policy as Community Property—(A) In General.—A policy on

ject to the jurisdiction of the probate court. Judgment 44 S. W. 610, reversed.—*Andrews v. Union Cent. Life Ins. Co.*, 50 S. W. 572, 92 Tex. 584.

474. Where an insurance policy is payable to a creditor of insured as his interest may appear, otherwise to insured's executor, and the creditor holds the policy as collateral, and has paid the premiums thereon, he, in order to recover, need not show any assignment of it to him, as he is the absolute owner.—*Andrews v. Union Cent. Life Ins. Co.*, 58 S. W. 1039.

593.—**Assignee of Policy Before Loss.** (See 28 Cent. Dig. Insurance, §§ 1452, 1476-1478, 1481, 1482, 1485.)

475. A transfer of a policy of life insurance by a debtor to a creditor having no insurable interest in the debtor's life, operates only as a mortgage to secure the debt and interest and premiums subsequently paid by the creditor and interest, and to that extent is valid.—*Harde v. Germania Life Ins. Co.*, 153 S. W. 666. See 28 Cent. Dig. Insurance, §§ 1452-1485.

476. A life policy was made payable to insured's estate. Insured assigned the policy to his copartner to the extent of such an interest as the copartner might have when the policy

became a claim. Insurer before issuing the policy notified insured and his copartner that it did not issue policies based on the insurable interest of a partner in the life of his copartner. Held, that the interest of the copartner in the policy on the death of insured was the amount which insured then owed him.—*Smith v. Hessey*, 134 S. W. 256. See 28 Cent. Dig. Insurance, §§ 1452, 1476, 1481, 1485.

477. A wife, paying premiums on a policy on the life of her husband assigned to her by the husband during the existence of the marriage relation, is, on the divorce of the parties, entitled to a lien on the policy for such premiums.—*Hatch v. Hatch*, 80 S. W. 411, 35 Tex. Civ. App. 373.

Beneficiary Having no Insurable Interest, Heirs May Recover.

478. Where the beneficiary of a life insurance policy had no insurable interest, and the father of such beneficiary paid the first annual premium, and was to pay the premiums thereafter, the heirs of the assured can recover the money due on the policy on his death, in preference to such beneficiary.—*Mayher v. Manhattan Life Ins. Co.*, 27 S. W. 124.

the life of the husband is not part of the community estate,⁴⁸⁰ and a wife cannot claim it even though the premium is paid out of their community estate, unless the payments are made with intent to defraud her.^{481 482} A policy on the life of the wife, payable to the husband is his separate property, and not community property.⁴⁷⁹ A wife cannot recover either the policy or premiums paid by her husband for the benefit of his children by his first marriage, even where the premiums were paid out of the community funds of the second marriage, where there was no intent to defraud the wife.⁴⁸³

(B) **After Divorce.**—After divorce a wife cannot recover of insurer because community funds were used in paying premiums on the husband's policy.⁴⁸⁴ And a judgment of divorce, adjudging personal property to belong to the community estate, does not give the wife, after divorce, any interest in a policy on the husband's life.⁴⁸⁵

PAYMENT OR DISCHARGE, CONTRIBUTION AND SUBROGATION

Interest on Amount of Loss.—Interest is properly assessed against the insurer on the amount of a policy from the time proof of death is received until the money is tendered into court but it is not proper to allow it up to the time of trial.⁴⁸⁶ However, a tontine

Policy as Community Property.

479. The right to the proceeds of an insurance policy on the life of the wife, payable to the husband, is his separate property, and not community property. Judgment 61 S. W. 522, reversed.—*Martin v. McAllister*, 63 S. W. 624, 94 Tex. 567.

480. An insurance policy on the life of the husband is no part of the community estate of a husband and wife.—*Jones v. Jones*, 146 S. W. 265.

481. A wife cannot claim the proceeds of an insurance policy on the life of her husband, even though the premium be paid out of their community estate—unless the payments are made with intent to defraud her.—*Id.*

482. Evidence held to support a finding that the use by a husband of community funds of his second marriage to pay premiums on a life policy in favor of the children of his first marriage was not with intent to defraud his second wife.—*Rowlett v. Mitchell*, 114 S. W. 845.

483. The wife after the husband's death, cannot follow and recover community funds lawfully disposed of by the husband for other purposes than the benefit of the community estate, and hence, where a husband procured a life policy for the benefit of his children by a first marriage, if they

survived him, and, after his second marriage, continued to pay premiums thereon from community funds of the second marriage without intent to defraud the wife and without changing the beneficiaries, the wife could not recover any of the premiums paid or proceeds of the policy.—*Id.*

484. After divorce, wife cannot recover of insurer because community funds were used in paying premiums on husband's life policy.—*Northwestern Mut. Life Ins. Co. v. Whiteselle*, 188 S. W. 22.

485. Judgment of divorce, adjudging personal property to belong to community estate, does not give wife, after divorce, any interest in policy of husband's life.—*Id.*

PAYMENT OR DISCHARGE, CONTRIBUTION AND SUBROGATION. (SEE 25 CYC. 901.)

598.—**Interest on Amount of Loss.** (See 28 Cent. Dig. Insurance, §§ 1494.)

486. Interest was properly assessed against a life insurance company on the amount of a policy from the time proof of death was received until the money was tendered into court, but improperly allowed up to the time of trial.—*Southwestern Ins. Co. v. Woods Nat. Bank*, 107 S. W. 114. See 28 Cent. Dig. Insurance, § 1494.

dividend, becoming by the terms of a policy a part thereof, does not bear interest.⁴⁸⁷

Mode and Sufficiency of Payment.—Where the beneficiary retains a check for the amount due sent by the insurer, without objection, except an unfounded one that it was insufficient in amount, this constituted a sufficient tender and prevented the recovery of interest.⁴⁸⁸

Recovery of Payment.—An insurer is not entitled to recover back money paid because of a mistake due to its ignorance of the facts.⁴⁸⁹

Release or Discharge from Liability.—A release from liability is not binding where it is procured by an adjuster who fraudulently represents that the policy was void because it had not been delivered while the insured was in good health.⁴⁹⁰

Damages for Refusal of Payment—Losses Shall Be Paid Promptly (A)—Statutory Regulations.—In all cases where a loss occurs and the insurance company liable therefor shall fail to pay the same within thirty days after demand, such company shall be liable to

487. A tontine dividend, becoming by the terms of a policy a part thereof, does not bear interest.—*Stevens v. German Life Ins. Co.*, 62 S. W. 824, 26 Tex. Civ. App. 156.

599.—**Mode and Sufficiency of Payment.** (See 28 Cent. Dig. Insurance, §§ 1495, 1496.)

488. Where an insurance company sent to a beneficiary under a policy a check for the amount due, which she retained without objection, except an unfounded objection that it was insufficient in amount, this constituted a sufficient tender, and prevented the recovery of interest.—*Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., v. Zapp*, 160 S. W. 139. See 28 Cent. Dig. Insurance, § 1494.

601.—**Recovery of Payment.** (See 28 Cent. Dig. Insurance, §§ 1500, 1501.)

489. An insurance company held not entitled to recover back money paid because of a mistake due to its ignorance of facts.—*Kansas City Life Ins. Co. v. Blackstone*, 143 S. W. 702. See 28 Cent. Dig. Insurance, §§ 1500, 1501.

603.—**Release or Discharge From Liability.** (See 28 Cent. Dig. Insurance, §§ 1499, 1505.)

490. A release procured by an insurance adjuster of a claim on a life policy by fraudulently representing that the policy was void because not having been delivered in the good health of the insured, would not be binding.—*Northwestern Life Ass'n v. Findley*, 68 S. W. 695.

602.—**Damages for Refusal of Payment.** (See 28 Cent. Dig. Insurance, § 1498.)

491. Where the beneficiary under a policy of life insurance, after death of the insured, demanded the amount of the policy, and refused the amount offered by the insurer, and began suit for and recovered the amount of the policy she was entitled to attorneys' fees.—*First State Ins. Co. v. Jiminez*, 163 S. W. 656. See 28 Cent. Dig. Insurance, § 1498.

492. Rev. St. 1895, Art. 3071, authorizing the recovery of penalty and attorney's fees in an action on a policy, having been repealed by Acts 31st Leg. ch. 108, par. 69, and the penalty clause of such act having no application to assessment companies, plaintiff could not recover penalty and attorneys' fees in an action on an assessment policy; the cause of action accruing after such repeal.—*National Life Ass'n v. Hagelstein*, 156 S. W. 353. See 28 Cent. Dig. Insurance, § 1498.

493. Rev. St. 1895, Art. 3071, provides that, if a life insurance company liable for a loss fails to pay it within the time specified in the policy after demand, the company shall be liable, in addition to the amount of the loss, for 12 per cent damages, together with reasonable attorney's fees for the collection of the loss. Held, that where the attorneys of the beneficiary, under certain policies, after proofs of death, wrote defendant a letter directed to its home office, notifying it that the policies had been placed in their hands for collection, and that, as the statutes provided for attorney's fees and a penalty in case of suit, the attorneys thought it was fair to notify defendant and request

pay the insured in addition to the amount of loss twelve per cent damages on the amount of such loss together with reasonable attorney's fees for the collection of such loss. (Art. 4746, Rev. St. 1914.)

(B) Change in Law.—The original law imposing twelve per cent damages and attorney's fees for failure to pay a loss promptly was passed in 1874 and was included in the Revised Statutes of 1895 as Article 3071.⁵¹⁰ It was applicable to life and health insurance companies only and made such companies liable to the damages mentioned when they failed to pay the amount of the policy "within the time specified in the policy." Article 4746 of the Revised Statutes of 1914 includes life, accident and health insurance companies and makes such companies liable for the damages when they shall fail to pay a loss "within thirty days after demand therefor." Article 3071 of the Revised Statutes of 1895, authorizing the recovery of damages and attorney's fees for failure to pay within the time specified was held not to apply to accident insurance companies.⁵¹⁴

(C) As to Constitutionality of Law.—The law making an insurer, failing to pay a loss within the time specified in the statute, liable to twelve per cent damages and reasonable attorney's fees, is constitutional.^{507 508 517} Such a law is not in violation of the Fourteenth Amendment to the Constitution of the United States, when applied to a foreign insurance company, as denying such company the equal protection of the laws.^{496 508 500 504} Neither is it un-

payment in advance of litigation, such letter constituted a sufficient demand, and, the policy sued on not having been paid according to its terms, plaintiff was entitled to recover damages and attorney's fees.—Penn Mut. Life Ins. Co. v. Maner, 109 S. W. 1084, 101 Tex. 553.

494. Where the time had elapsed within which the proceeds of a policy were payable according to its terms, and a sufficient demand before suit brought had been made, the beneficiary's right to damages and attorney's fees as provided by Rev. St. 1895, Art. 3071, became a part of the principal claim, which was not affected by the fact that the attorneys for the insurance company offered to pay the amount of the policy and 6 per cent interest before suit brought.—Id. See 28 Cent. Dig. Insurance, § 1498.

495. Rev. St. 1895, Art. 3071, provides that, where a loss occurs under a policy, and a life insurance company liable therefor fails to pay it within the time specified in the policy, after demand, the company shall pay the holder of the policy in addition to the amount of the loss 12 per cent damages on the amount, etc. Held, that the additional amount required to be paid is not a penalty, but damages, and every life insurance policy entered into in the state is made in view of

the provision, and embraces it as part of the contract.—Mutual Reserve Life Ins. Co. v. Jay, 109 S. W. 1116.

496. Rev. St. 1895, Art. 3071, making life insurance companies failing to pay a loss within the time specified in the policy after demand therefor, liable to a 12 per cent penalty and reasonable attorney,—fees for the collection of such loss, is not in violation of the 14th amendment to the United States Constitution, when applied to a foreign insurance company, as denying such company the equal protection of the laws.—New York Life Ins. Co. v. Orlopp, 61 S. W. 336, 25 Tex. Civ. App. 284.

497. A finding that a life insurance company refused to pay a policy to an alleged assignee thereof because it supposed that the wife and children of insured had claimed or might claim the proceeds of the policy or a part thereof, carries with it a finding of good faith, relieving the company from liability for damages and attorneys' fees imposed by Rev. St. 1895, Art. 3071, for nonpayment within the time stipulated in the policy, since, if refusal to pay was on the ground, it was not because of a desire to evade payment altogether.—Southwestern Ins. Co. v. Woods Nat'l Bank, 107 S. W. 114. See 28 Cent. Dig. Insurance, § 1498.

constitutional as discriminating against insurance companies or as attempting to take their property without due process of law,^{501 502} nor is it a special law regulating the practice of the courts within the prohibition of Constitution, Article 3, paragraph 56, subdivision 16.⁵⁰³ Such a law is not unconstitutional as being special legislation,⁵⁰⁵ or as violating Constitution, Article 1, paragraph 3, providing that no man or set of men are entitled to exclusive separate public services.⁵⁰⁹

498. Rev. St. 1895, Art. 3071, making a life insurance company failing to pay within the time specified in the policy liable for damages and attorney's fees, does not make an insurance company liable, where there are adverse claimants to the amount due under the policy, and it has merely refused to pay until the claimant entitled thereto has been determined in court.—Id.

499. That a life insurance company did not anticipate a lawsuit by adverse claimants to the amount due under a policy by instituting an interpleader suit and bringing them into court to settle their dispute cannot be held to show a desire to evade payment, rendering the company subject to the liability for damages and attorney's fees imposed by Rev. St. 1895, Art. 3071, for nonpayment within the time stipulated in the policy.—Id.

500. Rev. St. Art. 3071, providing that a life insurance company refusing to pay a policy within the time specified therein shall be liable to a penalty of 12 per cent, and reasonable attorney's fees, does not deny the equal protection of the laws guaranteed by the fourteenth amendment of the federal constitution.—Sun Life Ins. Co. v. Phillips, 70 S. W. 603.

501. Rev. St. 1895, Art. 3071, providing that a life insurance company failing to pay a loss within the time specified in the policy shall be liable to pay the holder 12 per cent of the amount of the loss in addition thereto, is not unconstitutional, as discriminating against insurance companies, and as attempting to take their property without due process of law.—New York Life Ins. Co. v. English, 70 S. W. 440, judgment reversed, 72 S. W. 58.

502. Rev. St. Tex. Art. 2953, providing that health and life insurance companies failing to pay a loss when due are liable for 12 per cent. of such loss in addition thereto, does not conflict with Const. Art. 1, Par. 19, providing that no citizen shall be deprived of property except by due course of the land.—Union Cent. Life Ins. Co. v. Chowning, 26 S. W. 982, 86 Tex. 654.

503. Rev. St. Art. 2953, providing that health and life insurance companies failing to pay a loss when due are liable for 12 per cent thereof, and

an attorney's fee in addition thereto, is not a special law regulating the practice of courts within the prohibition of Const. Art. 3, Par. 56, subd. 16.—Union Cent. Life Ins. Co. v. Chowning, 26 S. W. 982, 86 Tex. 654; Mutual Life Ins. Co. of New York v. Blodgett, 27 S. W., 286.

504. Rev. St. Tex. Art. 2953, providing that health and life insurance companies failing to pay a loss when due are liable for 12 per cent of such loss in addition thereto, does not violate Const. U. S. Amend. 14, Par. 1, providing that no state shall deny the equal protection of its laws to persons within its jurisdiction.—Union Cent. Life Ins. Co. v. Chowning, 26 S. W. 982, 86 Tex. 654.

505. Rev. St. 2953, which provides a penalty for a failure on the part of insurance companies to pay a loss within the time specified in a policy, is not unconstitutional, as being special legislation.—Manhattan Life Ins. Co. v. Fields, 26 S. W. 280.

506. Rev. St. Tex. Art. 2953, making health and life companies, failing to pay losses when due, liable for a reasonable attorney's fee in addition to such loss, does not violate Const. 1, Par. 13, providing that all courts shall be open, and every person shall have remedy by due course of law.—Union Cent. Life Ins. Co. v. Chowning, 26 S. W. 982, 86 Tex. 654.

507. Article 2953, Rev. St., making a life insurance company, failing to pay a loss, within the time specified in the policy, liable for 12 per cent damages on the amount of such loss, together with reasonable attorney fees for the collection of such loss, is constitutional.—Mutual Life Ins. Co. of New York v. Walden, 26 S. W. 1012; Union Cent. Life Ins. Co. v. Chowning, 26 S. W. 117; Mutual Life Ins. Co. of New York v. Simpson, Id. 837.

508. Rev. St. 2953, providing that health and life insurance companies failing to pay a loss when due are liable for 12 per cent of the loss in addition thereto, is not unconstitutional.—Mutual Life Ins. Co. of New York v. Blodgett, 27 S. W. 286.

509. Rev. St. Tex. Art. 2953, providing that health and life insurance companies failing to pay a loss when due are liable for 12 per cent of such loss

(D) **As to Its Construction; and Operation.**—This additional amount required to be paid is not a penalty, but damages and all life policies are made in view of the provision and embrace it as a part of the contract.⁵²⁰ The Supreme Court held that it applied to future losses only when it was enacted by the Fourteenth Legislature, saying that to apply it to policies existing at the time of passage and even to future losses would violate the obligation of the contract and the prohibition in the State Constitution against retrospective laws.⁵²⁰

(E) **Application to Foreign Companies.**—A foreign company can not stipulate in its policy that it shall be payable in the state of its incorporation to avoid the twelve per cent penalty.⁵¹⁸

(F) **Application to Assessment Companies.**—Where the cause of action accrued after the repeal of Article 3071 of the Revised Statutes of 1895 by the Thirty-first Legislature, and the penalty clause of such act had no application to assessment companies the plaintiff could not recover the twelve per cent damages and attorney's fees.⁵²² The Laws of 1909, Chapter 108, paragraph 65, however, exempting assessment companies from liability for penalties and attorney's fees were changed by the incorporation of such provisions in the statute of 1911 as Article 4957, so that thereafter assessment companies were subject to such liability.⁵¹⁹ (See Ann. 524^a.)

(G) **Necessity for Demand as a Condition Precedent.**—The court is not authorized to impose a penalty by way of damages and attorney's fees unless there is proof of a specific demand, the word demand meaning a request made on another to do a particular act under a claim of right.⁵¹¹ Demand can be made on any authorized agent.^{525b} Evidence of the furnishing of proofs of death, of a statement by insurer to the policyholder that it would not pay and the bringing of the suit on the policy is insufficient.^{511 525c} The bringing of suit does not constitute the statutory "demand."^{512 525} De-

in addition thereto, does not violate Const. Art. 1, Par. 3, providing that no man or set of men are entitled to exclusive separate public services.—*Union Cent. Life Ins. Co. v. Chowning*, 26 S. W. 982, 86 Tex. 654.

510. Const. 1876, Art. 3, Paragraph 43, authorizing a revisal, held not to prevent the change made in Rev. St. 1895, Art. 3071, in taking it over from Act May 2, 1874 (Acts 14 Leg. c. 145), Paragraph 9, which statute makes life insurance companies liable to a penalty and attorney's fee on refusal to pay.—*American Nat. Ins. Co. v. Collins*, 149 S. W. 554.

511. Rev. St. 1895, Art. 3071, imposing a penalty by way of damages and attorney's fees for the failure of an insurance company to pay a policy within a specified time when demand for payment has been made, does not authorize the court to impose the penalty unless there is proof of a specific demand, and evidence of the furnish-

ing of proofs of death, and of a statement by insured to the policyholder that it would not pay, and the bringing of suit on the policy, is insufficient; the word "demand" meaning a request made on another to do a particular act under a claim of right.—*Mutual Life Ins. Co. v. Ford*, 130 S. W. 769, writs of error denied, 131 S. W. 406.

512. Rev. St. 1895, Art. 3071, imposes a penalty by way of damages and attorney's fees for failure of an insurance company to pay a policy within a specified time after demand. Held, that where an insurance company refuses to pay a loss after proofs have been furnished, and thereupon plaintiff at once began suit, such suit did not constitute a statutory "demand," and she was therefore not entitled to recover statutory damages and attorney's fees on recovering the amount of the policy.—*Id.* See 28 Cent. Dig. Insurance, § 1498.

mand must come before suit, even though it appears that the demand would have been ineffectual.^{513 524} However, a late case holds that demand may be made after suit is brought on the policy.^{513a} Where the attorneys for the plaintiff wrote to the insurer's home office notifying it that the claim was in their hands for collection, that the statute provided for penalties and attorney's fees and they thought it was fair to notify it and request payment, the letter was a sufficient demand under the statute.⁴⁹³

Offer of Settlement No Bar.—After the time had elapsed within which the policy was payable according to its terms, the right to damages and attorney's fees was not affected by the fact that the attorneys of the insurer offered to pay the amount of the policy and six per cent interest before suit brought.^{494 525a} Where the beneficiary refused the amount offered by the insurer and began suit for and recovered the amount of the policy she was entitled to attorney's fees.⁴⁹¹

(H) Good Faith on the Part of Insurer With no Desire to Evade Payment.—Where the insurer refused to pay because it supposed the proceeds might be claimed by another and it acted in good faith, it was relieved from the operation of the statute imposing damages.⁴⁹⁷ An insurer merely refusing to pay in a case where there are adverse claimants, until the claimant entitled thereto has been determined by the court, is not liable for damages under the statute.^{498 523} In such a case that the insurer did not anticipate a lawsuit by filing an interpleader and bringing the claimants into court to settle their dispute cannot be held to show a desire to evade payment, rendering the company subject to the statutory damages.⁴⁹⁹

513. The penalty prescribed by Rev. St. 1895, Art. 3071, against life insurance companies for failure to pay the proceeds of a policy within the time specified by the policy after demand therefor is not recoverable in the absence of demand before suit, though it appears that demand would have been ineffectual.—*American Nat. Ins. Co. v. Collins*, 149 S. W. 554. See 28 Cent. Dig. Insurance, § 1498.

513a. The demand by the beneficiary for payment of a disputed claim on a life policy sufficient to entitle him to recover 12 per cent damages and attorney's fee may be made after bringing action on the policy.—*Illinois Bankers' Life Ass'n v. Dodson*, 189 S. W. 992.

514. Rev. St. Art. 3071, authorizes a recovery of 12 per cent. of the loss and an attorney's fee as a penalty for the failure of an insurance company to pay its policy within the time specified. The article is found in chapter 3, tit. 53, entitled "General Provisions," but which deals with foreign insurance companies. Chapter 4 concerns "Home, Life and Accident Insurance Companies," but contains no

such provision. Held, that the penalty could not be exacted from an accident insurance company.—*Aetna Life Ins. Co. v. J. B. Parker & Co.*, 72 S. W. 621.

515. *Batts' Ann. Civ. St. Art. 3071*, authorizing the recovery of 12 per cent. of the loss and an attorney's fee from an insurance company for its failure to pay within the time specified in the policy, does not apply to accident insurance.—*Aetna Life Ins. Co. v. J. B. Parker & Co.*, 72 S. W. 168, 580.

516. A foreign life insurance company, which obtains a permit to do business in Texas, cannot avoid the 12 per cent. penalty, provided by statute for a failure to pay a policy, by a stipulation in the policy that it shall be payable in the state of the incorporation, in which no such penalty is provided for.—*Franklin Ins. Co. v. Villeneuve*, 60 S. W. 1014.

517. The Statute providing for damages and attorney's fees for refusal to pay an insurance policy within the time specified in the statute, if liability thereon be established, is constitutional.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

In a late case, however, it is held that where the insurer fails to pay within the thirty days provided after a proper demand and proof of death, it becomes liable for the penalty and attorney's fees, though the omission was not willful, but in good faith.⁵¹⁸

(I) Insurer Liable for Penalty Though Policy Has Been Surrendered.—Where the insured, while insane, surrendered his policies and his personal representatives after his death notified the insurer of their election to rescind such surrender, the latter becomes liable for the statutory damages and attorney's fees when the claim is not paid within thirty days after such notice and demand.⁵²⁰

(J) Computation of Penalty.—The twelve per cent penalty is charged on the portion of the amount due on the policy which the insurer withholds.⁵²²

(K) Amount of Attorney's Fees.—Where the plaintiffs recovered nearly twenty thousand dollars, a verdict fixing the attorney's fees at five thousand dollars was held not excessive.⁵²¹ In

518. In determining whether a life insurance company was liable for the statutory penalty for failing to make payment within a specified time after the filing of proofs of death, only such proofs as were submitted to the insurer could be considered.—*National Life Ass'n v. Parsons*, 170 S. W. 1038.

Where an insurance company fails to pay a loss within 30 days after a proper demand and proofs of death, it becomes liable for the penalty and attorney's fee prescribed by Rev. St. 1911, Art. 4746, though its omission was not willful, but in good faith.—*Id.*

519. Laws 1909, c. 108, § 65, exempting assessment companies from liability for penalties and attorney's fees for failure to pay losses within 30 days after proofs and demand, held changed by the incorporation of such provision in the statute of 1911, as article 4957, so that thereafter assessment companies were subject to such liability.—*Id.*

520. Where insured, while insane, surrendered his policies of life insurance, and his personal representatives after his death notified the insurer of their election to rescind such surrender, insurer having refused to pay the policies within 30 days after such notice and demand became liable under *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4746*, for damages and attorney's fees.—*New York Life Ins. Co. v. Hager*, 169 S. W. 1064.

521. Where, in a suit to set aside the surrender of life insurance policies and to recover thereon, it was finally held that plaintiffs were entitled to recover \$19,876.23, together with a penalty and attorney's fees, a verdict fixing such fees at \$5,000 was not excessive.—*Id.*

522. The 12 per cent. penalty pro-

vided by statute for the failure of an insurance company to pay a life policy will only be charged on the portion of the amount due thereon which the company withholds.—*Franklin Ins. Co. v. Villeneuve*, 60 S. W. 1014.

523. Where the beneficiary of an insurance policy is uncertain by reason of conflicting claims, and the insurance company proceeds promptly and properly to file its bill of interpleader, it is not liable for statutory penalties for failure to pay loss within the time specified in the policy after demand of payment.—*Stevens v. Germania Life Ins. Co.*, 62 S. W. 824, 26 Tex. Civ. App. 156.

524. *Sayles' Civ. St. Art. 3071*, provides that in all cases where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, the company shall be liable in addition to pay the policyholder 12 per cent. damages on the loss and reasonable attorney's fees. Held, that a demand was necessary under such section to entitle plaintiff to the benefit thereof, notwithstanding its apparent futility.—*Northwestern Life Assur. Co. v. Sturdevant*, 59 S. W. 61.

524a. Rev. St. Art. 2953, provides for a penalty of 12 per cent. and reasonable attorney's fees, in addition to the amount of the loss on a life policy, if the company fails to pay the loss within the time specified therein. Article 2971a, as amended in 1885, excepts from this provision mutual relief associations which have no capital stock, and whose relief funds are created by assessment, if the principal officers of such associations make an annual statement showing certain specified facts. Held, that it is in-

the absence of proof of services performed by attorneys it is improper, in interrogating expert witnesses, to recite what was done by counsel in preparing the case.^{525d}

ACTIONS

Conditions Precedent in General.—The insurer cannot complain that the plaintiff failed to return money paid him in pursuance of an invalid agreement of release, where the money so paid was credited on the amount recovered.⁵²⁷

Service of Process—Statutory Regulations.—Process against any domestic insurance company may be served only on the president, or any active vice-president, or secretary, or general counsel residing at the city of the home office of the company, or by leaving a copy of same at the home office of such company during business hours. (Art. 4745, Rev. St. 1914.)

Change in Law.—This article of the statute repeals Article 1222

cumbent on a company which has rendered itself amenable to the penalty to show every fact necessary to bring it within the exception.—*Mutual Reserve Fund Life Ass'n v. Payne*, 32 S. W. 1063.

525. The suit itself was not such a demand as the statute intended.—*Northwestern Life Assur. Co. v. Sturdevant*, 59 S. W. 61.

525a. Under *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4746*, insurance company, which failed to pay beneficiary under \$450 policy, after her demand for payment of \$225, represented by insurer's division superintendent to be all that was due, held liable in damages of 12 per cent. of the face amount of policy, which was in fact the amount.—*American Nat. Ins. Co. v. Hawkins*, 189 S. W. 330.

525b. Under *Vernon's Sayles' Ann. Civ. St. 1914, art. 4746*, allowing interest and attorney's fees upon failure to pay loss after demand upon insurance company, held, that demand can be made upon any agent of company authorized to act in premises.—*American Nat. Ins. Co. v. Hollingsworth*, 189 S. W. 792.

525c. Under *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4746*, proper demand on insurance company for payment of loss is a prerequisite to demand for penalty and attorney's fees, and proof of loss and filing suit is not sufficient.—*Id.*

525d. On issue of attorney's fees allowed by *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4746*, upon failure of insurance company to pay loss after demand, in absence of proof of services performed by attorneys, held improper, in interrogating expert witnesses, to recite what was done by counsel in preparation of case.—*American Nat.*

Ins. Co. v. Hollingsworth, 189 S. W. 792.

526. "The several insurance companies, and those incorporated out of this State, in all cases where a loss occurs, and when they refuse to pay within the time specified in the policy, shall be liable to pay the holder of said policy, in addition to the loss, not more than twelve per cent on the liability of said company for said loss; also all reasonable attorney's fees for the prosecution of the case against said company" (Act of 14th Leg., p. 200). This is held to apply to future losses. In a suit on a policy prior to this act it was error to allow as part of damages attorney's fees to plaintiff. Statutes are held to operate prospectively unless a contrary construction is evidently intended by their plain and unequivocal language. To apply this act to policies existing at the time of passage and even to future losses would violate the obligation of the contract and the prohibition in the State Constitution against retrospective laws.—*The Piedmont and Arlington Life Insurance Co. v. Tresy Ray et al.*, 50 Tex. 511.

ACTIONS. (SEE 25 CYC. 904).

612—Conditions Precedent in General. (See 28 Cent. Dig. Insurance, §§1520-1523.)

527. An insurance company in a suit on a policy could not complain that plaintiffs had failed to return money paid to them in pursuance of an invalid agreement of release, where the money so paid was credited on the amount recovered.—*Northwestern Life Ass'n v. Findley*, 68 S. W. 695.

of the Revised Civil Statutes of 1895, authorizing service of citation in an action against an incorporated company, on its local agent.⁵²⁸

Defenses in General.—In an action by the executor of insured it was no defense that the insurer had paid the proceeds to an assignee under an assignment for moneys advanced, to be used by insured in gambling transactions in cotton futures.⁵²⁹ In such a case where the assignee had no insurable interest and the insurer paid the proceeds with notice of such assignee's claim against the insured's estate, the insurer was not entitled to justify the payment on the theory that the assignee received the money in trust for those equitably entitled thereto.⁵³⁰

Joinder of Causes of Action.—In a case where the payee of notes given by a firm and secured by liens on the firm property and by certain stock belonging to one of the partners, after the death of the latter, sued the surviving partner and the widow of the deceased partner to foreclose the liens, attempting to subject the proceeds of the policies on the life of the deceased partner collected by the widow, it was held that the action against the widow of the surviving partner to recover the insurance could not be joined in the suit to foreclose the liens.⁵³¹ There was no misjoinder where the insurer sued its agent and the sureties on his bond together securing his indebtedness to the company.⁵³²

Venue of Suits—(A) Statutory Regulations.—Suits against life

610—Statutory Provisions.

528. As regards service on domestic insurance companies, of certain kinds, Acts 31st Leg., c. 108, Par. 34, providing how service on them "may only" be had, repeals Rev. St. 1895, Art. 1222, as amended by Acts 28th Leg., c. 47, authorizing service of citation, in an action against an incorporated company, on its local agent.—*American Nat. Ins. Co. v. Rodriguez*, 152 S. W. 871.

615—Defenses.—In General. (See 28 Cent. Dig. Insurance, §§ 1530, 1532-1534.)

529. In an action by insured's executor on certain life policies, it was no defense that the insurer had paid the proceeds to an assignee under an assignment for moneys advanced, to be used by insured in gambling transactions in cotton futures.—*Manhattan Life Ins. Co. v. Cohen*, 139 S. W. 51. See 28 Cent. Dig. Insurance, §§ 1530, 1532.

530. Insurer having paid the proceeds of policies to an assignee having no insurable interest, with notice of his adverse claim against the insured's estate, held not entitled to justify the payment on the theory that the as-

signee received the money in trust for those equitably entitled thereto.—*Id.*

Joinder of Causes of Action.

531. The payee of notes given by a firm, and secured by liens on the firm property and by certain stock belonging to one of the partners, after the death of the latter partner sued the surviving partner and the widow of the deceased partner to foreclose the liens, and sought to subject to payment of the claim the proceeds of policies, on the life of the deceased partner collected by his widow, which policies, it was alleged, had been secured with moneys belonging to the firm, on the understanding between the partners that they should stand as security for the debts in question. The surviving partner joined in a cross-bill asking the same relief as to the policies. Held, that the action against the widow of the surviving partner to recover the insurance could not be joined in the suit to foreclose the liens.—*First Nat'l Bank v. Valenta*, 75 S. W. 1087.

532. There was no misjoinder of causes of action, where a life insurance company sued together its agent and the sureties on his bond securing his indebtedness to the company.—*Shaw v. Southland Life Ins. Co.*, 185 S. W. 915.

and accident insurance companies or associations may be commenced in the county in which the persons insured, or any of them, resided at the time of death or injury. (Art. 1830 (29), Rev. St. 1914; also, Art. 2308 (12), Rev. St. 1914.) Suit may also be instituted in the county where the home office of the insurer is located, or in the county where the loss has occurred or where the policyholder or beneficiary instituting such suit resides. (Art. 4744, Rev. St. 1914.)

(B) Case Law.—Under Article 1830 of the Revised Civil Statutes (see above) the insurer's interpleader against the widow of the insured residing in one county and a creditor residing in another, was held properly brought in the creditor's county.⁵³³ And the fact that the widow was subsequently appointed administratrix in her county gave her no privilege to have the cause transferred to such county.⁵³⁴ The claim of the creditor was held not a money demand against the estate so that administratrix was not entitled to have the cause removed to the county of her residence.⁵³⁵ The defendant in such a case by filing a motion to quash citation and a plea in abatement in the county of the creditor's residence was not deprived of any privilege to be sued in her own county.⁵³⁶

Limitations by Provisions of Policy.—A stipulation in a policy limiting the time within which suit shall be brought, is valid, and runs during the minority of the beneficiaries, there being no exceptions in their favor, and the insured having had knowledge that, if a cause of action should accrue to them at all, it would be during their minority.⁵³⁶

Statutory Regulations as to Limitations in Policy.—Insurers are prohibited from having a provision in their policies limiting the time within which any action may be commenced to less than two years after the cause of action shall accrue. (Art. 4742, Rev. St. 1914.)

612—*Venus*. (See 28 Cent. Dig. Insurance, §§ 1536-1539.)

533. Under Rev. St. 1911, Art. 1830, cl. 4, insurer's interpleader against the widow of insured residing in D. county and a creditor residing in K. county held properly brought in K. county, and that the widow's subsequent appointment as administratrix in D. county gave her no privilege to have the cause transferred to D. county.—*Joy v. Citizens Life Ins. Co.*, 178 S. W. 590.

534. Defendant, by filing a motion to quash citation and a plea in abatement in an action in the district court of K. county, held not thereby deprived of any privilege to be sued in D. county.—*Joy v. Citizens' Life Ins. Co.*, 178 S. W. 590.

535. Under Rev. St. 1911, Art. 1830, § 6, claim of defendant creditor on insurer's interpleader to establish right

to proceeds of policy as between the creditor and the widow and administratrix of insured held not a money demand against the estate so that administratrix was not entitled to have the cause transferred to the county of her residence.—*Joy v. Citizens' Life Ins. Co.*, 178 S. W. 590.

620—*Limitations by Provisions of Policy*. (See 28 Cent. Dig. Insurance, §§ 1540, 1542-1553.)

536. A stipulation, limiting the time within which suit shall be brought, is valid, and runs during the minority of the beneficiaries, there being no exception in their favor, and the assured having had knowledge that, if a cause of action should accrue to them at all, it would be during their minority.—*Suggs v. Travelers Ins. Co.*, 9 S. W. 676.

Time Within Which Action Must Be Brought.—As a general rule, the statute of limitations begins to run from the time the right of action accrues.⁵³⁷ A beneficiary under a policy assigned by the insured in payment of his debt is not entitled to plead limitations against the debt as a defense to the creditor's right to recover the debt, interest, etc., out of the proceeds on the insured's death.⁵⁴³ In such a case where the creditor had no insurable interest, limitations did not begin to run against the creditor's claim until the policy became payable on the insured's death.⁵⁴⁴ The statute of limitation begins to run for conversion of a premium by an agent when he refuses to return it and negotiates it, barring action by the applicant after two years.^{538 540} Whenever the owner of the property has notice or by reasonable diligence would know of the conversion the statute begins to run and an assignee in such a case occupies no better position than the assignor.^{539 541 542}

Parties.—The Supreme Court in an early case held that a policy payable to the widow, half for herself and half for the use of the children, can be collected by the widow and the children are not necessary parties.⁵⁵⁰ The widow of the insured is not a necessary party in an action on a policy by the insured's special administrator.⁵⁴⁸ The right of the widow and children to sue on a policy is not defeated by the fact that it was payable to the "executors,

622—Time Within Which Action Must Be Brought. (See 28 Cent. Dig. Insurance, §§ 1540, 1544-1550.)

537. As a general rule, the statute of limitations begins to run from the time the right of action accrues.—*Adams v. San Antonio Life Ins. Co.*, 185 S. W. 610.

538. When a life insurance agent, on refusal of the insurer to accept a risk, refused to return the applicant's premium, and negotiated it, the right of action arose, and the statute of limitations began to run, barring action for the conversion after two years.—*Adams v. San Antonio Life Ins. Co.*, 185 S. W. 610.

539. The statutes of limitations governing actions of conversion begins to run from the time when the owner of the property has notice or by reasonable diligence would know of the conversion.—*Adams v. San Antonio Life Ins. Co.*, 185 S. W. 610.

540. Where an insurance agent, when the company declined the risk, refused to return the applicant's note but negotiated it and appropriated the money, the refusal of the agent to return the note after notice to the applicant that his application was declined was sufficient notice of the conversion to start the running of the

statute of limitations.—*Adams v. San Antonio Life Ins. Co.*, 185 S. W. 610.

541. The assignee of one holding a right of action for conversion occupies no better position than the assignor, and is subject to the same rule as to limitation of his action.—*Adams v. San Antonio Life Ins. Co.*, 185 S. W. 610.

542. Evidence held to show that the holder of a right of action for conversion exercised no diligence in the premises, so that his action was barred within the statutory period from the time of the conversion.—*Adams v. San Antonio Life Ins. Co.*, 185 S. W. 610.

543. A beneficiary under a policy assigned by the insured in payment of his debt held not entitled to plead limitations against the debt as a defense to the creditor's right to recover the debt, interest, etc., out of the proceeds of the insurance on the insured's death.—*Harde v. Germania Life Ins. Co.*, 153 S. W. 666.

544. Where a debtor transferred a life insurance policy to his creditor in payment of the debt, the creditor having no insurable interest in his life, limitations did not begin to run against the creditor's claim until the policy became payable on the insured's death.—*Harde v. Germania Life Ins. Co.*, 153 S. W. 666. Digitized by Google

administrators or assigns.⁵⁴⁵ Suit on a policy which has been assigned to a creditor as security may be in the name of the creditor alone as assignee or in the name of the insured for the use of the creditor.⁵⁴⁷ Although the beneficiary has no insurable interest in the life of the insured he may maintain an action on the policy and a judgment against the company does not preclude inquiry between the beneficiary and the legal representative of the insured as to the ultimate right to the proceeds.⁵⁴⁶ A petition, in an action by the transferee of a premium note on a policy, which was never delivered, alleging that the insurer had agreed to indemnify the maker against any liability on the note, is not sufficient to justify the making of the insurer a party defendant.⁵⁴⁹ An attorney does not become a necessary party although he has been promised a certain sum based on recovery on a policy.^{550a}

Process in General.—The fact that the judgment shows the defendant was duly served and cited is not conclusive on appeal, where the original petition shows service was sought on defendant's local agent, and the citation in the record shows it was served on such agent.⁵⁵¹

Petition—(A) Form and Requisites in General.—The incorporation of the insurer must be alleged, in county other than where its principal office is.⁵⁵² A description of the defendant as to the

624—Parties. (See 28 Cent. Dig. Insurance, §§ 1557-1570.)

545. That a policy of life insurance was payable to the "executors, administrators, or assigns" of the insured did not defeat the right of the widow and children of insured to sue on it.—Sun Life Ins. Co. v. Phillips, 70 S. W. 603.

546. The beneficiary in an insurance policy may maintain an action thereon although he has no insurable interest in the life of the assured, and a judgment against the company does not preclude inquiry between the beneficiary and the legal representative of the assured as to the ultimate right to the proceeds of the policy.—Pacific Mut. Life Ins. Co. v. Williams, 15 S. W. 478.

547. Where the insured assigns his policy to a creditor as collateral security for the debt due the creditor, suit on the policy may be in the name of the creditor alone as assignee, or in the name of the insured for the use of the creditor.—New Orleans Ins. Co. v. Gordon, 3 S. W. 718.

548. In an action on a life insurance policy by insured's special administrator, the widow of insured was not a necessary party.—Metropolitan Life Ins. Co. v. Gibbs, 78 S. W. 398, 34 Tex. Civ. App. 131.

549. A petition, in an action by the transferee of a note for a premium on an insurance policy, which was never delivered, alleging that the insurance company had agreed to indemnify the

maker against any liability on the note, is insufficient to justify the making of the insurance company a party defendant.—Young v. State Bank of Marshall, 117 S. W. 476.

550. An insurance policy payable to widow, half for herself and half for use of children can be collected by widow and the children are not necessary parties.—Piedmont and Arlington Life Ins. Co. v. Ray, 50 Tex. 511.

550a. Agreement to pay attorney a fixed sum, based on recovery on a life insurance policy, held not to pass the legal title out of the beneficiary so as to make the attorney a necessary party to an action on the policy.—American Nat. Ins. Co. v. Hawkins, 189 S. W. 330.

626—Process.—In General.

551. Recital in the judgment that defendant was "duly served and cited" is not conclusive on appeal, the original petition showing service was sought on defendant's local agent, and the citation in the record showing it was served on such agent.—American Nat. Ins. Co. v. Rodriguez, 152 S. W. 871.

629—Petition. (A) Form and Requisites in General. (See 28 Cent. Dig. Insurance, §§ 1575-1590, 1584-1586, 1592, 1598.)

552. Incorporation of insurer must be alleged, in county other than where its principal office is. Description of it as "Texas Mutual Insurance Com-

"Texas Mutual Insurance Company" was not sufficient.⁵⁵² The petition need not set out the policy entire, but only its substance and facts showing the company's liability.⁵⁵³ It must allege consideration to support policy or it will be insufficient on demurrer.⁵⁵⁴ It is not necessary that the petition allege that insured was in sound health when the policy was issued, as required by its conditions.^{554 555} (For sufficient allegations to the authority of the agent to bind the insurer by his statements as to what the premium would be, see Ann: 556a.)

(B) Performance or Waiver of Conditions.—The plaintiff must allege a waiver of proofs of death required in the policy if he relies thereon.⁵⁵⁷ A plea that the agent to whom the plaintiff paid his premium was authorized to collect premiums generally in a case where the insurer claimed that the policy had lapsed for non-payment of premium was proper as raising the issue of authority given outside the written contract, the latter limiting the agent's authority to first premiums.⁵⁵⁸ Where the plaintiff who was led to believe that a settlement of the policy would be accomplished without suit, delayed filing same as alleged in the petition, it was held that such petition showed a waiver by the defendant of a condition in the policy providing for suit within one year from the insured's death, such delay being alleged to have been with fraudulent intent to allow such year to expire.⁵⁵⁹ In this case it was held that the evidence was sufficient to establish a waiver of the condition where the defendant's objections to the proofs of death were such that it would be hard to attribute to it any other motive than the fraudulent purpose to allow the year

pany" is not sufficient.—Texas Mut. Life Ins. Co. v. Davidge, 51 Tex. 244.

553. Petition on life policy need not set it out entire, but only its substance, and facts showing the company's liability.—Northwestern Mut. Life Ins. Co. v. Freeman, 47 S. W. 1025, 19 Tex. Civ. App. 832.

554. In action on policy of life insurance, it was not necessary that petition affirmatively allege that insured was in sound health when policy was issued, as required by its conditions.—American Nat. Ins. Co. v. Burnside, 175 S. W. 169.

555. In action on a life policy, held necessary that petition allege that insured at issuance of policy was in sound health.—American Nat. Life Ins. Co. v. Rowell, 175 S. W. 170.

556. Petition must allege consideration to support policy or it will be insufficient on demurrer.—Texas Mut. Life Ins. Co. v. Davidge, 51 Tex. 244.

556a. Allegations of petition held to sufficiently allege the authority of the agent to bind the insurer by his statements as to what the premium would be.—Illinois Bankers' Life Ass'n v. Dodson, 189 S. W. 992.

534—(B) Performance or Waiver of Conditions. (See 28 Cent. Dig. Insurance, §§ 1593, 1596, 1598, 1603-1606.)

557. A waiver of proofs of death required by policy, if relied on by the insured in an action thereon, must be alleged.—American Nat. Life Ins. Co. v. Rowell, 175 S. W. 170.

558. Where insurer claimed that the policy had lapsed for non-payment of the second premium, plaintiff's plea that the agent to whom he paid was authorized to collect premiums generally, though his written contract limited his authority to first premiums, while not sufficient for estoppel, was proper as raising the issue of authority given outside the written contract.—American Nat. Ins. Co. v. Collins, 149 S. W. 554. See 28 Cent. Dig. Insurance, §§ 1593, 1603-6.

559. In an action on a life policy providing for suit within one year from assured's death, the petition alleged quibbling over unimportant defects in the proofs, leading plaintiff to understand that the matter would be adjusted when such defects were

to expire, without expressing dissatisfaction with the merits of the claim, and a statement of the vice-president of the insurer that if the proofs of death were intelligently filled out he had no doubt that the matter could be arranged.⁵⁶⁰

Filing of Supplemental Pleadings.—The filing of a trial amendment after a verdict has been rendered is not prejudicial where the prayer of the amendment was refused.⁵⁶¹

The Answer of the Defendant.—The allegation of the insurer that the coroner found that insured committed suicide presents no defense, his finding not being proof or even evidence of suicide.⁵⁶² Where a petition alleged that the insurance should be binding the day following the delivery of the policy, several days before the insured's death, but that the premium should be paid a number of weeks after such delivery, an exception stating that the contract was without consideration and that it had not taken effect before insured's death was properly overruled.⁵⁶³

Replication and Subsequent Pleadings.—Demand sufficient to entitle beneficiary to damages and attorney's fees may be made after filing suit and can be shown by amendment.^{564a} After a plea of misrepresentation as to habits of drunkenness on the part of the insured, evidence that the drunkenness was known to the agent of the insurer could not be introduced in the absence of replication setting it up.⁵⁶⁴

cured, with a fraudulent intent to allow such year to expire. Held, that the petition showed a waiver by defendant of such condition in the policy.—*Mutual Reserve Fund Life Ass'n v. Tolbert*, 33 S. W. 295.

560. In an action on a life policy providing for suit within one year from assured's death, the evidence showed that defendant's objections to the proofs of loss furnished were such that it would be hard to attribute to it any other motive than the fraudulent purpose of allowing such year to expire; that in addition to repeated letters written by defendant, demanding purely formal changes in the proofs of death, without intimating dissatisfaction with the merits of the claim, defendant's vice president stated to plaintiff's agent that plaintiff had the blanks necessary to be filled up, and, if they were intelligently filled, he had no doubt that the matter could be arranged. Held, that the evidence was sufficient to establish a waiver of the condition.—*Mutual Reserve Fund Life Ass'n v. Tolbert*, 33 S. W. 295.

643—Amended and Supplemental Pleadings.

561. Permitting filing of trial amendment after verdict held not prejudicial, where prayer of the amendment was refused.—*Alamo Trust Co. v. Prudential Life Ins. Co. of Texas*, 183 S. W. 787.

640—Plea, Answer or Affidavit of Defense. (See 28 Cent. Dig. Insurance, §§ 1554, 1609-1612, 1614-1624.)

562. The allegation of the answer, in an action on a life policy, that the coroner found that insured committed suicide, presents no defense, his finding not being proof or even evidence of suicide.—*De Garcia v. Cherokee Life Ins. Co. of Rome, Ga.*, 180 S. W. 153.

563. Where a petition on an oral contract of life insurance alleged that the contract was on consideration that insured should pay defendant out of his monthly wages a certain sum in monthly installments, beginning November, 1900, and that it was agreed at the time insured delivered his application to defendant's agent, on October 7, 1900, that the insurance should be binding on October 8, 1900, which was several days before insured's death, an exception to the petition that it showed that the contract was without consideration, and that it had not taken effect before insured's death, was properly overruled.—*Pacific Mut. Ins. Co. v. Shaffer*, 70 S. W. 566.

641—Replication or Reply and Subsequent Pleadings. (See 28 Cent. Dig. Insurance, §§ 1554, 1626, 1628, 1629.)

564. With regard to a plea of misrepresentation as to habits of drunkenness on the part of the insured, held, that the evidence that the drunken-

Issues, Proof and Variance.—It was not error to exclude the evidence of the defendant showing that there was another policy issued besides the policy offered by the plaintiff when such defendant had not pleaded the issuance of the second policy.⁵⁶⁷ Where the facts constituting a waiver of any defense are not specifically pleaded, evidence tending to prove such waiver is inadmissible.⁵⁶⁸ Evidence that the insured was not in good health when the policy issued was properly excluded where such objection was not made within ninety days after the issuance of the policy.⁵⁶⁵ (See Ann. 566 for evidence held insufficiently pleaded to justify evidence that insured was not in sound health when the policy issued.) In an early case it was held that as statements in an application are warranties and not mere representations, an issue as to their materiality, is immaterial.⁵⁷⁹

Presumption and Burden of Proof—(A) In Showing Suicide.—The presumption of law is against suicide and the insurer, defending on that ground, has the burden of establishing the fact.^{580 586 587 590} As to whether the death of a person is accidental or suicidal, the presumption is in favor of death by accident.⁵⁸⁸

(B) In Showing Insured Was Not in Sound Health.—Under the statute (Arts. 4947 and 4948, Rev. St. 1914) the burden is not on the plaintiff to show that she was in sound health when the policy

ness was known to the agent of the company could not be introduced in absence of replication setting it up.—*Texas Mut. Life Ins. Co. v. Davidge*, 51 Tex. 244.

564a. The demand by the beneficiary for payment of a disputed claim on a policy of life insurance, sufficient to entitle him to recover 12 per cent. damages and attorney's fee, may be made after bringing action on the policy and be shown by amendment.—*Illinois Bankers' Life Ass'n v. Dodson*, 189 S. W. 992.

645—Issues, Proof and Variance. (See 28 Cent. Dig. Insurance, §§ 1554, 1632, 1644.)

565. In action on policy of life insurance, evidence that insured was not in good health when the policy issued held properly excluded, where such objection was not made within 90 days after issuance of policy.—*American Nat. Life Ins. Co. v. Burnside*, 175 S. W. 169.

566. In action on life insurance policy, defense that insured was not in sound health when policy issued held not sufficiently pleaded to justify admission of evidence to establish it.—*American Nat. Life Ins. Co. v. Rowell*, 175 S. W. 170.

567. Where the life insurance policy introduced by plaintiff was the one

sued on, and defendant did not plead the issuance of another policy, there was no error in excluding evidence offered by defendant to show that there were two policies issued.—*American Nat. Ins. Co. v. Bird*, 174 S. W. 939.

568. In an action on an insurance policy, where facts constituting a waiver of any defense against a demand on the policy are not specifically pleaded, evidence tending to prove the waiver is inadmissible.—*Metropolitan Life Ins. Co. v. Wagner*, 109 S. W. 1120. See 28 Cent. Dig. Insurance, §§ 1554, 1632-1644.

579. As statements in an application for a life insurance are warranties, and not mere representations, an issue as to their materiality, in an action for the insurance, is immaterial.—*Kansas Mut. Life Ins. Co. v. Coalson*, 54 S. W. 388, 22 Tex. Civ. App. 64.

646—Presumption and Burden of Proof. (See 28 Cent. Dig. Insurance, §§ 1555, 1645-1668.)

580. Under a policy excepting liability where insured commits suicide, but not requiring the beneficiary to establish that death was accidental, the presumption of law is against suicide and the insurer, defending on that ground, has the burden of establishing the fact.—*First Texas State Ins. Co. v. Jiminez*, 163 S. W. 656. See 28 Cent. Dig. Insurance, §§ 1555, 1645-1668.

issued, the latter providing that no obligations were assumed unless insured was in sound health.⁵⁸⁹

(C) **In Showing Waiver.**—The burden is on the insured to show waiver where there has been a failure in the payment of a premium or premium note and the policy has thereby become forfeited.⁵⁸⁴

(D) **In Showing Deceased Indebted to Recipient of Proceeds of Policy.**—The burden is on the insurer, in an action by the administratrix of insured on a policy payable to a creditor of insured "as his interest may appear, otherwise to the executor, administrator, etc.," to show that the deceased was indebted to the creditor and the amount of the debt, when it attempts to justify on the ground of payment to the creditor.⁵⁸¹

(E) **In Showing Survivorship.**—The burden is on the administrator of the beneficiary to show that his decedent had survived the insured where the policy provided that it should be payable to a certain beneficiary, if living, otherwise to the executors of the insured, in a suit by the administrator of the insured against the insurer and the administrator of the beneficiary to recover the proceeds of the policy.⁵⁸⁵

(F) **In Showing Financial Condition of Insured.**—Under the law of a foreign state, limiting the amount of insurance payable to a wife as against creditors, the wife, in an action claiming a greater amount of insurance on his life as against his creditors, has the burden of showing that his financial condition warranted him in paying greater premiums for her.⁵⁸³

The Burden of Showing a Prima Facie Case.—A charge that the burden is on plaintiff to show a prima facie case by proof of execution of policy, payment of all premiums, death of insured, proof thereof to defendant, and defendant's failure to pay and that if the jury find these facts they will find for the plaintiff unless they find for the defendant on the other issues, where the company sets up a breach of warranty in the application, is not objectionable as permitting recovery on less than a preponderance of the evidence, and without proof of compliance with the warranties and conditions precedent.⁵⁸²

581. In an action by the administratrix of insured on a policy payable to a creditor of insured "as his interest may appear, otherwise to the executor administrator, or assigns of the insured," the burden is on the company to show that deceased was indebted to the creditor, and the amount of the debt, when it attempts to justify on the ground of payment to the creditor. Judgment, 44 S. W. 610, reversed.—*Andrews v. Union Cent. Life Ins. Co.*, 50 S. W. 572, 92 Tex. 584.

582. Where the company sets up breach of warranty in the application, a charge that the burden is on plain-

tiff to show a prima facie case by proof of execution of the policy, payment of all premiums, death of insured, proof thereof to defendant, and defendant's failure to pay, and that if the jury find these facts, they will find for plaintiff unless they find for defendant on the other issues, is not objectionable as permitting recovery on less than a preponderance of evidence, and without proof of compliance with the warranties and conditions precedent.—*Mutual Life Ins. Co. v. Nichols*, 24 S. W. 910.

583. Under *Mansf. Dig. Ark. § 4623*, authorizing insurance on one's life for

Admissibility of Evidence—(A) In General.—The record of an assessment passed at a meeting of a foreign insurance company and signed by its president and secretary is admissible.^{590a} Parol evidence that it was agreed that a premium note executed by the defendant should not be paid if the defendant would assist in procuring other insurance is inadmissible.⁵⁹² A card notifying deceased of the maturity of a premium was held not immaterial or irrelevant.⁵⁹⁶ An insurer may not introduce a letter written by its officers stating that insured committed suicide.⁶⁰⁶ Proof of the appointment of an administrator is admissible in an action on a policy to establish his capacity to sue.⁵⁹⁵ Declarations of insured after the policy was delivered to the effect that he had dropped it offered in evidence with reference to the alleged invalidity on account of the premium not having been paid in full, are not admissible.⁵⁹⁴ Evidence of an understanding between the insured and the agent, when the application was made, that when the policy arrived it might be accepted or rejected at the option of the insured, is admissible as explaining the subsequent repudiation of

the benefit of his wife, which shall be payable to her free from the claims of his creditors, provided that such exemption shall not apply where the amount of premium annually paid out of the funds of the husband exceed \$300, the wife, claiming a greater amount of insurance on his life as against his creditors, has the burden of showing that his financial condition warranted him in paying such greater premiums for her.—*Red River Nat. Bank v. De Berry*, 105 S. W. 998. See 28 Cent. Dig. Insurance, §§ 1645-1668.

594. Where there has been a failure in the payment of a premium or a premium note and a policy by its express provision has become forfeited, the burden of showing waiver is upon the insured.—*Security Life & Annuity Co. of America v. Underwood*, 150 S. W. 293. See 28 cent Dig. Insurance, §§ 1555, 1645-1668.

595. Where a life policy provided that it should be payable to a certain beneficiary, if living, otherwise to the executors of the insured, in a suit by the administrator of the insured against the insurance company and the administrator of the beneficiary to recover the proceeds of the policy the burden was on the administrator of the beneficiary to show that his decedent had survived the insured.—*Hildebrandt v. Ames*, 66 S. W. 128, 27 Tex. Civ. App. 377.

596. In an action for life insurance, defended on the ground of suicide the burden was on the defendant to prove its defense. Judgment, 111 S. W. 967, reversed.—*Grand Fraternity v. Melton*, 117 S. W. 788, 102 Tex. 399. See 28 Cent. Dig. Insurance, §§ 1555, 1645-1668.

597. It is presumed that an insured's death was not by suicide.—*Grand Fraternity v. Green*, 131 S. W. 442.

598. In the absence of satisfactory evidence in an action on an insurance policy as to the death of a person being accidental or suicidal, the presumption is in favor of death by accident.—*Mutual Life Ins. Co. v. Ford*, 130 S. W. 769, writs of error denied 131 S. W. 406. See 28 Cent. Dig. Insurance, §§ 1555, 1645.

599. The burden was not on one, suing on a life policy, to show that she was in sound health at the issuance of the policy, which provided that no obligations were assumed unless insured was in sound health, in view of the provisions of Rev. Civ. St. 1911, Arts. 4947, 4948.—*American Nat. Ins. Co. v. Fawcett*, 162 S. W. 10. See 28 Cent. Dig. Insurance, §§ 1555, 1645.

590. In an action on a life policy, the burden of showing suicide on the part of deceased is on defendant.—*Equitable Life Assur. Soc. v. Liddell*, 74 S. W. 87.

647—Admissibility of Evidence. (A) In General. (See 28 Cent. Dig. Insurance, §§ 1555, 1669, 1681, 1683-1706.)

591. Where defendant alleges that the policy was taken out by plaintiff as a wagering policy, its agent may testify that he urged the parties to apply, and that the insured paid the premium, and thought at first of making plaintiff's minor children the beneficiaries, but concluded to make plaintiff the beneficiary, in order that in the event of his marriage it might be changed more easily.—*Equitable Life Assur. Soc. v. Hazlewood*, 12 S. W. 621.

the transaction, the return of the policy, the refunding of the premium and other acts of the parties.⁵⁹³ Where the defendant alleges that the policy was taken out by plaintiff as a wagering policy, the insurer's agent may testify that he urged the parties to apply, that the insured paid the premium and why a certain beneficiary was selected.⁵⁹¹ Where a policy provides that no forfeiture shall be declared for non-payment of premium unless a notice in writing shall have been mailed the insured, it is error to admit over objection evidence of such notice and forfeiture where they have not been affirmatively alleged by the insurer.⁵⁹⁷ Testi-

592. Where defendant executed a premium note, parol evidence that it was agreed that it should not be paid if defendant would assist in procuring other insurance held inadmissible.—*Security Life Ins. Co. of America v. Allen*, 170 S. W. 131.

593. Insured executed a note in payment of a life insurance policy. The policy was received by his father while insured was away from home. Subsequently the insurance agent collected a payment on the note from the employer of the insured, but on his return he repudiated the transaction, and the money was refunded. The note remained in the possession of the company, but insured returned the policy, stating that it had never been delivered to him, and asking that it be canceled. Held, in an action on the policy, that evidence of an understanding between the insured and the agent, when the application was made, that when the policy arrived it might be accepted or rejected at the option of the insured, was admissible as explaining the subsequent acts of the parties.—*Atkins v. New York Life Ins. Co.*, 62 S. W. 563.

594. In an action on a life insurance policy it appeared that assured failed to pay the first premium in full, but paid all except the agent's commissions, and the policy was delivered and the company accepted what was paid, and otherwise treated it as obligatory. Held, that declarations of assured made after the policy was delivered, to the effect that he had dropped it, offered in evidence, with reference to the alleged invalidity on account of the premium not having been paid in full, were properly excluded.—*Metropolitan Life Ins. Co. v. Bradley*, 79 S. W. 367, judgment reversed 82 S. W. 1031, 98 Tex. 230.

595. *Sayles' Ann. Civ. St. 1897, Arts. 1931, 1933*, authorized the appointment of a temporary administrator for the prosecution of a suit, and declared that the appointment shall cease at the succeeding term of the county court, unless continued in force by an order entered on the minutes in open court. Held, that where a temporary administrator was appointed to sue on a pol-

icy of insurance in December, 1902, and at the March term of the county court his appointment was continued, proof of his appointment and the continuation thereof was properly admitted in evidence in the action on the policy to establish plaintiff's capacity to sue.—*Metropolitan Life Ins. Co. v. Gibbs*, 78 S. W. 398, 34 Tex. Civ. App. 131.

596. In an action on an insurance policy, an objection to a card notifying deceased of the maturity of a premium as immaterial and irrelevant was properly overruled.—*Metropolitan Life Ins. Co. v. Gibbs*, 78 S. W. 398, 34 Tex. Civ. App. 131.

597. In an action on a life policy on the joint lives of plaintiff and his wife, containing a provision that no forfeiture should be declared for non-payment of premium, unless a notice in writing should have been mailed by defendant to plaintiff, it was error to admit, over objection, evidence of such notice and forfeiture, where they had not been affirmatively alleged by defendant, though plaintiff had alleged, and defendant, by both general and special denials, denied, that the policy was in force at the date of the death of plaintiff's wife, and that plaintiff and his wife had complied with the terms of the policy as to the payment of premiums. 32 S. W. 911 reversed.—*Mullen v. Mutual Life Ins. Co.*, 34 S. W. 605, 89 Tex. 259.

598. In an action for life insurance on a policy to be void in case of suicide within two years from date, the evidence showed that assured's death resulted from morphine or opium self-administered. Held that, it having been shown that assured was not accustomed to the use of morphine, it was proper to allow a physician to answer plaintiff's question as to whether one not accustomed to handling it could have any conception of how much an eighth or a quarter of a grain was, as bearing on the question of whether assured might not have accidentally taken an overdose without any suicidal intent.—*Mutual Life Ins. Co. of New York v. Tillman*, 19 S. W. 294.

mony that at the time the policy is issued that the state agents of the insurer had stated that they would accommodate insured with respect to the payments is admissible and is not objectionable as an attempt to contradict a provision in the policy that only certain officers could waive forfeitures or grant extensions.⁶⁰¹ Evidence that naming of the deceased's younger brother as beneficiary claimed to show that he would not have contributed to his father's support, was requested by his mother on her death bed is not admissible as *res gestae*,⁶⁰² or as a dying declaration,⁶⁰⁴ but is hearsay.⁶⁰⁵ (As to suicidal intent in taking drugs, see Ann. 598, and evidence explanatory of his statements in connection therewith, see Ann. 599. As to testimony of druggist about filling prescriptions, see Ann. 600.) An agent's declaration that he was the insurer's agent was held inadmissible in an action on a note given him and transferred by him to the plaintiff, in which the defendant asked judgment over against the insurer,⁶⁰⁷ this being

599. In an action for life insurance on a policy to be void in case of suicide within two years from date, the evidence showed that assured's death resulted from morphine or opium self-administered. Held that, defendant having introduced testimony that assured refused to tell the doctor called in to attend him where he got the morphine, saying that "he did not want to hurt anybody's business," it was proper to allow plaintiff to show that it was the custom for druggists to sell it to anyone; such evidence having a tendency to show that assured did not understand the character of his statement.—*Mutual Life Ins. Co. v. Tillman*, 19 S. W. 294.

599a. In an action against a foreign insurance company on its policy, the record of an assessment passed at a meeting, signed by the president and secretary, is admissible in evidence under Rev. St. 1911, Art. 3713, as to evidence of corporate acts, and in view of the presumption, that the statute of the corporation's domicile was the same as prevailed in Texas.—*Illinois Bankers' Life Ass'n v. Dodson*, 189, S. W. 992.

600. Where a doctor swore that he prescribed for insured, it was not error to permit a druggist to testify that he had filled the prescriptions, though he did not know who brought them to the drug store.—*Filpen v. State Life Ins. Co.*, 70 S. W. 787.

601. It being in issue, in an action on a life policy, whether the state agents of the company agreed to extend a certain premium, and whether they had authority to do so, testimony that at the time the policy was issued they stated that they would accommodate insured with respect to the payments was admissible, and was not objectionable as an attempt to contradict a provision in the policy that

only the president, vice president, or secretary could waive forfeitures or grant extensions, etc.—*Washington Life Ins. Co. v. Berwald*, 72 S. W. 436.

602. Evidence that naming of deceased's younger brother as beneficiary in insurance policy, claimed to show that he would not have contributed to his father's support, was requested by his mother on her deathbed, held not admissible as *res gestae*.—*St. Louis, B. & M. Ry. Co. v. Jenkins*, 172 S. W. 984.

603. A contract of employment between an insurance company and an agent consisting of two written contracts held ambiguous, in that one contract spoke of agents' compensation as a salary, and the other as an advance against commissions, so as to warrant parol evidence in explanation.—*Generes v. Security Life Ins. Co. of America*, 163 S. W. 386.

604. Evidence that naming of deceased younger brother as beneficiary in an insurance policy, claimed to show that he would not have contributed to his father's support, was requested by his mother on her deathbed, held not admissible as a dying declaration.—*St. Louis, B. & M. Ry. Co. v. Jenkins*, 172 S. W. 984.

605. Evidence that naming of deceased's younger brother as beneficiary in insurance policy, claimed to show that he would not have contributed to his father's support, was requested by his mother on her deathbed, is hearsay.—*St. Louis, B. & M. Ry. Co. v. Jenkins*, 172 S. W. 984.

606. An insurer sued on a life policy may not introduce a letter written by its officers stating that insured committed suicide.—*DeGarcia v. Cherokee Life Ins. Co. of Rome, Ga.*, 180 S. W. 153.

607. In action on a note given insurance agent and transferred by him

proved by other evidence and in effect admitted by the insurer. In a case where two written contracts of employment between a company and an agent were ambiguous, parol evidence was admissible.⁶⁰³ Where it was not permissible to show, because of the incontestable clause in a life policy, that the insured committed fraud in obtaining a policy, it was not permissible to show that the beneficiary participated in such fraud.⁶⁰⁸ An affidavit in lieu of a cost bond made by the insured previous to the issuance of the policy is not admissible to show his financial condition when the policy was issued.^{607a}

(B) Payment of Premiums.—Parol evidence that it was agreed that a premium note executed by the defendant should not be paid if the defendant would assist in procuring other insurance is inadmissible.⁶⁰² A card notifying deceased of the maturity of a premium was held not immaterial or irrelevant.⁵⁹⁶ Evidence of an agreement by which the premium note was made payable to the agent and was to be his individual property was admissible in a case where the insurer claimed forfeiture for non-payment of the note.⁶⁰⁹ A receipt signed by the agent is admissible notwithstanding a provision of the policy that receipts for premiums should be signed by the secretary and countersigned by the person to whom payment is made.⁶¹⁰ On the issue as to forfeiture of a policy for non-payment of a certain year's premium, correspondence relative to extension of time of payment for the previous year's premium is admissible to show the company's attitude towards the risk.⁶¹³ Correspondence of an officer of the insurer, after forfeiture for non-payment of premium, which does not tend to show

to plaintiff, in which defendant asked judgment over against the insurance company, the agent's declaration that he was the company's agent, held inadmissible; this being proved by other evidence and, in effect, admitted by the company in its answer.—*Reserve Loan Life Ins. Co. v. Benson*, 167 S. W. 266.

607a. In an action on a policy the premiums on which were paid by assured's wife, who was beneficiary, an affidavit in lieu of cost bond made by assured previous to the issuance of the policy, is inadmissible to show his financial condition when the policy was issued.—*Mutual Life Ins. Co. of Kentucky v. Mellot*, 57 S. W. 887.

608. Where it was not permissible, because of the incontestable clause in a life policy, to show that the insured committed fraud in obtaining the policy, it was not permissible to show that the beneficiary participated in such fraud.—*Southern Union Life Ins. Co. v. White*, 188 S. W. 266.

27—Ins.

654]—(B) Payment of Premiums. (See 28 Cent. Dig. Insurance, §§ 1674, 1686.)

609. Where a life insurance company defended against recovery on a policy on the ground that it had been forfeited, by its terms, by the failure of insured to pay a note given for premium, evidence of an agreement by which the note in question was made payable to the agent, and was to be his property, and that defendant had no interest therein, was admissible.—*Thies v. Mutual Life Ins. Co.*, 35 S. W. 676.

610. In an action against an insurance company to recover a premium paid to its agent, a receipt for the premium signed by the agent individually is admissible to show that he received the money notwithstanding a provision of the policy that receipts for premiums should be signed by the secretary, and countersigned by the person to whom payment is made.—*Equitable Life Assur. Soc. v. Cole*, 35 S. W. 720.

waiver of the forfeiture clause, is immaterial.⁶¹² On the issue of failure of consideration of a premium note, error in the admission of a letter from the insurer to the policyholder cancelling the policy is harmless, where the agent who accepted the note and agreed to pay the amount to the company did not deny that he had failed to pay the money as agreed.⁶¹⁴ In an action on a note for amount paid by plaintiff as premiums on defendant's policy and to enforce collateral security, testimony as to defendant's promise to pay in any event is admissible on the issue of his promise to pay made after his discharge in bankruptcy.⁶¹⁶ Evidence that an agent had agreed to take his own board bill for the first premium is admissible and it is error to exclude all parol evidence impeaching the consideration of a policy and that the agent had acted outside the scope of his authority in accepting anything but a cash payment.⁶¹⁷ The fact that the insured was a man of considerable wealth was material on the question whether the agent extended credit to him for the premium.⁶¹¹ (As to agreement between parties that a premium note should be endorsed without recourse, see Ann. 615.) A wife's statement of what her husband said in delivering the policy to her as to the time when the premium would be due, is not objectionable as a confidential communication,^{616a} but is hearsay and incompetent.^{616b}

611. In an action on a life policy claimed by the company not to have become effectual because of failure to pay the premium while insured was in good health, evidence that insured was a man of considerable wealth was material on the question whether the agent extended credit to him for the premium, as claimed by plaintiff.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

612. Correspondence of an officer of an insurance company, after forfeiture of a policy for nonpayment of premium and death of assured, which does not tend to show waiver of the forfeiture clause, is immaterial in an action on the policy.—*Laughlin v. Fidelity Mut. Life Ass'n*, 28 S. W. 411.

613. On an issue as to the forfeiture of a policy for nonpayment of the 1906 premium, correspondence relative to extension of time for the payment of the 1905 premium was admissible as tending to show the company's attitude toward the risk.—*Equitable Life Assur. Society of United States v. Ellis*, 152 S. W. 625, 105 Tex. 526.

614. On the issue of failure of consideration of a premium insurance note, error in the admission of a letter from the company to the policyholder cancelling the policy was harmless, where the agent who accepted the note and agreed to pay the amount to the company did not deny that he had

failed to pay the money as agreed.—*Newman v. Tarwater*, 159 S. W. 495.

615. In an action by the indorsee of a premium note, a letter written to defendant by its state agent seeking such indorsement held admissible to show that the agreement between the parties was that the note should be endorsed without recourse.—*Security Trust & Life Ins. Co. v. Stuart*, 163 S. W. 396.

616. In an action on a note for amount paid by plaintiff as premiums on defendant's policy and to enforce collateral security, testimony as to defendant's promise to pay in any event held admissible on the issue of his promise to pay made after his discharge in bankruptcy.—*Underwood v. First Nat. Bank of Galveston*, 185 S. W. 395.

616a. In an action by a wife on a policy on her husband's life, her statement as to what the husband said when he delivered the policy to her as to the time when the premium would be due was hearsay and incompetent.—*Illinois Bankers' Life Ass'n v. Dodson*, 189 S. W. 992.

616b. In an action by the wife on a policy on her husband's life, her statement as to what the husband said when he delivered to her the policy, as to the time when the premium would be due, is not objectionable as a confidential communication.—*Illinois Bankers' Life Ass'n v. Dodson*, 189 S. W. 992.

(C) Death of Insured and Cause Thereof.—While ordinarily the verdict of a coroner's jury is inadmissible to prove the cause of a decedent's death, yet where the policy provides that the proofs of death shall contain the record and verdict of the coroner's inquest, and such information is not contained in the proofs of death, the insurer may introduce it at the trial.⁶¹⁹ Evidence that several years before a brother of the insured met a violent death and another brother charged with his murder fled, has no bearing on the issue of whether the insured committed suicide.⁶¹⁸

(D) Persons Entitled to Proceeds.—Where an illegitimate daughter charged the wife of insured with having used undue influence to persuade the insured to substitute the wife as beneficiary and also that the insured was of unsound mind, evidence that the insured was very fond of the daughter and expressed an intention of changing the policy to provide for her is relevant in a controversy between the two.⁶²⁰ The application to be appointed a guardian of a minor son by the widow of insured is admissible to determine the amount of insurance available for the wife and son, such application listing a policy other than the one in litigation, where the widow is claiming the latter.⁶²¹

(E) Estoppel or Waiver.—Evidence of an insurer's custom to present a premium receipt as a demand for payment and that this

617. Held to be error in refusing to admit evidence that agent had agreed to take as an equivalent for the first premium his own board bill to D., and in excluding all parol evidence impeaching the consideration of the policy, and that the agent had acted outside the scope of his authority in accepting anything but a cash payment.—*Texas Mut. Life Ins. Co. v. Davidge*, 51 Tex. 244.

659—**(C) Death of Person Insured and Cause Thereof.** (See 28 Cent. Dig. Insurance, §§ 1691-1693.)

618. Evidence in an action on a life policy that several years before a brother of insured met a violent death, and another brother charged with his murder fled, has no bearing on the issue of insured having committed suicide.—*De Garcia v. Cherokee Life Ins. Co. of Rome, Ga.*, 180 S. W. 153.

619. While ordinarily the verdict of a coroner's jury is inadmissible to prove the cause of decedent's death, yet where a life insurance policy expressly provides that proofs of death shall contain the record and verdict of the coroner's inquest, if any be held, and that the proofs of death shall be evidence of the facts therein stated in behalf of the company, the beneficiary, in a suit on the policy, by willfully omitting from the proofs the record of the proceedings of the coroner's inquest, in violation of the express terms

of the policy, may not deprive the insurer of the evidence contained therein, but the insurer may introduce it at the trial.—*Metropolitan Life Ins. Co. v. Wagner*, 109 S. W. 1120. See 28 S. W. Cent. Dig. Insurance, §§ 1691, 1692.

663—**(D) Persons Entitled to Proceeds.**

620. Where, in a controversy between the illegitimate daughter and the wife of an insured as to the proceeds of a policy, the daughter charged that the wife induced the insured by undue influence to substitute her, instead of the daughter, as beneficiary, and also that the insured was of unsound mind, evidence that the insured was very fond of the daughter, and expressed an intention at the time of changing the policy to provide for her in some method, was relevant to such issues.—*Maxey v. Franklin Life Ins. Co.*, 164 S. W. 438.

621. In an action by the beneficiary of a life policy, where insured's wife claimed the proceeds under an agreement with her husband to insure in her favor in consideration of her agreeing to transfer their homestead, the admission of her application as guardian for her minor son, in which she listed another policy as his property, was proper to determine the amount of insurance available for the wife and son.—*Jones v. Jones*, 146 S. W. 265.

had been done in the case of other policies held by the plaintiff on the life of the insured and others is admissible in an action by an assignee on a policy which the insurer claimed had been forfeited for non-payment of premiums.⁶²² In general, a finding that insured, in a policy void if he committed suicide within a specified period, did not commit suicide must stand unless the evidence establishes his death was intentional to a point which precludes a reasonable doubt.⁶²³ The fact that a pistol can only be fired by pulling a trigger does not show beyond a reasonable doubt that the insured was killed by a shot from the pistol intentionally fired.⁶²⁴ To show a waiver of proofs of death evidence that an officer of the insurer stated that the insurer would not pay the policy and would not furnish blanks for proof of death because the premiums had not been paid is admissible.⁶²⁷ An insurer, after accepting an application containing the question, "For what have you sought medical advice during the past seven years?" which was answered "No," was not entitled to submit to the jury the question as to what the applicant meant by such answer.⁶²⁶ (For certain evidence held admissible to show a waiver of forfeiture for non-payment of a premium, see Ann. 625.)

Weight and Sufficiency of Evidence—(A) In General.—Where insured executed a premium note, the policy was delivered to his father while insured was away, the agent subsequently collected a part of the note from insured's employer, but on his return the

624.—(E) Estoppel or Waiver. (See 28 Cent. Dig. Insurance, §§ 1555, 1687, 1699, 1699.)

622. In an action by an assignee on a life policy which the insurer claimed was forfeited for failure to pay the last premium, evidence of the insurer's custom to present the premium receipt as a demand for payment, and that it had done so in the case of other policies held by plaintiff on the life of the insured and others, is admissible. —Mutual Life Ins. Co. of New York v. Davis, 154 S. W. 1184. See 28 Cent. Dig. Insurance, §§ 1555, 1687-1699.

623. A finding that insured in a life policy void if he committed suicide within a specified period did not commit suicide must stand, unless the evidence establishes that the shooting causing his death was intentional to that degree of conclusiveness which precludes a reasonable doubt to the contrary, and there must be no room for fair and reasonable minds to reach different conclusions from the evidence. —Mutual Life Ins. Co. v. Ford, 130 S. W. 769, writs of error denied, 131 S. W. 406.

624. In an action upon a life policy void on the suicide of insured, evidence held to justify a finding that insured's death was accidental, and not suicidal. —Id. See 28 Cent. Dig. Insurance, §§ 1555, 1707.

The fact that a pistol could only be fired by pulling the trigger does not show beyond a reasonable doubt that insured killed by a shot from the pistol intentionally fired it.—Id.

625. In an action on a life policy, certain evidence held admissible to show a waiver by insurer of a forfeiture of the policy for non-payment of a premium.—Equitable Life Assur. Society of United States v. Ellis, 137 S. W. 184, judgment affirmed 147 S. W. 1152.

626. Where, in an application for life insurance, the question "For what have you sought medical advice during the past seven years?" was answered "No," the company, after accepting such application and issuing a policy thereon, was not entitled, in an action on the policy to submit to the jury the question as to what the applicant meant by such answer.—Thies v. Mutual Life Ins. Co., 35 S. W. 676.

627. In an action on a policy, evidence that the insurer's superintendent stated that insurer would not pay the policy, and would not furnish blanks for proof of death, because the premiums had not been paid, was admissible to show a waiver of proofs of death.—Metropolitan Life Ins. Co. v. Gibbs, 78 S. W. 398, 34 Tex. Civ. App. 131.

insured repudiated the transaction, the money was refunded, the policy returned with the statement that it had not been delivered to insured and with the request that it be canceled, the note however, remaining in the possession of the insurer, there was no binding contract of insurance.⁶³⁷ In a case where there was evidence that the insured at the time of delivery of the policy was suffering from a certain disease, evidence that he appeared to be in good health was insufficient to raise an issue whether he was in fact suffering from such a disease, it being a matter of common knowledge and shown by the undisputed evidence that the earlier stages of such disease in no way affected the healthful appearance of the sufferer.^{628 640} (As to evidence held sufficient to sustain a finding that the wife induced the insured by undue influence to substitute her instead of the daughter as beneficiary, see Ann. 631. Evidence warranting a finding that insured did not use intoxicating liquors as a habit or custom, see Ann. 629. Evidence held insufficient to show that insured's death was caused by poison administered by his wife, see Ann. 643. For evidence showing agent had power to bind the insurer by a statement of what the annual premium would be, see Ann. 639a.)

(B) As Regards the Payment of the Premium.—Where the defense was non-payment of the fee required as a condition precedent to membership and it appeared that the insurer had forwarded the certificate to deceased, who was one of its agents, that the accounts between him and the company were confused, that at one time he had made an over-payment in his remittances, that his name had been published in the list of members, and a mortuary assessment had been levied on him as if he were a member, the

665—Weight and Sufficiency of Evidence. (See 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.)

628. Where, in an action on a life insurance policy, there was evidence that insured, when the policy was delivered, was in the earlier stages of Bright's disease, evidence that at that time he appeared to be in good health was insufficient to raise an issue as to whether he was in fact suffering from Bright's disease; it being a matter of common knowledge and shown by undisputed evidence that the earlier stages of that disease in no way affect the healthful appearance of the sufferer.—Metropolitan Life Ins. Co. v. Betz, 99 S. W. 1140. See 28 Cent. Dig. Insurance, §§ 1707-1728.

629. In an action on a life policy the evidence held to warrant a finding that insured did not use intoxicating liquors as a habit or custom.—Pacific Mut. Life Ins. Co. v. Terry, 84 S. W. 656.

630. In an action on a life insurance policy with a suicide clause, evidence

held sufficient to show that insured killed himself.—State Mut. Life Ins. Co. of Rome, Ga., v. Long, 178 S. W. 778.

631. In a controversy between the wife of an insured and an illegitimate daughter as to the proceeds of an insurance policy, evidence held to sustain a finding that the wife induced the insured by undue influence to substitute her, instead of the daughter, as beneficiary of the policy.—Maxey v. Franklin Life Ins. Co., 164 S. W. 438.

632. Evidence held not to show an agreement to extend the payment of a premium note and the policy insurance during the month in which insured died.—Wichita Southern Life Ins. Co. v. Roberts, 186 S. W. 411.

633. In an action upon a life policy evidence held to justify a finding that an agent of insurer had authority to extend the time of payment of premiums due on a policy.—Equitable Life Assur. Society of United States v. Ellis, 137 S. W. 184, judgment affirmed 147 S. W. 1152. See 28 Cent. Dig. Insurance, § 1555.

jury was warranted in finding that the fee had either been paid or its payment waived as a condition precedent.⁶³⁹ (As to evidence held sufficient to sustain a finding that premium notes were taken by the agent individually for his part of the first premium.⁶⁴⁰) (Evidence justifying a finding that the insurer waived a forfeiture for non-payment of premium.⁶³⁴) (As to evidence held insufficient to show that payments of premium out of a community estate on a policy for a beneficiary other than the wife were a fraud on the wife.⁶³⁶)

(C) Authority and Agreement to Extend Premium.—As to evidence held not sufficient to show an agreement to extend the payment of a premium note and the insurance during the month in which insured died, see Ann. 632, 635.) (Evidence held to sustain a finding that the insurer intended to extend credit for the premium of insured to its general agent and to permit him to extend credit therefor to the insured, see Ann. 646.) (For evidence justifying a finding that the agent of insurer had authority to extend the time of payment of premiums due, see Ann. 633.)

(D) Showing Suicide.—Where the deceased left a note referring to his death, with directions for sending a telegram, and the evidence shows death from morphine poisoning, a judgment for plaintiffs will be set aside where the suicide of the deceased is the sole issue tried.⁶⁴¹ (For evidence showing death by suicide,

^{634.} Evidence held to justify a finding that the insurer in a life policy waived forfeiture for non-payment of premium at maturity.—*Id.*

^{635.} In an action on a life policy, evidence held not to show that insured obtaining an extension of the time of the payment of an annual premium, and dying before payment, would not have paid the premium had he lived.—*Id.*

^{636.} In an action where the wife of insured contested the right of a beneficiary to the proceeds of a policy, the premium of which had been paid out of the community estate of the husband and wife, evidence held insufficient to show that such payments were a fraud on the wife.—*Jones v. Jones*, 146 S. W. 265.

^{637.} Insured executed a note in payment of a life insurance policy. The policy was received by his father while insured was away from home. Subsequently the insurance agent collected a payment on the note from the employer of the insured, and on his return he repudiated the transaction and the money was refunded. The note remained in the possession of the company, but insured returned the policy, stating that it had never been delivered to him, and asked that it be canceled. Held sufficient to sustain a finding that there was no binding contract of insurance.—*Atkins v. New York Life Ins. Co.*, 62 S. W. 563.

^{638.} In an action on a life policy, evidence held insufficient to show that insured knowingly made false answers to questions in the application, or that at that time he realized he was affected with cancer of the stomach.—*Guarantee Life Ins. Co. v. Evert*, 178 S. W. 643.

^{639.} Evidence held to show that answers did not avoid the policy under *Vernon's Sayles' Ann. Civ. St.* 1914, Art. 4947, not being material to the risk or affecting the policy's issuance.—*Id.*

^{639a.} Evidence held to show that the agent soliciting insurance had power to bind insurer by a statement of what the annual premium would be.—*Illinois Bankers' Life Ass'n v. Dodson*, 189 S. W. 992.

^{640.} In an action on a life insurance policy, evidence examined, and held to show that insured was not in good health, when the policy was delivered.—*Metropolitan Life Ins. Co. v. Betz*, 99 S. W. 1140. See 28 Cent. Dig. Insurance, §§ 1707-1728.

^{641.} Where suicide of deceased is the sole issue tried in an action on a life insurance policy, and deceased left a note referring to his death, with directions for sending a telegram, and the evidence shows death from morphine poisoning, a judgment for plaintiffs will be set aside.—*Mutual Life Ins. Co. v. Hayward*, 27 S. W. 36.

see Ann. 630, 642, 648 and evidence held sufficient to show death from natural causes rather than suicide, Ann. 647.)

(E) Showing False Answers in Application and Effect Thereof.

—(For evidence held insufficient to show that the insured knowingly made false answers to questions in the application or that at the time he realized that he was affected with a certain disease, see Ann. 638.) (For evidence showing that answers did not affect the policy as not being material to the risk, see Ann. 639.) (Evidence held sufficient to show that defendant waived its right to forfeit policy on account of false answers in the application and of ill health at the time the policy was delivered.⁶⁴³)

642. In an action for life insurance on a policy to be void in case of suicide within two years from date, the evidence showed that assured's death resulted from morphine or opium self administered; that, though only a manager in a store and insolvent, he carried \$23,000 life insurance; that he was greatly troubled over the matter of his homestead, which had been conveyed in payment of a debt, with right to repurchase; that on a hot Sunday afternoon, complaining of a headache and the noise, he went out, saying that he would take a street car; that later in the evening he was found by his brother in the store, with the door locked, lying on a table; that, when asked what was the matter, he said he had a headache, and falsely said that he had taken Hoffman's Anodyne, and might have taken it too strong; that he never used narcotics, and was opposed to taking any medicine except on the prescription of a regular physician; that when asked by the doctor, whom his brother immediately got, how much morphine he had taken, he said that it was none of his business, but that he had taken so much that he could not get it out of him; that at the time a note in the handwriting of assured, and evidently written after he went to the store, was found conspicuously stuck in the railing about his office, and had on it the word "sick"; that though this was traced to the possession of assured's brother, and plaintiff was notified to produce it, he failed to do so or to account for it. Held, that a verdict finding that assured did not come to his death by suicide would be set aside, as manifestly against the weight of evidence.—*Mutual Life Ins. Co. of New York v. Tillman*, 19 S. W. 294.

643. The premiums on a policy issued shortly before assured's death were paid by his wife. Assured for more than a year previous to his death was in bad health, and died from convulsions, after a brief illness. Such convulsions were among the usual symptoms of the disease, and deceased had had several just before he died.

There was some evidence that the convulsion from which he died was different from those from which he suffered, and similar to those caused by poison, and that deceased's wife had procured strychnine about a week previous to the death. No medicine was given deceased by his wife on the night he died, and a post mortem analysis of deceased's body, made six months after the death, failed to show any trace of strychnine. Held insufficient to show that deceased's death was caused by poison administered by his wife.—*Mutual Life Ins. Co. of Kentucky v. Mellott*, 57 S. W. 887.

644. In an action on a life insurance policy, where the company claimed forfeiture for non-payment of premium notes, evidence held to sustain a finding that the notes were taken by the agent individually, for his part of the first premium. Judgment, *National Life Ins. Co. v. Reppond*, 96 S. W. 778, reversed.—*Reppond v. National Life Ins. Co.*, 101 S. W. 786, 11 L. R. A. 981. See 28 Cent. Dig. Insurance, §§ 1707-1728.

645. In an action on a life insurance policy, evidence examined, and held sufficient to sustain a plea that defendant waived its right to insist on a forfeiture of the policy, on account of false statements in the application, and of the ill health of insured at the time the policy was delivered.—*Security Mut. Life Ins. Co. v. Calvert*, 100 S. W. 1033, judgment reversed 105 S. W. 320.

646. In an action on a life policy, defended on the ground that the first premium was not paid, so as to put the policy into effect, evidence held to sustain a finding that the company intended to extend credit for the premium to its general agent and to permit him to extend credit therefor to insured.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

647. In action on a life policy, evidence considered, and held sufficient to show that deceased came to his death from natural causes, and not from suicide.—*Equitable Life Assur. Soc. v. Liddell*, 74 S. W. 87.

Amount of Recovery.—The beneficiary is entitled to interest on the amount of the policy, where he refused the amount offered by the insurer, and, after demand, began suit for and recovered such amount.⁶⁵⁰

Questions for the Jury.—(A) **In Regard to the Application.**—In general, where the meaning of an application is doubtful, the question whether it has been truthfully answered is for the jury.⁶⁵¹ (On the question of misstatement of age in the application, see Ann. 651, 652, 656.) (As to truth of declarations of father of insured in regard to the time and place of insured's birth, see Ann. 657.) In a case of the substitution of other urine for that of the applicant

648. Evidence held to show that an insured committed suicide.—*Metropolitan Life Ins. Co. v. Wagner*, 109 S. W. 1120.

649. In an action on a certificate of membership, where the defense was non-payment of the fee required as a condition precedent to membership, it appeared that the company had forwarded the certificate to deceased, who was one of its agents; that the accounts between him and the company were confused; that on one occasion they had returned to him part of a remittance he had sent them, on the ground that it was an overpayment; that they had published his name in the list of members, and had levied a mortuary assessment on him as if he were a member. Held, that the evidence warranted the jury in finding that the fee had either been paid, or its payment waived, as a condition precedent.—*Bankers' & Merchants' Mut. Life Ass'n v. Stapp*, 14 S. W. 168.

650—Amount of Recovery. (See 28 Cent. Dig. Insurance, § 1791.)

650. Where the beneficiary under a policy of life insurance, after death of the insured, demanded the amount of the policy, and refused the amount offered by the insurer, and began suit for and recovered such amount, held, that he was entitled to interest thereon.—*First Texas Ins. Co. v. Jiminez*, 163 S. W. 656. See 28 Cent. Dig. Insurance, § 1791.

651—Questions for Jury. (See 28 Cent. Dig. Insurance, §§ 1556, 1732-1770.)

651. In an action to recover the balance due on a life insurance policy, evidence held not to conclusively show that the insured in his application misstated his age, and hence a motion for a directed verdict was properly overruled.—*Metropolitan Life Ins. Co. v. Lennox*, 124 S. W. 623. See 28 Cent. Dig. Insurance, §§ 1556, 1732-1770.

652. In an action to recover the balance due on a life insurance policy, evidence held sufficient to take the question of defendant's liability for

the balance due under the terms of the policy to the jury.—*Id.*

653. In an action to recover a balance due on a life insurance policy, where the company set up that the insured had misstated his age, and that under a provision of the policy the beneficiary should receive only the amount of insurance that the premiums paid would buy under the company's rates for the correct age of the insured, evidence held insufficient to raise an issue for the jury as to whether the insurance company waived this condition of their policy.—*Id.*

654. In an action to recover the balance due on a life insurance policy, where the company paid only part of the sum called for by the policy, claiming that that was all that was due, and plaintiff executed a release which stated that she accepted the sum paid in full satisfaction of her entire claim, evidence held not to conclusively show a valuable consideration for the release, so as to require a directed verdict for defendant.—*Metropolitan Life Ins. Co. v. Lennox*, 124 S. W. 623.

655. Where the evidence, in an action on a policy of life insurance excepting liability in case of suicide, indicated that the death of insured was caused by accident or suicide, it was for the jury to say whether defendant had sustained the burden of removing the presumption against suicide.—*First Texas State Ins. Co. v. Jiminez*, 163 S. W. 656. See 28 Cent. Dig. Insurance, §§ 1556, 1732-1770.

656. Evidence in an action on a life policy held sufficient to go to the jury on the question of the age of insured being correctly stated in the application for the policy.—*Mutual Reserve Life Ins. Co. v. Jay*, 101 S. W. 545. See 28 Cent. Dig. Insurance, §§ 1732-1770.

657. In an action on a life insurance policy whether declarations of the father of insured as to the time and place of insured's birth were true, held to be for the jury.—*Mutual Reserve Life Ins. Co. v. Jay*, 109 S. W. 1116. See 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.

in the examiner's examination, the question of whether the policy would have been issued had the examiner known of such substitution should not have been submitted to the jury where the physician testified it would not have been, and no other testimony was offered.⁶⁵⁸ Where the insured stated in her application that a certain physician was her family physician and it appeared that up to the time of making such application she had been treated by other physicians for trivial ailments only, the question of the truth of the statement was for the jury.⁶⁶⁰ Further, in this case it was held that the evidence warranted a submission to the jury of the question whether in her application the insured truthfully stated that her menstruation was and had been regular.⁶⁶¹ Where the evidence was undisputed that the insured had been attended by a physician several times within the time specified and that she was in bad health when the policy was delivered, it was error to submit these questions to the jury, as issues in the case.⁶⁶⁵ And where it was undisputed as to the contents of the application as to the street and number of the insured's place of residence, the court properly refused to allow an issue of fact to be raised by a previous deposition which had been changed to conform with the facts, as set out in such application.⁶⁶⁴

658. The question whether, had the examining physician of a life insurance company known that the urine furnished him by an applicant for insurance as her own was that of another, the policy would have been issued, should not have been submitted to the jury, where the only testimony was that of the physician that, if he had known of the substitution, the policy would not have been issued.—*Mutual Life Ins. Co. of New York v. Crenshaw*, 116 S. W. 375.

659. In an action on a life insurance policy, evidence examined, and held insufficient to take to the jury the question of the company's waiver of its right to forfeit the policy for false statements in the application. Judgment 100 S. W. 1033, reversed.—*Security Mut. Life Ins. Co. v. Calvert*, 105 S. W. 320.

660. Where insured stated, in her application for a life policy, that a certain physician, who was her family physician before she married, and treated her in her only severe illness, and in her last sickness was her family physician, and it appeared that up to the making of the application insured was treated by other physicians for trivial ailments only, the question as to the truth of the statement was for the jury.—*Security Mut. Life Ins. Co. v. Calvert*, 100 S. W. 1033, judgment reversed 105 S. W. 320. See 28 Cent. Dig. Insurance, §§ 1732-1770.

661. In an action on a life insurance policy, evidence examined, and held to warrant the submission to the

jury of the question whether, in her application, insured truthfully stated that her menstruation was and had been regular.—*Security Mut. Life Ins. Co. v. Calvert*, 100 S. W. 1033, judgment reversed, 105 S. W. 320.

662. In an action on a life insurance policy, evidence examined, and held sufficient to warrant the submission to the jury of the question whether defendant, by demanding additional proofs of death, had waived its right to claim a forfeiture of the policy by reason of false statements by insured in her application.—*Security Mut. Life Ins. Co. v. Calvert*, 100 S. W. 1033, Judgment reversed, 105 S. W. 320.

663. Whether an insurer on default in payment of a note given to extend the policy after premium was due and unpaid exercises its option to forfeit the policy for non-payment of the note or waives its right is a question of fact for the jury.—*Security Life & Annuity Co. of America v. Underwood*, 150 S. W. 293. See 28 Cent. Dig. Insurance, §§ 1556, 1732-1770.

664. In an action on a life insurance policy, the agent who wrote the application testified by deposition that the application stated the street and number of insured's place of business. Defendant produced the original application, which showed that the street and number were not stated therein. The agent thereupon made a subsequent deposition, and corrected his testimony in the former deposition so as to make it conform to what the application actually disclosed. Held,

(B) As to Good Health of Insured.—(For facts on the issue as to whether the insured was in good health for one year previous to his conditional reinstatement, warranting the submission of such issue to the jury, see Ann. 668.)

(C) As to Issue and Delivery of Policy.—(For evidence warranting the submission of these issues to the jury, see Ann. 668b.)

(D) As to Waiver of Forfeiture.—Whether an insurer on default in payment of a note given to extend the policy after premium was due and unpaid, exercises its option to forfeit the policy for non-payment of the note or waives its right is a question of fact for the jury.⁶⁶³ (For evidence held insufficient to raise an issue for the jury as to whether the insurer waived a condition that where the insured misstated his age the beneficiary should receive only the amount of insurance the premiums paid would buy under the insurer's rates for the correct age of the insured, see Ann. 653.) (Evidence held insufficient to take to the jury the question of the insurer's waiver of forfeiture for false statements in the application.⁶⁵⁹) (For evidence held sufficient to submit to the jury the question whether defendant by demanding additional proofs of death, waived its right of forfeiture by reason of false statements in application, see Ann. 662.)

(E) As to Suicide.—Where the evidence indicated that the death of insured was either by accident or suicide, it was for the jury to say whether defendant had sustained the burden of removing the presumption against suicide, the policy excepting liability in case of suicide.⁶⁵⁵

(F) In Regard to Release from Liability and Settlement.—The question whether the agent of the insurer was sincere and acting in good faith in representing to the beneficiary that an incontestable clause was of doubtful interpretation, the beneficiary being induced thereby to settle for less than the amount of the policy, is for the jury,⁶⁶⁶ and whether there was any consideration which would render the settlement a valid accord and satisfaction should

that the court properly assumed that the application failed to disclose the street and number of insured's place of business, and properly refused to allow an issue of fact to be raised by the original deposition.—*Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404.

^{665.} A policy of life insurance made the application a part thereof, in which insured warranted that she had not been attended by a physician and had not consulted one for 10 years. The application also provided that the policy should not be in force unless actually delivered to and accepted by insured during her lifetime, and while in good health. Held, in an action on the policy, where there was undisputed evidence that insured had been attend-

ed by and had consulted a physician several times less than 10 years before the application was made, and that she was in bad health when the policy was delivered, it was error to submit these questions to the jury as issues in the case.—*Security Mut. Life Ins. Co. v. Calvert*, 87 S. W. 889.

^{666.} Whether the agent of an insurance company was sincere and acting in good faith in representing to a beneficiary that an incontestable clause was of doubtful interpretation, by which the beneficiary was induced to settle for less than the face of the policy, is for the jury in an action by the beneficiary to recover the balance due under the policy.—*Franklin Life Ins. Co. v. Villeneuve*, 68 S. W. 203.

also be submitted to the jury.⁶⁶⁷ (For evidence held not to show a valuable consideration for a release of liability for less than the amount of the policy, so conclusively as to require a directed verdict, see Ann. 654.)

Instructions—(A) In General.—Where the defense is misrepresentations, a charge that, to avoid the policy, the misrepresentations must be found false and fraudulent is erroneous, when the stipulations in the policy were to avoid it if the representations were false or fraudulent.⁶⁶⁸ A charge that if, when the application was made, or any premiums paid, the defendant knew that any of the insured's answers were false it is estopped to urge such false answers, does not authorize the jury to find estoppel if defendant had notice of the falsity of any part of an answer, though not of another part.⁶⁶⁹ It is error to refuse to charge, at the request of intervening children in an action by a widow on a policy payable to her, that the decedent had power to verbally direct that his children share in the proceeds of the policy, provided he plainly designated the proportion to be received by each.⁶⁷⁰ Where the evidence was held not sufficient to support a finding in the insurer's

⁶⁶⁷. Where a life policy is settled for less than its face by representations by the company that the policy is not collectible when in fact it is collectible, and suit is afterwards brought for the balance due thereon, the question whether there was any consideration which would render the settlement a valid accord and satisfaction should be submitted to the jury.—*Franklin Ins. Co. v. Villeneuve*, 60 S. W. 1014.

⁶⁶⁸. Where the meaning of an application for life insurance is doubtful, the question whether it has been truthfully answered is for the jury.—*Mutual Life Ins. Co. of New York v. Baker*, 31 S. W. 1072, 10 Tex. Civ. App. 515.

^{669a}. In an action on a life policy, on the issue whether deceased had been in continuous good health for one year previous to September 16th, the date of his conditional reinstatement, within the conditions of the receipt given for his payment, there was testimony that on September 1st, 2nd, 3rd and 4th, he had a bilious attack, and fever for two days, being discharged by his physician on the 4th as well, and free from fever. On the 10th he was ailing, and went to a physician, complaining of indigestion, and was given a simple prescription, which appeared to correct the complaint. The physician was called late on the 17th, when he had a high fever, which never left him until his death, October 17th. There was testimony that he had entirely recovered of the complaint of September 4th and of the 10th; that bilious fever was common

in that locality, and yielded readily to treatment, and did not affect the constitution; that the attack of the 10th had no connection with the previous attack; and that the attack of the 17th was a sudden attack, which developed into typhoid. One physician testified that he died of pneumonia. Held, that the question whether the last attack was a continuation of the former, and, if not, whether the former were such as were contemplated by the conditions of the receipt, was for the jury.—*Mutual Reserve Fund Life Ass'n v. Bozeman*, 52 S. W. 94, 21 Tex. Civ. App. 490.

^{669b}. In an action on a life policy, evidence examined, and held to warrant submission to the jury of the questions whether the policy had ever been issued and delivered to insured, and whether it was in force at the time of his death, and whether, in view of the fact that the proof of loss had not been made as required, defendant had promised to pay the policy on the return of the proofs as claimed by the plaintiff.—*McCarthy v. Mutual Reserve Fund Life Ass'n*, 74 S. W. 921.

⁶⁶⁹—**Instructions.** (See 28 Cent. Dig. Insurance, §§ 1556, 1771-1784.)

⁶⁶⁹. A charge that if, when application was made, or any premiums paid, defendant knew that any of insured's answers were false, defendant is estopped to urge "said false answers," does not authorize the jury to find estoppel if defendant had notice of the falsity of any part of an answer, though not of another part.—*Mutual Life Ins. Co. v. Nichols*, 24 S. W. 910.

favor on the issue, a charge assuming that there was no evidence that deceased had died of a certain disease under conditions making it a partial defense to the policy is harmless.⁶⁷⁴

(B) As to Agents.—In an action for the amount of the first premium, wherein the defendant did not contend that the condition precedent to his acceptance had not been complied with, there was no error in omitting reference thereto in the charge.⁶⁷⁷ In an action for damages for refusal to accept and pay for a policy smaller in amount than the one applied for, the applicant being accepted by the company for the smaller amount only, an instruction was held erroneous for requiring a ratification of the issuance of the smaller policy in addition to an original agreement to accept it, to authorize recovery.⁶⁷⁰ (For facts in an action on an insurance agent's bond warranting a charge that if the jury found for plaintiff on the only issue submitted they should find in his favor for the full amount sued for, see Ann. 672.)

(C) As to the Sale of Stock.—Where the agent agreed to make the subscriber for stock in an insurance company a loan, an instruction allowing a recovery of the money paid for the stock from the promoter if the company had not accepted the contract in good faith was held improper as submitting an issue not made by the pleadings, which alleged an acceptance of the contract by the company and a refusal thereafter to make the loan.⁶⁷⁹ In an action where there was a dispute as to whether there was a sale of stock, more than one abstract definition of the term "sale" by the court was unnecessary.⁶⁷⁵ Where the court charged that to constitute

^{670.} Instruction in an action by insurance agents for damages for refusal to accept and pay for a \$10,000 policy, upon an application for a \$12,000 policy, accepted by the company for \$10,000, held erroneous for requiring a ratification of the issuance of a \$10,000 policy, in addition to an original agreement to accept it, to authorize recovery.—*Galles & Bowie v. Alarcon*, 145 S. W. 634.

^{671.} An instruction in an action on a life policy that the jury should find as "attorney's fees \$....." was harmless to defendant, though irregular, in absence of a showing that the jury found improperly on the item of attorneys' fees.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

^{672.} Where in an action on an insurance agent's bond there was only one witness who testified concerning the amount of the agent's defalcation, and his testimony showed a liability in excess of the penalty of the bond, and there was no controverting evidence or anything to cause suspicion as to his testimony, it was not error to charge that, if the jury found for plaintiff on the only issue submitted,

they should find in plaintiff's favor for the full amount sued for.—*Foster v. Franklin Life Ins. Co.*, 72 S. W. 91.

^{673.} In an action by a widow on a policy payable to her, it is error to refuse to charge, at the request of intervening children, that the decedent had power to verbally direct that his children share in the proceeds of the policy, provided he plainly designated the proportion to be received by each, although the widow is named therein as beneficiary.—*Clansen v. Jones*, 45 S. W. 183, 18 Tex. Civ. App. 376.

^{674.} Charge assuming that there was no evidence that deceased had died of heart disease under conditions making it a partial defense to life policy held harmless, where not sufficient to support finding in insurer's favor on that issue.—*First Texas State Ins. Co. v. Bell*, 184 S. W. 277.

^{675.} Where, in action in which there was a dispute as to whether there was a sale of stock, the court defined the term "sale," held, that another abstract definition was unnecessary.—*Alamo Trust Co. v. Prudential Life Ins. Co. of Texas*, 183 S. W. 787.

sale the agreement must be unconditional, the failure to again use the word unconditional in stating facts to be found to warrant finding for plaintiff was not misleading.⁶⁷⁶

(D) As to Attorney's Fees.—It is not error to charge the jury to find ten per cent as attorney's fees in an action against a company where the plaintiff was entitled to recover such fees and it was undisputed that ten per cent was a reasonable fee.⁶⁷⁸ An instruction that the jury should find as attorney's fees blank dollars is harmless to the defendant though irregular, in an absence of a showing that the jury found improperly on such item.⁶⁷¹

Findings.—A finding that representations by an agent in selling stock involved future contingencies, were speculative and conjectural, was not inconsistent with other findings as to what the representations were.⁶⁸¹

Judgment.—The inability of a jury to answer a special issue which is not essential to a proper judgment, does not invalidate the judgment rendered upon answer to pertinent issue.⁶⁹⁰ A court does not err in not rendering judgment for premiums paid by a payee in a policy who has no insurable interest in the life insured, where recovery of such premiums is not asked.⁶⁸⁷ Where the policy provides that the amount may be payable in a certain number of annual installments after insured's death, unless written consent of the insured was filed requesting that it be paid in a lump sum, the court has no power where such consent has not been filed to render judgment against the insurer for the entire face value, but could

⁶⁷⁶. Where court charged that to constitute sale the agreement must be unconditional, failure to again use the term "unconditional" in stating facts to be found to warrant finding for plaintiff held not misleading.—*Alamo Trust Co. v. Prudential Life Ins. Co. of Texas*, 183 S. W. 787.

⁶⁷⁷. In insurance agent's action for amount of first premium, wherein defendant did not contend that condition precedent to his acceptance had not been complied with, there was no error in omitting reference thereto in the charge.—*Just v. Henry*, 174 S. W. 1012.

⁶⁷⁸. Where, in an action against an insurance company, in which plaintiff was entitled to recover attorney's fees, it was undisputed that 10 per cent was a reasonable fee, it was not error to charge the jury to find 10 per cent as attorney's fees.—*New York Life Ins. Co. v. English*, 70 S. W. 440, judgment reversed, 72 S. W. 58.

⁶⁷⁹. In an action upon a collateral agreement for a loan contained in a contract subscribing for stock in an insurance company, an instruction allowing a recovery of the money paid

for the stock from the promoters if the company had not accepted the contract in good faith held improper as submitting an issue not made by the pleadings, which alleged an acceptance of the contract by the company and a refusal thereafter to make the loan.—*American Home Life Ins. Co. v. Compere*, 159 S. W. 79.

⁶⁸⁰. With a defense of this kind it was held, a charge that, to avoid a policy, the misrepresentations must be found false and fraudulent, was erroneous, when the stipulations in the policy were to avoid it if the representations were false or fraudulent.—*Texas Mut. Life Ins. Co. v. Davidge*, 51 Tex. 244.

⁶⁷⁰—**Findings.** (See 28 Cent. Dig. Insurance, §§ 1785-1787.)

⁶⁸¹. A finding that representations by an agent for an insurance company in selling stock involved future contingencies and were speculative and conjectural held not inconsistent with other findings as to what the representations were.—*Cope v. Pitzer*, 166 S. W., 447.

only render judgment for the installments as they matured.⁶⁸⁴ ⁶⁸⁵ It was further held in this case that judgment could not be rendered for the whole amount with execution to issue for the various installments as they fell due.⁶⁸⁶ Where recovery over against the company was sought on a premium note, the application having been rejected, the allegations of the insurer's cross-action against a third party to whom the insurer's agent paid a part of the proceeds of the note as commission were insufficient to support a default judgment.⁶⁸² Where a premium note had been converted by an agent a judgment on same by an assignee against the maker was not a bar to an action against the insurer to recover the amount of such note, although the note had never been applied on the premium.⁶⁸³

Costs and Attorney's Fees.—The plaintiff is not entitled to recover attorney's fees in the absence of proof of demand of payment of a policy, provided for in the statute.⁶⁹¹ ⁶⁹³ The court will reverse a case for excess in recovery of attorney's fees and for failure of the judgment to state that one-half of the recovery was for the use of the children of the plaintiff.⁶⁹⁴ An amended petition alleging demand for payment which was filed more than thirty days after such demand will support a recovery of the twelve per cent stat-

672—Judgment. (See 28 Cent. Dig. Insurance, §§ 1789, 1790, 1792-1794.)

682. In an action on a note given for premium on insurance policy, application for which was rejected, in which recovery over against the company was sought, allegations of company's cross action against R., to whom its agent paid a part of the proceeds of the note as commission, held insufficient to support a default judgment.—Reverse Loan Life Ins. Co. v. Benson, 167 S. W. 266.

683. Judgment in action on note by assignee against the maker, who gave it for an insurance premium, to which purpose it was never applied, having been converted by the insurance agent, held not a bar to an action by the maker's assignee against the insurer to recover the amount of such note; the causes not being identical.—Adams v. San Antonio Life Ins. Co., 185 S. W. 610.

684. Where a life policy obligated the company to pay \$300 in 10 equal annual installments after decedent's death, and provided that the installments might be commuted for a single payment of \$2,582, payable when the first installment became due, if the written consent of the insured was filed with the company, the court, in an action on the policy after insured's death, had no power to render judgment against the company for the entire face value thereof, nor for the commuted value,—such consent not

having been filed,—but could only render judgment for the installments as they matured.—New York Life Ins. Co. v. English, 70 S. W. 440, judgment reversed, 72 S. W. 58.

685. Where plaintiff was entitled to recover on a policy payable in 10 annual installments, but her contention that she was entitled to recover the entire amount, by reason of the company's failure to recognize any liability on the policy, was not sustained, that fact did not prevent the court from entering judgment against the company for the installments as they matured, under Rev. St. Art. 1335, requiring the judgment to be so framed as to give the party all relief to which he may be entitled, either in law or equity, since the judgment enforcing specific performance of the contract would avoid a multiplicity of suits.—New York Life Ins. Co. v. English, 70 S. W. 440, judgment reversed, 72 S. W. 58.

686. A life policy called for the payment of the insurance in 10 annual installments, commencing with the death of the insured. The company refused to pay the first installment when due. Held that, though action on the policy put the company's liability on the contract in issue, judgment could not be rendered against it for the whole amount, with execution to issue for the various installments as they fell due. Judgment 70 S. W. 440, reversed.—New York Life Ins. Co. v. English, 72 S. W. 58.

utory penalty and attorney's fees, although the demand was not made thirty days before the filing of the original petition.⁶⁹⁵

Appeal and Error—(A) Settlement of Policy through Agents.—Where the beneficiary gave a receipt reciting that she voluntarily made and understood the settlement, the question whether her relatives, who negotiated the compromise, were her authorized agents, is immaterial.⁷⁰⁰ And an instruction that they were her

687. Where the payee of a life policy had no insurable interest in the life insured, and in a suit for the face of the policy did not seek in the petition to recover the premiums paid, the court did not err in not rendering judgment for them.—*Wilton v. New York Life Ins. Co.*, 78 S. W. 403, 34 Tex. Civ. App. 156. See Cent. Dig. vol. 28, cols. 2924-2930, §§ 1789-1794.

688. On error to review judgment by default against a surety, where judgment recites surety filed no answer, but transcript contains an answer marked as having been filed before rendition of judgment, recital in judgment was conclusive.—*Shaw v. Southland Life Ins. Co.*, 185 S. W. 915.

689. By direct provision of Vernon's Sayles' Ann. Civ. St. 1914, Art. 1626, where the judgment below is reversed, and there is no matter of fact to be ascertained, damage to be assessed, and the matter to be decreed is not uncertain, the court will render the judgment the court below should have rendered.—*Prudential Life Ins. Co. of Texas v. Smyer*, 183 S. W. 825.

690. Where finding upon special issue is not essential to proper judgment, inability of jury to answer such issue does not invalidate judgment rendered upon answer to pertinent issue.—*Reliance Life Ins. Co. v. Beaton*, 187 S. W. 743.

675—Costs and Attorneys Fees. (See 28 Cent. Dig. Insurance, §§ 1805-1806.)

691. In the absence of proof of demand of payment of a life policy prior to bringing suit thereon, plaintiff was not entitled to recover any penalty or attorney's fees.—*Bankers' Reserve Life Co. v. Ellison*, 135 S. W. 226. See 28 Cent. Dig. Insurance, §§ 1805, 1806.

692. A petition in an action on a life policy alleging that 10 per cent on the amount due on the policy, amounting to \$207 is a reasonable attorney's fee for prosecuting that action, will sustain a judgment for \$250 for such fees; that in fact being ten per cent of the amount due.—*Washington Life Ins. Co. v. Gooding*, 49 S. W. 123, 19 Tex. Civ. App. 490.

693. Rev. St. 1895, Art. 3071, giving plaintiff in an action on a policy in

which he recovers a right to attorney's fees, held not unconstitutional.—*Manhattan Life Ins. Co. v. Cohen*, 139 S. W. 51. See 28 Cent. Dig. Insurance, §§ 1805, 1806.

694. Court will reverse case for excess in recovery of attorney's fees and for failure of judgment to state that one-half the recovery was for the use of children of plaintiff.—*Piedmont & Arlington Life Ins. Co. v. Ray*, 50 Tex. 511.

695. In an action on a life policy, where demand for the payment of loss was not made 30 days before filing of original petition, but an amended petition, alleging such demand was filed more than 30 days after the demand, plaintiff could recover the 12 per cent. statutory penalty and attorney's fees.—*Southern Union Life Ins. Co. v. White*, 188 S. W. 266.

Appeal and Error.

696. In an action on life policies, certain propositions held germane to an assignment of error under which they were urged; and, the other propositions being germane to the assignment only, the propositions in question would be deemed waived.—*National Life Ass'n v. Parsons*, 170 S. W. 1038.

697. An assignment not followed by a sufficient statement of facts to enable the court to determine, without resort to the record, whether there was error in the ruling complained of will not be considered.—*Generes v. Security Life Ins. Co. of America*, 163 S. W. 386.

698. Where, at the time the cause was briefed for the Court of Civil Appeals, Act April 4, 1913 (Acts 33d Leg. c. 136), had been passed, but not published or called to the attention of appellants' counsel, an application to rebrief the cause to comply with such act would be allowed.—*Security Trust & Life Ins. Co. v. Stuart*, 163 S. W. 396.

699. Any error in sustaining a demurrer to defendant's sole defense in an action on the policy, held fundamental within District Court Rule, 71a (145 S. W. vii), providing that a motion for new trial should be a prerequisite to review unless the error is fundamental.—*American Nat. Ins. Co. v. Briggs*, 156 S. W. 909.

agents is harmless, even if erroneous.⁷⁰⁰ Further, the question whether the controversy as to cause of deceased's death between the insurer and her relatives was to be considered as if between herself and the insurer was immaterial.⁷⁰¹

(B) Prejudicial Evidence as to Suicide.—The erroneous admission of testimony which must have had a strong influence on the jury is prejudicial in a case where the evidence is sparse as to whether the insured committed suicide.⁷⁰²

Reinsurance.—In a case where the defendant company bought out the business of another company, the contract stipulating that the reinsurer only became liable for such claims as arose by reason of death upon policies occurring subsequent to the agreement, and plaintiff held a policy in the old company which contained a provision for a cash surrender value, it was held that there was no privity of contract between the parties as to the cash surrender value feature of the policy, and the defendant was not liable thereon.⁷⁰⁴

700. Where the beneficiary gave a receipt in full for two life policies which recited that she voluntarily made and understood the settlement, the question whether her relatives, who negotiated the compromise, were her authorized agents, is immaterial, and an instruction that they were her agents, even if erroneous, is harmless.—*McDonald v. Aetna Life Ins. Co. of Hartford, Conn.*, 187 S. W. 1005.

701. Where the beneficiary voluntarily gave a receipt in full of two life policies for one-half their face value, the question whether the controversy as to cause of deceased's death between the insurer and her relatives was to be considered as if between herself and the insurer was immaterial, and an instruction that it should be so considered was without prejudice.—*Id.*

702. The evidence being sparse as to insured's having committed suicide, erroneous admission of testimony which must have had a strong influence on the jury is prejudicial.—*De Garcia v. Cherokee Life Ins. Co. of Rome, Ga.*, 180 S. W. 153.

703. Error in overruling demur-

ers to the petition is waived by the parties submitting the cause on an agreed statement of facts.—*Harde v. Germania Life Ins. Co.*, 153 S. W. 666.

684—Reinsurance—Extent of Liability of Reinsurer. (See 28 Cent. Dig. Insurance, § 1817.)

704. Defendant insurance company bought out the business of another company. The contract between the companies expressly stipulated that the reinsurer did not assume and should not be liable for any of the liabilities of the other company to members or beneficiaries then existing or thereafter accruing for any cause, except claims arising by reason of death upon policies or certificates of membership occurring subsequent to the ratification of the agreement, etc. Plaintiff held a policy in the old company which contained a provision for a cash surrender value. Held, that there was no privity of contract between the parties as to the cash surrender value feature of the policy, and defendant was not liable thereon.—*Mutual Reserve Fund Life Ass'n v. Green*, 109 S. W. 1131. See 28 Cent. Dig. Insurance, § 1817.

STATUTORY LAW

	Page
Commissioner of Insurance and Banking.....	195
Duties of Commissioner.....	196
Incorporation of Insurance Companies (Home).....	207
General Provisions	211-228

CHAPTER I

LIFE, HEALTH AND ACCIDENT INSURANCE COMPANIES— HOME

Terms Defined.

Section 1. A life insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value, conditioned on the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities. An accident insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value, conditioned upon the injury, disability or death of persons resulting from traveling or general accidents by land or water. A health insurance company shall be deemed to be a corporation doing business under any charter involving the payment of any amount of money or other thing of value, conditioned upon loss by reason of disability due to sickness or ill health. When consistent with the context and not obviously used in different sense, the term "company" or "insurance company," as used herein, includes all corporations engaged as principals in the business of life, accident or health insurance. The term "home" or domestic company, as used herein, designates those life, accident or life and accident, health and accident, or life, health and accident insurance companies incorporated and formed in this State. The term "foreign company" means any life, accident or health insurance company organized under the laws of any other State or Territory of the United States, or foreign country. The term "home office" of the company means its principal office within the State or country in which it is incorporated and formed. The "insured" or "policyholder" is the person on whose life a policy of insurance is effected. The "beneficiary" is the person to whom a policy of insurance affected is payable. By the term "net assets" it means the funds of the company available for the payment of its obligations in

this State, including uncollected premiums not more than three months past due and deferred premiums on policies actually in force, after deducting from such funds all unpaid losses and claims for losses, and all other debts, exclusive of capital stock. The "profits" of a company are that portion of its funds not required for the payment of losses and expenses, nor set apart for any other purpose required by law. (R. S., Art. 4724.)

Who May Incorporate—What Articles of Incorporation Shall Contain.

2. Any three or more citizens of this State who shall be known as corporators, may associate themselves for the purpose of forming a life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, provided, that no such company shall transact more than one of the foregoing classes of business, except in separate and distinct departments. In order to form such a company the corporators shall sign and acknowledge its articles of incorporation before any officer authorized to take acknowledgments to deeds, and file the same in the office of the Commissioner of Insurance and Banking. Such articles of incorporation shall Specify:

(a) The name and place of residence of each of the incorporators.

(b) The name of the proposed company, which shall contain the words "insurance company" as a part thereof, and which must not so closely resemble the name of any existing company transacting insurance business in this State as to mislead the public.

Note.—The Commissioner of Insurance and Banking has no authority to pass upon question of similarity of names. (Opinion of Attorney General, August 25, 1906.)

(c) The location of its home office.

(d) The kind or kinds of insurance business it purposes to transact.

(e) The amount of its capital stock, not less than \$100,000, all of which capital stock must be subscribed and fully paid up and in the hands of the corporators before said articles of incorporation are filed, such capital stock to be divided into shares of \$100 each.

Note.—(1) A share of stock of a life insurance company cannot be divided and sold in fractional parts of a share. (Opinion of Attorney General, August 3, 1909.)

(2) Stock, paid for in notes or other evidence of promise to pay, cannot be lawfully issued, and unless fully paid for and issued, it cannot be voted. A stock subscription agreement, failing to show what portion of money paid under it is used for promotion and commissions for selling the stock, is fraudulent. (Opinion of Attorney General, September 10, 1909.)

(f) The period of time it is to exist, which shall not exceed five hundred years.

(g) The number of shares of such capital stock.

(h) Such other provisions not inconsistent with the law as the incorporators may deem proper to insert therein. (R. S., Art. 4725.)

Fee for Filing Articles of Incorporation—Duties of Commissioner When Articles Are Filed.

3. When such articles of incorporation are filed with the Commissioner of Insurance and Banking, together with an affidavit made by two or more of its incorporators that all the stock has been subscribed in good faith and fully paid for, together with a charter fee of \$20, it shall be the duty of the Commissioner to submit such articles of incorporation to the Attorney General for examination, and if he approves the same as conforming with the law he shall so certify and deliver such articles of incorporation, together with his certificate of approval attached thereto, to the Commissioner of Insurance and Banking, who shall, upon receipt thereof, record the same in a book kept for that purpose, and upon receipt of a fee of \$1.00 he shall furnish a certified copy of the same to the corporators, upon which they shall be a body politic and corporate, and may proceed to complete the organization of the company, for which purpose they shall forthwith call a meeting of the stockholders, who shall adopt by-laws for the government of the company, and elect a board of directors, not less than five, composed of stockholders, which board shall have full control and management of the affairs of the corporation, subject to the by-laws thereof as adopted or amended from time to time by the stockholders or directors and to the laws of this State. The board of directors so elected shall serve until the second Tuesday in March thereafter on which date annually thereafter there shall be held an annual meeting of the stockholders at the home office, and a board of directors elected for the ensuing year. At all meetings of the stockholders, each stockholder shall be entitled to one vote for each share of stock fully paid up appearing in his name on the books of the company, which vote may be given in person or by written proxy. The majority of the paid-up capital stock at any meeting of the stockholders shall constitute a quorum. (R. S., Art. 4726.)

Charter May Be Amended—Capital Stock May Be Increased or Reduced.

4. At any regular meeting or called meeting of the stockholders they may, by resolution, provide for any lawful amendment to the charter or articles of incorporation, and such amendment, accompanied by a copy of such resolution duly certified by the president and secretary of the company, shall be filed and recorded in the same manner as the original charter, and shall thereupon become effective. Stockholders representing a majority of the capital

stock of any such company may in such manner also increase or reduce the amount of its capital stock; provided, that the capital stock shall in no case be reduced to less than \$100,000 fully paid up. A statement of any such increase or reduction shall be signed and acknowledged by two officers of the company and filed and recorded along with the certified copy of the resolution of the stockholders provided therefor in the same manner as the charter or amendment thereto. For any such increase or reduction the company may require the return of the original certificates as other evidences of stock in exchange for new certificates issued in lieu thereof. (R. S., Art. 4727.)

Note.—A charter cannot be amended prior to meeting of stockholders called by the corporators for adoption of by-laws and election of board of directors. The corporators cannot sell or assign their right or interest in the charter nor in the unorganized corporation. The assignee of such coporators, acting alone or with the corporators who did not assign or sell out, cannot amend the charter nor call a meeting of stockholders to adopt by-laws and elect a board of directors. The subscribers to the capital stock are not stockholders and cannot amend the charter prior to being called together by the corporators to adopt by-laws and elect a board of directors. After being called together by the corporators, and after the adoption of by-laws and election of a board of directors, the subscribers to the stock thereupon become stockholders and may amend the charter, notwithstanding the fact that no certificate of authority to do business has been issued. (Opinion of Attorney General, April 2, 1910.)

Shares of Stock Shall Be Transferable.

5. The shares of stock of such company shall be transferable on its books in accordance with law and the by-laws of the company by the owner in person or his authorized agent, and every person becoming a stockholder by such transfer shall succeed to all rights of the former holder of the stock transferred, by reason of such ownership. (R. S., Art. 4727.)

Shall Be Examined When—Certificate of Authority Issued.

6. When the first meeting of the stockholders shall be held and the officers of the company elected it shall be the duty of the president or secretary to so notify the Commissioner of Insurance and Banking, and he shall thereupon immediately make or cause to be made at the expense of the company a full and thorough examination thereof, and if he shall find that all of the capital stock of the company, amounting to not less than \$100,000, has been fully paid up and is in the custody of the officers, either in cash or securities of the class in which such companies are authorized by this act to invest or loan their funds, he shall issue to such company a certificate of authority to transact such kind or kinds of insurance business within this State as such officers may apply for and as may be authorized by its charter, which certificate shall expire on the last day of February next after the date of its issu-

ance. Before such certificate is issued not less than two officers of such company shall execute and file with the Commissioner of Insurance and Banking a sworn schedule of all the assets of the company exhibited to him upon such examination, showing the value thereof together with a sworn statement that the same are bona fide, the unconditional and unincumbered property of the company and are worth the amounts stated in such schedule. No original or first certificate of authority shall be granted except in conformity herewith, regardless of the date of filing of the articles of incorporation with the Commissioner of Insurance and Banking. (R. S., Art. 4728.)

Note.—A portion of the capital stock of a company may be exchanged for notes secured by first liens on real estate worth double the amount of the notes. (Opinion of Attorney General, June 28, 1910.)

Annual Statement, Shall Contain—Commissioner May Change Form of.

7. Each life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, organized under the laws of this State, shall, after the first day of January of each year and before the first day of March following, and before the renewal of its certificate of authority to transact business, prepare under oath of two of its officers, and deposit in the office of Commissioner of Insurance and Banking, a statement accompanied with the fee for filing annual statements of \$10, showing the condition of the company on the 31st day of December the next preceding, which shall include a statement in detail, showing the character of its assets and liabilities on that date, the amount and character of business transacted, moneys received and how expended during the year, and the number and amount of its policies in force on that date in Texas, and the total amount of all policies in force; and the Commissioner of Insurance and Banking may from time to time make such changes in the form and requirements of the annual statements of companies as shall seem to him best adapted to elicit from the companies a true exhibit of their condition and methods of conducting business, and such statement shall also contain and set forth an exhibit of the investments of such company; provided, that such terms and requirements shall elicit only such information as shall pertain to the business of the company. (R. S., Art. 4729.)

Renewal Certificate of Authority, Issued When.

8. Whenever any life insurance company or accident insurance company or life and accident, or health and accident, or life, health and accident insurance company transacting insurance business in this State shall have filed its annual statement in accordance with the preceding article, showing a condition which entitles it to transact business in this State in accordance with the provisions

of this chapter, the Commissioner of Insurance and Banking shall, upon receipt of a fee of \$1.00, issue a renewal certificate of authority to such company, which shall expire on the last day of February of the subsequent year. (R. S., Art. 4730.)

Shall Receive Certified Copy of Certificate of Authority for Agents.

9. Any such company organized under the laws of this State, having received authority from the Commissioner of Insurance and Banking to transact business in this State, shall receive from such Commissioner upon written request therefor a certified copy of this certificate of authority for each of its agents in this State. (R. S., Art. 4731.)

10. Actions may be maintained by a company organized under the laws of this State against any of its policyholders, stockholders, or other persons for any cause relating to the business of such company, and actions may also be prosecuted and maintained by any policyholder or the heirs or legal representative of any such policyholder against the company for losses which accrue on any policy, but no action shall be brought or maintained by any person other than the Commissioner of Insurance and Banking of this State for the enjoining, restraining or interfering with the prosecution of the business of the company. (R. S., Art. 4732.)

Laws Relating to Corporations Shall Govern.

11. The laws relating to and governing corporations in general shall apply to and govern companies organized under this chapter, in so far as the same are pertinent and not in conflict with the provisions of this chapter. (R. S., Art. 4733.)

May Invest in or Loan Upon, What Securities.

12. A life insurance company organized under the laws of this State may invest in or loan upon the following securities, viz.:

(a) It may invest any of its funds or accumulations in the bonds of the United States, or of any State, county or city of the United States, or the bonds of any independent or common school district, or first mortgage bonds of any dividend-paying railroad or electric railway company duly incorporated under the laws of the United States or any State thereof.

(b) It may loan any of its funds and accumulations, taking as security therefor such collateral as under the previous subdivision it may invest in; and upon first liens upon real estate, the title to which is valid, and the value of which is double the amount loaned thereon; provided, that if any part of such value is in buildings, such buildings shall be insured against loss by fire for at least 50 per cent of the value thereof, with loss clause payable to such company. It may also make loans upon the security of or purchase its own policies, but no loan on any policy shall exceed the reserve value thereof. No investment or loan, except policy

loans, shall be made by any such insurance company unless the same shall first have been authorized by the board of directors, or by committee charged with the duty of supervising such investments or loans. No such company shall subscribe to, or participate in, any underwriting of the purchase or sale of securities or property or enter into any such transaction for such purpose or sell on account of such company jointly with any other person, firm or corporation; nor shall any such company enter into any agreement to withhold from sale any of its property; but the disposition of its property shall be at all times within the control of its board of directors. Every such company possessed of assets not authorized by this chapter shall dispose of the same within five years after July 10, 1909, unless such time is extended for good cause by the Commissioner of Insurance and Banking. (R. S., Art. 4734.)

Note.—(1) A company may invest its funds in a portion of a series of notes or bonds, secured by first lien on real estate worth double amount of entire loan. (Opinion of Attorney General, August 10, 1910.)

(2) A life insurance company cannot invest in bonds of the Republic of Mexico. (Opinion of Attorney General, November 3, 1910.)

(3) A life insurance company may make loan to a church, where it is secured by bonds constituting a first lien on real estate. (Opinion of Attorney General, June 17, 1911.)

(4) A home life insurance company cannot lawfully count, as admitted assets, time certificates of deposit which are not due or payable on demand by the bank issuing them. (Opinion of Attorney General, April 2, 1912.)

(5) A life insurance company, chartered in Texas, may lawfully borrow money and pledge its assets as security, and the excess of such collateral may be regarded as available or admitted assets of the company. An investment in paper secured by real estate worth less than double amount of loan is not void, but is unauthorized and therefore an ultra vires act, but where amount is small and is part of purchase and sale of an office building is not ground for withholding permit to the company or declining to consider the investment as part of its available assets. (Attorney General's opinion, March 15, 1915.)

Real Estate, May Hold.

13. Every such insurance company may secure, hold and convey real property only for the following purposes and in the following manner:

1. One building site and office building for its accommodation in the transaction of its business and for lease and rental.

2. Such as shall have been acquired in good faith by way of security for loans previously contracted, or for moneys due.

3. Such as shall have been conveyed to it in the satisfaction of debts previously contracted in the course of its dealings.

4. Such as shall have been purchased at sales under judgment or decrees of court, or mortgage, or other liens held by such company.

Note.—(1) A company may invest in a lot, for an office building, upon which there is an encumbrance, provided the company definitely undertakes to pay off the encumbrance. (Opinion of Attorney General, August 10, 1910.)

(2) A life insurance company may exchange a portion of its capital stock for property to be used as an office building. (Opinion of Attorney General, November 3, 1910.)

(3) The word "purchase," in this statute, means acquired either by purchase or rental. A life insurance company has the right to secure, hold and convey a lease on a building for a period of time, with option of purchase at expiration of lease. The aggregate amount to be paid for the lease extending over a long period of time is not a debt which could amount to an impairment of the capital of the company. Ownership of such building or lease is a chattel real and, as such, is real property and the investment is lawful. (Opinion of Attorney General, June 22, 1914.)

All such real property specified in Subdivision 2, 3 and 4 of this article which shall not be necessary for its accommodation in the convenient transaction of its business shall be sold and disposed of within five years after the company shall have acquired title to the same, or within five years after the same shall have ceased to be necessary for the accommodation of its business, and it shall not hold such property for a longer period unless it shall procure a certificate from the Commissioner of Insurance and Banking that its interests will suffer materially by the forced sale thereof; in which event the time for the sale may be extended to such time as the Commissioner shall direct in such certificate. (R. S., Art. 4735.)

Directors Shall Not Receive Money in Connection With Nor Be Interested in Purchase, Loan or Sale of Company.

14. No director or officer of any insurance company transacting business in this State, or organized under the laws of this State, shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in any purchase or sale by such company of any property or any loan from such company, nor be pecuniarily interested either as principal, co-principal, agent or beneficiary, in any such purchase, sale or loan; provided, that nothing contained in this article shall prevent a life insurance corporation from making a loan upon a policy held therein by the borrower not in excess of the reserve value thereof. Any person violating any provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine of not less than \$300 nor more than \$1000. (R. S., Art. 4736. P. C., Art. 687.)

Note.—(1) See Section 44, Post.

(2) It is unlawful for a company to buy securities from or sell securities to or loan money to a banking or other corporation in which the officers or directors of the life insurance company are interested as stockholders, officers or directors. (Opinion of Attorney General, August 10, 1910.)

(3) A life insurance company may lease a property from another corporation, notwithstanding certain officers of the insurance company are also officers and large stockholders of the other corporation. (Opinion of Attorney General, March 27, 1911.)

(4) The president of a fire insurance company may lawfully sell the capital stock of his company on commission. (Opinion of Attorney General, August 3, 1911.)

(5) A life insurance company ordinarily has no authority to buy or sell its own stock. Exigencies, however, might arise where the buying of its own stock would be to the interest of the company, and where such occasions arise and there is no fraud in the transaction, it would probably not be in violation of law. In such cases, the certificate of authority of the company should not be revoked by the Commissioner, but the company should be required to file with him a transcript of all minutes, correspondence and other papers connected with the transaction. (Opinion of Attorney General, February 19, 1914.)

(6) An accident and health insurance company, organized under Texas laws, any of whose officers or directors are likewise officers or directors of a loan and trust company cannot lawfully make such loan and trust company its fiscal agent. The fact that the officers or directors of such insurance company are stockholders of a loan and trust company would not prevent the insurance company from employing such loan and trust company as its fiscal agent. (Opinion of Attorney General, April 16, 1914.)

May Reinsure.

15. Any life insurance company organized under the laws of this State may reinsure in any insurance company authorized to transact business in this State any risk or part of a risk which it may assume; provided, that no such company shall have the power to so reinsure its entire outstanding business until the contract therefor shall be submitted to the Commissioner of Insurance and Banking and be by him approved as protecting fully the interests of all the policyholders. (R. S., Art. 4737.)

Note.—A foreign life insurance company may lawfully reinsure the business of a Texas life insurance company which deposits securities covering its reserves with the Commissioner of Insurance and Banking. (Opinion of Attorney General, January 16, 1915.)

Dividends, Shall Not Pay, Except From Profits.

16. No life insurance company organized under the laws of this State shall declare or pay any dividends to its policyholders except from the profits made by such company; provided, that this shall not prohibit the issuance of policies guaranteeing a definite payment, or reduction in premiums, not exceeding the expense of loading on said premiums, but where said reduction exceeds said expense loading the proper reserve therefor must be held by the company to provide for the deficiency so arising in the net premium; and, provided further, that this shall not apply to payments to holders of special or board contracts heretofore issued. No such life insurance company shall declare or pay any dividends to its stockholders except from the profits made by said company,

not including surplus arising from the sale of stock. (R. S., Art. 4738.)

Note.—The issuance of guaranteed dividend policies is not prohibited. (Opinion of Attorney General, January 5, 1911.)

Salaries, Shall Not Pay Excessive.

17. No domestic life insurance company shall pay any salary, compensation or emolument to any officer, trustee or director thereof, nor any salary, compensation or emolument amounting in any year to more than \$5,000 to any person, firm or corporation, unless such payment be first authorized by a vote of the board of directors of such life insurance company; provided, that the limitation as to time contained herein shall not be construed as preventing a life insurance company from entering into contracts with its agents for the payment of renewal commissions. No such company shall grant any pension to any officer, director or trustee thereof, or to any member of his family after his death. (R. S., Art. 4739.)

Shall Not Make Disbursements Without Voucher.

18. No domestic life insurance company shall make any disbursement of \$100 or more unless the same be evidenced by a voucher signed by or on behalf of the person, firm or corporation receiving the money, and correctly describing the consideration for the payment. If the expenditure be for both services and disbursements, the voucher shall set forth the service rendered and statement of the disbursement made. If the expenditure be in connection with any matter pending before any Legislature or public body or before any department or officer of any State or government, the voucher shall correctly describe, in addition, the nature of the matter and the interest of such company therein. When such voucher cannot be obtained, the expenditure shall be evidenced by a paid check or an affidavit describing the character and object of the expenditure and stating the reasons for not obtaining such voucher. (R. S., Art. 4740.)

Policies Shall Contain.

19. No policy of life insurance shall be issued or delivered in this State, or be issued by a life insurance company organized under the laws of this State, unless the same shall contain provisions substantially as follows:

1. A provision that all premiums shall be payable in advance either at the home office of the company, or to an agent of the company upon the delivery of a receipt signed by one or more of the officers who are designated in the policy.

2. A provision for a grace of at least one month for the payment of every premium after the first, which may be subject to an interest charge, during which month the insurance shall continue

in force, which provision may contain a stipulation that if the insured shall die during the period of grace the overdue premium will be deducted in any settlement under the policy.

Note.—The grace provision, above referred to, is not limited to policies providing for an annual premium, but must be in, and applies to, policies in which the premium is payable monthly, quarterly or semi-annually, and such grace period applies immediately when the date for payment of each premium, except the first, occurs. (Opinion of Attorney General, December 17, 1912.)

3. A provision that the policy or policy and application, shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date except for non-payment of premiums, and which provision may or may not, at the option of the company contain an exception for violations of the conditions of the policy relating to naval and military services in time of war.

Note.—If application is made part of contract it must be attached to policy. (Department ruling.)

4. A provision that all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties.

5. A provision that, if the age of the insured has been understated, the amount payable under the policy shall be such as the premium paid would have purchased at the correct age.

6. A provision that after three full years' premiums have been paid the company, at any time while the policy is in force, will advance upon proper assignment of the policy and upon the sole security thereof at a specified rate of interest a sum equal to, or at the option of the owner of the policy, less than the legal reserve at the end of the current policy year on the policy, and on any dividend additions thereto, less than a sum not more than two and one-half per centum of the amount insured by the policy and of any dividend addition thereto; and that the company may deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year and may collect interest in advance on the loan to the end of the current policy year; which provision may further provide that such loans may be deferred for not exceeding six months after application therefor is made. It shall further be stipulated in the policy that failure to repay any such advance or to pay interest shall not void the policy until the total indebtedness thereon to the company shall equal or exceed the loan value. No condition other than is herein provided shall be exacted as a prerequisite to any such advance. This provision shall not be required in term insurances nor in pure endowments issued or granted as original policies, or in exchange for lapsed or surrendered policies, and

no provision herein required shall compel any company to loan on any policy an amount greater than $97\frac{1}{2}$ per centum of the face value thereof, including net dividend additions thereto.

7. A provision which, in event of default in premium payments, after premium shall have been paid for three full years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserves, less a sum not more than $2\frac{1}{2}$ per cent of the amount insured by the policy and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy. Such provision shall stipulate that the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value, at least equal to the sum which would otherwise be available for the purchase of insurance, as aforesaid, and may stipulate that the company may defer payment for not more than six months after the application therefor is made. This provision shall not be required in term insurances.

8. A table showing in figures the loan values, and the options available under the policies each year upon default in premium payments during the first twenty years of the policy, or the period during which premiums are payable, beginning with the year in which such values and options become available.

9. A provision that if, in event of default in premium payments, the value of the policy shall be applied to the purchase of other insurances; and if such insurance shall be in force and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company and payments of arrears of premiums with interest.

Note.—Reinstatement clause not necessary in policies of term insurance. (Department ruling.)

10. A provision that, when a policy shall become a claim by the death of the insured, settlement shall be made upon receipt of due proof of death, and the right of the claimant to the proceeds, or not later than two months after the receipt of such proof.

11. A table showing the amounts of installments in which the policy may provide its proceeds may be payable.

Any of the foregoing provisions or portions thereof not applicable to single premium policies shall, to that extent, not be incorporated therein. (R. S., Art. 4741.)

Note.—(1) Subdivisions 4 and 5 of above section, and specifications of mortality table and rate of interest not necessary in paid-up policies issued upon default in premium payments. (Department ruling.)

(2) Issuance of guaranteed dividend policies is not prohibited. (Opinion of Attorney General, January 5, 1911.)

Policies Shall Not Contain.

20. No policy of life insurance shall be issued or delivered in this State, or be issued by a life insurance company incorporated under the laws of this State if it contains any of the following provisions:

1. A provision limiting the time within which any action at law or in equity may be commenced to less than two years after the cause of action shall accrue.

2. A provision by which the policy shall purport to be issued or to take effect more than six months before the original application for insurance was made, if thereby the insured would rate at any age younger than his age at date when the application was made, according to his age at nearest birthday.

3. A provision for any mode of settlement at maturity of less value than the amounts insured on the face of the policy, plus dividend additions, if any, less any indebtedness to the company on the policy, and less any premium that may by the terms of the policy be deducted; provided, that any company may issue a policy promising a benefit less than the full benefit in case of the death of the insured by his own hand while sane or insane, or by following stated hazardous occupations. This provision shall not apply to purely accident and health policies; none of the foregoing provisions relating to policy forms shall apply to policies issued in lieu of or in exchange for any other policy issued before July 10, 1909. (R. S., Art. 4742.)

Note.—(1) Some benefit, however small, must be provided in case of suicide. (Department ruling.)

(2) A rider on a life insurance policy providing that "Death caused by smallpox is a risk not covered by this policy unless the insured submits proof to the company of successful vaccination," is in violation of above provision. (Opinion of Attorney General, June 12, 1912.)

(3) The life insurance companies cannot agree upon a uniform policy at a uniform rate, to be sold for the benefit of the students loan fund or the assured, as this controverts the anti-trust laws of this State. The students loan fund could not retain the proceeds of a policy in its favor, because it would have no insurable interest in the life of the assured. (Opinion of Attorney General, December 11, 1914.)

Policies of Foreign Companies May Contain.

21. The policies of a life insurance company not organized under the laws of this State may contain any provision which the law of the State, Territory, district or country under which the company is organized prescribes shall be in such policies when issued in this State, and the policies of a life insurance company organized under the laws of this State may, when issued or delivered in any other State, Territory, district or country, contain any provision required by the laws of the State, Territory,

district or country in which the same are issued, anything in this act to the contrary notwithstanding. (R. S., Art. 4743.)

Taxes, Shall Pay.

22. Insurance companies incorporated under the laws of this State shall hereafter be required to render for State, county and municipal taxation all of their real estate as other real estate is rendered, and all of the personal property of such insurance companies shall be valued as other property is valued for assessment in this State in the following manner: From the total valuation of its assets shall be deducted the reserve, being the amount of the debts of insurance companies by reason of their outstanding policies in gross, and from the remainder shall be deducted the assessed value of all real estate owned by the company and the remainder shall be the assessed taxable value of its personal property. Home insurance companies shall not be required to pay any occupation or gross receipt tax. (R. S., Art. 4764.)

Note.—A life insurance company in rendering its personal assets for taxation, in making the deduction on account of its real estate, is permitted to deduct the "assessed" valuation of such real estate, and not an "appraised" value, which might be different in amount from the assessed valuation. (Opinion of Attorney General, June 15, 1912.)

Venue of Suits on Policies (Home and Foreign Companies).

23. Suits on policies may be instituted and prosecuted against any life insurance company, or accident insurance company, or life and accident, or health and accident, or life, health and accident insurance company, in the county where the home office of such company is located, or in the county where loss has occurred, or where the policyholder or beneficiary instituting such suit resides. (R. S., Art. 4744.)

Service of Process.

24. Process in any civil suit against any domestic life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, may be served only on the president, or any active vice-president or secretary or general counsel residing at the city of the home office of the company, or by leaving a copy of same at the home office of such company during business hours. (R. S., Art. 4745.)

Losses Shall Be Paid When (Home and Foreign Companies).

25. In all cases where a loss occurs and the life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days, after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent.

damages on the amount of such loss, together with reasonable attorney fees for the prosecution and collection of such loss. (R. S., Art. 4746.)

Certificate Shall Be Declared Null and Void Upon Failure to Pay Losses (Home and Foreign Companies.)

26. Should any life insurance company, accident insurance company, life and accident, health and accident, or life, health and accident insurance company fail to pay off and satisfy any execution that may lawfully issue on any final judgment against said company within thirty days after the officer holding such execution has demanded payment thereof from any officer or attorney of record of such company, in this State, or out of it, such officer shall immediately certify such demand and failure to the Commissioner of Insurance and Banking, and thereupon the Commissioner shall forthwith declare null and void the certificate of authority of such company, and such company shall be prohibited from transacting any business in this State until such execution shall be fully satisfied and discharged, and until such Commissioner shall renew his certificate of authority to such company. (R. S., Art. 4747.)

Companies Cannot Transact Business of Both Fire, Marine, Etc., and Life and Health (Home and Foreign Companies).

27. It shall be unlawful for any life insurance company, accident insurance company, life and accident, health and accident, and life, health and accident insurance company to take any kind of risks, or issue any policies of insurance, except those of life, accident or health, nor shall the business of life, accident or health insurance in this State be in anywise conducted or transacted by any company which in this or any other State or country is engaged or concerned in the business of marine, fire or inland insurance. (R. S., Art. 4748.)

May Deposit With State Treasurer—Commissioner Shall Approve Deposit Situs of Property for Taxation.

28. Any life insurance company, accident insurance company, life and accident, health and accident, or life, health and accident insurance company, organized under the laws of this State, may at its option deposit with the Treasurer of this State securities equal to amount of its capital stock, and may at its option withdraw the same, or any part thereof, first having deposited in the treasury in lieu thereof other securities equal in value to those withdrawn. Any such securities, before being so originally deposited or substituted, shall be approved by the Commissioner of Insurance and Banking, and when any such deposit is made the Treasurer shall execute to the company making the deposit a receipt therefor, giving such description to such securities as will identify the same, and such company shall have the right to advertise such fact

or print a copy of the Treasurer's receipt on the policies it may issue, and the proper officers or agents of each insurance company making such deposit shall be permitted at all reasonable times to examine such securities and to detach coupons therefrom and to collect interest thereon under such reasonable rules and regulations as may be prescribed by the Treasurer and the Commissioner of Insurance and Banking of this State. The deposit herein provided for, when made by any company, shall thereafter be maintained as long as said company shall have outstanding any liability to its policyholders. For the purpose of State, county and municipal taxation the situs of all personal property belonging to such companies shall be at the home office of such company. (R. S., Art. 4749.)

Note.—(1) A life insurance company in making the deposit above authorized, may execute a conveyance in trust of its home office building to the State Treasurer, and after approval by the Commissioner of Insurance and Banking, may deposit such conveyance in trust with the State Treasurer. The conveyance should be recorded in the county where the building is situated, and should be properly authorized by resolution of the company's board of directors, or by a duly appointed and authorized finance committee acting for the company. (Opinion of Attorney General, January 6, 1912.)

(2) A life insurance company may deposit and the Commissioner of Insurance and Banking may approve for deposit securities worth more than the capital stock of the company, and such securities may be appraised at their market value at the time of the deposit, and not merely to the amount of the capital stock. As a part of such deposit, the company may convey in trust to the State Treasurer its home office lot and building, which may be appraised and approved by the Commissioner of Insurance and Banking at its market value at the time of deposit. Such approval as to valuation may be changed at any time by the Commissioner, and the amount of the deposit thereby increased or reduced whenever any change in the market value of the property occurs. (Opinion of Attorney General, January 30, 1912.)

May Deposit—Commissioner May Appraise Deposit.

29. Any life insurance company now incorporated, or which may hereafter be incorporated under the laws of this State, may deposit with the Commissioner of Insurance and Banking of the State of Texas, for the common benefit of all the holders of its policies and annuity bonds, securities of the kinds in which by the laws of this State it is permitted to invest or loan its funds, equal to the legal reserve on all its outstanding policies in force, which securities shall be held by said Commissioner in trust for the purpose and objects herein specified. Any such company may deposit lawful money of the United States in lieu of the securities above referred to, or any portion thereof and may also, for the purposes of such deposit, convey to said Commissioner in trust the real estate in which any portion of its said reserve may be lawfully invested, and in such case said Commissioner shall hold the title thereto in trust until other securities in lieu thereof shall be deposited with

him, whereupon he shall reconvey the same to such company; said Commissioner may cause any such securities or real estate to be appraised and valued prior to their being deposited with or conveyed to him in trust as aforesaid; the reasonable expense of such appraisement or valuation to be paid by the company. (R. S., Art. 4750.)

Note.—(1) A company having invested in a building site, upon which there is an encumbrance, for office purposes, may convey its equity in such site at the properly appraised value, to the Commissioner in trust as a part of its reserve deposit, and may be credited with the amount of such appraised value. When portions of the encumbrance are paid off, the company will be entitled to credits on its reserve deposits for the amounts of the encumbrance so discharged as they are paid off or discharged. As the building on the site progresses, the amount expended for construction, from time to time, may be appraised, and the company will be entitled to credit on its reserve deposit for the amount so expended in construction, or such proportion of said amount as the Commissioner shall determine to be the increase in value of the property as a result of such expenditure. (Opinion of Attorney General, August 10, 1910.)

(2) A foreign life insurance company, may lawfully reinsure the business of a Texas life insurance company which deposits securities under above section of the law. (Opinion of Attorney General, January 16, 1915.)

Policies Shall Have Upon Face—Commissioner Shall Sign Policy.

30. After making the deposit mentioned above, no company shall thereafter issue a policy of insurance or endowment or annuity bond, except policies of industrial insurance, unless it shall have upon its face a certificate substantially in the following words: "This policy is registered and approved securities equal in value to the legal reserve hereon are held in trust by the Commissioner of Insurance and Banking of the State of Texas." Which certificate shall be signed by such Commissioner and sealed with the seal of his office. (R. S., Art. 4751.)

Policies Shall Have Printed Thereon.

31. All policies and bonds of each kind and class issued and the forms thereof filed in the office of said Commissioner shall have printed thereon some appropriate designating letter or figure, combination of letters or figures or terms identifying the particular form of contract, together with the year of adoption of such form, and whenever any change or modification is made in the form of contracts, policy or bond, the designating letters, figures or terms and year of adoption thereon shall be correspondingly changed. (R. S., Art. 4751.)

Commissioner Shall Keep Record of Policies—Commissioner Shall Value Policies.

32. The Commissioner of Insurance and Banking shall prepare and keep such registers thereof as will enable him to compute

their value at any time. Upon written proof, attested by the president or vice-president and secretary of the company which shall have issued such policies or annuity bonds, that any of them have been commuted or terminated, the Commissioner shall commute or cancel them upon his register, and until such proof is furnished all registered contracts shall be considered in force for the purposes of this act. The net value of every policy or annuity bond, according to the standard prescribed by the laws of this State for the valuation of policies of life insurance companies, when the first premium shall have been paid thereon, less the amount of such liens as the company may have against it (not exceeding such value), shall be entered opposite the record of said policy or annuity bond in the register aforesaid at the time such record is made. On the first day of January of each year, or within sixty days thereafter, the Commissioner shall cause the policies and annuity bonds of each company accepting the terms of this chapter to be carefully valued, and the actual value thereof at the time fixed for such valuation, less such liens as the company may have against it, not exceeding such value, shall be entered upon the register opposite the record of such policy or bond, and the Commissioner shall furnish a certificate of the aggregate of such value to the company. (R. S., Art. 4751.)

Commissioner Shall Cancel Mutilated Policies.

33. It shall be the duty of the Commissioner to cancel mutilated or surrendered policies and annuity bonds issued by any such company and register other like policies or bonds issued in lieu thereof. (R. S., Art. 4751.)

Shall Make Additional Deposits.

34. Each company which shall have made the deposit herein provided for shall make additional deposits from time to time, in ~~amounts~~ **not** less than five thousand dollars, and of such securities as ~~are~~ **are** permitted by this chapter to be deposited, so that the market value of the securities deposited shall always be equal to the net value of the policies and annuity bonds, issued by said company, less such liens as the company may have against them, not exceeding such net value. So long as any company shall maintain its deposits as herein prescribed at an amount equal to or in excess of the net value of its policies and annuity bonds as aforesaid, it shall be the duty of said Commissioner to sign and affix his seal to the certificate before mentioned on every policy and annuity bond presented to him for that purpose by any company so depositing. (R. S., Art. 4751.)

Commissioner Shall Keep Record of Securities.

35. The Commissioner shall keep a careful record of the securities deposited by each company, showing by item the amount and

market value thereof. If at any time it shall appear therefrom that the value of the securities held on deposit is less than the actual value of the policies and annuity bonds issued by such company and then in force, it shall be unlawful for the Commissioner to execute the certificate on any additional policies or annuity bonds of such company until it shall have made good the deficit. (R. S., Art. 4751.)

Deposits May Be Increased.

36. Any company depositing under the provisions of this act may increase its deposits at any time by making additional deposits of not less than five thousand dollars of such securities as are authorized by this chapter. Any such company whose deposits exceed the net value of all policies and annuity bonds it has in force, less such liens (not exceeding such net value), as the company may hold against them, may withdraw such excess, and it may withdraw any of such securities at any time by depositing others of equal value and of the character authorized by this act in their stead, and it may collect the interest, coupons, rents and other income on the securities deposited as the same accrue. (R. S., Art. 4751.)

Commissioner Shall Keep Securities.

37. The securities deposited under this chapter by each company shall be placed and kept by the Commissioner of Insurance and Banking of the State in some secure, safe deposit fireproof box or vault in the city or town in or near which the home office of the company is located, and the officers of the company shall have access to such securities for the purpose of detaching interest coupons and crediting payment and exchanging securities as above provided, under such reasonable rules and regulations as the Commissioner may establish. (R. S., Art. 4751.)

Fees for Making Deposit.

38. Every company making deposit under the provisions of this chapter shall pay to the Commissioner of Insurance and Banking for each certificate placed on registered policies or annuity bonds issued by the company after the original or first deposit is made hereunder, a fee of 25 cents, and the fee so received shall be deposited by said Commissioner as follows:

(1) The payment of the annual rent or hire of the safety deposit fireproof box above provided.

(2) Payment for the services of a competent and reliable representative of said Commissioner, to be appointed by him, who shall have direct charge of the securities and safety box containing same, and through whom and under whose supervision the insurance company may have access to its securities for the purpose

above provided. The sum paid such representative shall not exceed sixty dollars per annum for each company.

(3) The balance of such fees shall be paid to or deposited with the State Treasurer to the credit of the general fund. (R. S., Art. 4752.)

Securities May Consist of Capital Stock.

39. Any life insurance company organized under the laws of this State and making the deposit provided for by this chapter, may include as a part thereof securities representing its capital stock, and any deposits of its securities heretofore or hereafter made in compliance with the laws of this State representing its capital stock, and shall only be required to deposit in addition thereto the remainder of its total reserve on outstanding policies and annuity bonds after deducting therefrom the amount of its capital stock securities so deposited. (R. S., Art. 4753.)

Securities Shall Be Added to.

40. Deposits of securities made hereunder to the value of the reserve on all outstanding policies and annuity bonds shall be added to and maintained from time to time as the reserve values increase, by the company issuing such contracts, or by any company which may reinsure or assume them, and such securities shall be held by the Commissioner of Insurance and Banking and his successors in office in trust for the benefit of such policies and annuity bonds so long as the same shall remain in force. No company making the deposit provided for herein shall reinsure its outstanding business, or the whole of any one or more of its risks except in or with a company or companies incorporated and organized under the laws of this State, or a company having permission to do business in this State. (R. S., Art. 4743.)

Note.—(1) A foreign life insurance company, while doing business in Texas under certificate of authority, had securities on deposit with the State Treasurer and with the Commissioner of Insurance and Banking as required by law. It merged with another foreign company under a new charter and a new name. The merged or consolidated company has no authority to do business in Texas and does not seek to do business in this State. Under these circumstances, the consolidated company may substitute its securities for those on deposit—those on deposit being withdrawn upon the deposit of new securities of equal value, when approved for deposit. (Opinion of Attorney General, March 10, 1912.)

(2) A foreign life insurance company, which has reinsured policies of a Texas company which is depositing its reserve with the Commissioner, and which foreign company afterwards merged with another foreign company, the consolidated company not being authorized to do business in Texas, may withdraw securities in excess of the reserve on the reinsured policies. The reserve which must be covered by the deposit must be calculated down to the date of withdrawal in determining the excess amount which may be withdrawn. (Opinion of Attorney General, August 1, 1914.)

Commissioner Shall Compute and Charge Extra Reserve (Home and Foreign Companies.)

41. If any life insurance company doing business under the laws of this State has written or assumed risks that are sub-standard or extra hazardous, and has charged therefor more than its published rates of premium, the Commissioner of Insurance and Banking shall in valuing such policies, compute and charge such extra reserve thereon as is warranted by reason of the extra hazard assumed and the extra premium charged. (R. S., Art. 4754.)

Companies Shall Not Pay Commissions to Officers.

42. No life insurance company transacting business in this State shall pay or contract to pay, directly or indirectly, to its president, vice-president, secretary, treasurer, actuary, medical director or other physician charged with the duty of examining risks or applications for insurance or to any officer of the company other than an agent or solicitor, any commission or other compensation contingent upon the writing or procuring of any policy of insurance in such company or procuring an application therefor, by any person whomsoever, or contingent upon the payment of any renewal premium, or upon the assumption of any life insurance risk by such company, and should any company violate the provisions of this section, it shall be the duty of the Commissioner of Insurance and Banking to revoke its certificate of authority to transact business in this State. (R. S., Art. 4755.)

Provisions Shall Govern Co-Operative Companies.

43. The provisions of Articles 4750 to Article 4755, Sections 96 to 109, this digest, inclusive, shall likewise apply to and govern co-operative life insurance companies organized under the laws of this State. (R. S., Art. 4756.)

Funds Shall Be Deposited in the Name of the Company.

44. Any director, member of a committee or officer or any clerk of a home company who is charged with the duty of handling or investing its funds shall not deposit or invest such funds except in the corporate name of such company; shall not borrow the funds of such company; shall not be interested in any way in any loan, pledge, security, or property of such company, except as stockholder; shall not take or receive to his own use and fee, brokerage, commission, gift or other consideration for or on account of a loan made by or on behalf of such company. (R. S., Art. 4757.)

Note.—See Section 14.

Capital Stock, Impairment of—Duties of Commissioner When Impaired.

45. Any such insurance company transacting business within this State whose capital stock shall become impaired to the extent of 33½ per cent thereof, computing its liabilities according to the

terms of this chapter, shall make good such impairment within sixty days by reduction of its capital stock (provided such capital stock shall in no case be less than \$100,000) or otherwise, and failure to make good such impairment within said time shall forfeit its rights to write new business in this State until said impairment shall have been made good; and provided that the Commissioner of Insurance and Banking may apply to any court of competent jurisdiction for the appointment of a receiver to wind up the affairs of such company when its capital stock shall become impaired to the extent of 50 per cent thereof, computing its policy liabilities according to the American Experience Table of Mortality and 4½ per cent interest; and, provided further, that no company shall write new business in Texas when its net surplus to policyholders is less than \$100,000. (R. S., Art. 4758.)

Form of Policies Shall Be Filed With Commissioner (Home and Foreign Companies).

46. Life insurance companies shall within five days after the issuance of and the placing upon the market any form of policies of life insurance file a copy of such form of policy with the Department of Insurance and Banking. (R. S., Art. 4759.)

Note.—The laws of Texas do not authorize the Commissioner to approve or disapprove the forms of life insurance policies. (Opinion of Attorney General, May 20, 1915.)

Commissioner Shall Approve Form of Policy (Home and Foreign Companies).

47. No insurance company transacting business in this State shall hereafter be permitted to issue or sell any policy of industrial life insurance, or any policy of accident or health insurance, until the form thereof has been submitted to the Commissioner of Insurance and Banking. If the Commissioner of Insurance and Banking shall approve the form of such policy as complying with the requirements of the laws of this State, the same may thereafter be issued and sold. If he shall disapprove the same, any such company may institute a proceeding in any court of competent jurisdiction to review his action thereon. (R. S., Art. 4760.)

Note.—(1) Policies of industrial insurance are not subject to provisions of Sections 19 and 20, *supra*. (Department ruling.)

(2) An accident policy was properly disapproved by the Commissioner because it contained the following provision in the application: "I hereby apply for a policy * * * to be based on the following statements, all of which I warrant to be complete and true * * *, and I agree that if any of said statements shall be untrue * * * said policy of insurance shall be null and void"; on the ground that the law provides that a policy shall be null and void in case of misrepresentation only when the misrepresentation is material, while the agree-

ment quoted attempts to make the policy void whether the untrue statements be material or not.

A provision in an accident policy requiring written notice of accident to be given at the home office of the company within fifteen days from date of injury "(subject, however, to any statutory provision respecting such notice)," was also properly disapproved by the Commissioner because the policy should not require such notice to be given within less than ninety days as provided by Texas statute, notwithstanding the parenthetical expression. (Opinion of Attorney General, December 2, 1910.)

(3) An accident policy which requires notice of the accident or injury to be delivered to an agent "authorized to receive the same," is more restrictive than the statute requires and should not be approved. A provision in such a policy requiring notice of accident to be given within five days is contrary to the statute and should not be approved. (Opinion of Attorney General, April 17, 1914.)

(4) A workmen's compensation policy is an accident policy, and the form must be filed with, and approved by, the Commissioner before it can be lawfully issued in Texas. Any company failing to obtain such approval before issuing in Texas should have its license revoked. (Opinion of Attorney General, June 22, 1914.)

Certificate of Authority, Must Have.

48. No foreign or domestic insurance company shall transact any insurance business in this State, other than the lending of money, unless it shall first procure from the Commissioner of Insurance and Banking a certificate of authority stating that the requirements of the laws of this State have been fully complied with by it, and authorizing it to do business in this State. Such certificate of authority shall expire on the last day of February in each year, and shall be renewed annually so long as the company shall continue to comply with the laws of the State, such renewals to be granted upon the same terms and consideration as the original certificate. (R. S., Art. 4761.)

Companies May Be Incorporated to Transact Monthly and Weekly Insurance Premium Plan, With Capital of \$25,000.

49. Companies may be incorporated in the manner prescribed by this chapter for the incorporation of life, accident and health insurance companies generally, which shall have power only to transact business within the State of Texas, and to write insurance only on the weekly or monthly premiums plan, and to issue on policy promising to pay more than one thousand dollars in the event of the death of the injured from natural causes, nor more than two thousand dollars in the event of death of any person from accidental causes, which may issue combined or separately, life, accident or health insurance policies with not less than an actual paid up capital of twenty-five thousand dollars, provided, that all such companies shall be subject to all the laws regulating life insurance companies in this State not inconsistent with the provisions of this article (section); and provided further, that such companies shall not be permitted to invest their assets in

other than Texas securities as defined by the laws of this State regulating the investments of life insurance companies. (R. S., Art. 4762.)

Note.—A life insurance company cannot amend its charter, reducing its capital stock below \$100,000, nor thereby place itself in a position where it can transact business by authority or above provision on the industrial plan. (Opinion of Attorney General, August 20, 1910.)

Dividends, Unlawful—Commissioner Shall Revoke Authority.

50. It shall not be lawful for any insurance company organized under the laws of this State to make any dividend except from surplus profits arising from its business, and in estimating such profits there shall be reserved therefrom the lawful reserve on all unexpired risks, and also the amount of all unpaid losses whether adjusted or unadjusted and all other debts due and payable, or to become due and payable by the company. Any dividends made contrary to the provisions of this article shall subject the company making them to a forfeiture of its charter, and the Commissioner of Insurance shall forthwith revoke its certificate of authority; provided, that he shall give such company at least ten days' notice in writing of his intention to revoke such certificate, stating specifically the reasons why he intends to revoke same. (R. S., Art. 4763.)

CHAPTER II

LIFE, HEALTH AND ACCIDENT INSURANCE COMPANIES— FOREIGN

Shall File Statement—Statement Shall Contain.

51. Any life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, incorporated under the laws of any other State, Territory or country, desiring to transact the business of such insurance in this State shall furnish said Commissioner of Insurance and Banking with a written or printed statement under oath of the president or vice-president or treasurer and secretary of such company, which statement shall show:

- (a) The name and locality of the company.
- (b) The amount of its capital stock.
- (c) Amount of its capital stock paid up.
- (d) The assets of the company, including, first, the amount of cash on hand and in the hands of other persons, naming such persons and their residences; second, real estate unincumbered, where situated and its value; third, the bonds owned by the company and how they are secured, with the rate of interest thereon; fourth, debts due the company secured by mortgage,

describing the property mortgaged and its market value; fifth, debts otherwise secured, stating how secured; sixth, debts for premiums; seventh, all other moneys and securities.

(e) Amount of liabilities to the company, stating the name of the person or corporation to whom liable.

(f) Losses adjusted and due.

(g) Losses adjusted and not due.

(h) Losses adjusted.

(i) Losses in suspense and from what cause.

(j) All other claims against the company, describing the same; provided, that the Commissioner of Insurance and Banking may require any additional fact to be shown by such annual statement; each such company shall be required to file a similar statement not later than March 1st of each year. (R. S., Art. 4765.)

Articles of Incorporation and By-Laws Shall Be Filed.

52. Such foreign life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, shall accompany such statement with a certified copy of its acts or articles of incorporation, and all amendments thereto, and a copy of its by-laws, together with the name and residence of each of its officers and directors, and all of which shall be certified under the hand of the president or secretary of such company. (R. S., Art. 4766.)

Capital Stock, Shall Have.

53. No such foreign life insurance company, accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, shall transact any business of insurance in this State unless such company is possessed of at least \$100,000 of actual paid up in cash money capital invested in such securities as provided under the laws of the State, Territory or country of its creation; and no mutual life insurance company or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company operating on the old line or legal reserve basis, shall transact any business of insurance in this State, unless such company is possessed of at least \$100,000 of net surplus assets invested in securities provided for under the laws of the State, Territory or country of its creation. (R. S., Art. 4767.)

Note.—The guaranty fund certificates of a foreign life insurance company, were issued by authority of a statute of the State in which the company was incorporated and organized, and which certificates contain the following provisions: 1st, The holders shall receive at least 6 per cent per annum interest hereon from the expense fund of the company; 2nd, The claims of the holders shall be inferior to the claims of the policyholders as against the funds of the company, and 3rd, In case the company ceased to do business, upon the winding up of the affairs of the company, the certificate holders shall be entitled to re-

ceive payment pro rata from the assets of the company after the claims of the policyholders have been met; while these provisions and the issuance of such certificates create a contingent liability of the company, such a liability is not such a one as should be charged against the assets of the company in its statement of financial condition, in ascertaining whether or not it has the net surplus assets required in above section.' (Opinion of Attorney General, October 24, 1912.)

Shall Make Deposits as is Required of Companies of This State in Their Home State.

54. Whenever the existing or future laws of any other State or Territory of the United States, or of any other country, shall require of life insurance companies, accident insurance companies, or life and accident, health and accident, or life, health and accident insurance companies, incorporated by this State, any deposit of securities in such other State, Territory or country before transacting insurance business therein, then, and in every such case, all insurance companies of such State shall, before doing any insurance business in this State, be required to make the same deposit of securities with the Treasurer of this State. (R. S., Art. 4768.)

Shall Deposit With State Treasurer.

55. No foreign life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company incorporated by or organized under the laws of any foreign government shall transact business in this State, unless it shall first deposit and keep deposited with the Treasurer of this State, for the benefit of the policyholders of such company, citizens or residents of the United States, bonds or securities of the United States or the State of Texas to the amount of \$100,000. (R. S., Art. 4769.)

Deposit Liable for Judgment.

56. The deposit required by the preceding article (section) shall be held liable to pay the judgments of policyholders in such company and may be so decreed by the court adjudicating the same. (R. S., Art. 4770.)

Deposit Not Required, When—Shall File Certificate of Deposit.

57. If the deposit required by Article 4769 (Section 122) has been made in any State of the United States, under the laws of such State in such manner as to secure equally all the policyholders of such company who are citizens and residents of the United States, then no deposit shall be required in this State, but a certificate of such deposit under the hand and seal of the officer of such other State with whom the same has been made shall be filed with Commissioner of Insurance and Banking. (R. S., Art. 4771.)

Assets Shall Be Invested In.

58. The assets of any company not organized under the laws of this State shall be invested in securities or property of the same classes permitted by the laws of this State as to home companies or by other laws of this State in other securities approved by the Commissioner of Insurance and Banking, as being of substantially the same grade. (R. S., Art. 4772.)

Officer Making False Statement Guilty of.

59. Any officer of any insurance company not organized under the laws of this State, who shall file with the Commissioner of Insurance and Banking any statement, report or other paper required or provided for by law to be so filed, which shall contain any material statement or fact known to be false by the person filing the same, or any person who shall execute or cause to be executed any such false statement, report or other paper to be so filed, shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for a term of not less than one year. (P. C., Art. 693.)

Power of Attorney, Shall File.

60. That each life insurance company engaged in doing or desiring to do business in this State shall file with the Commissioner of Insurance and Banking of this State an irrevocable power of attorney duly executed, constituting and appointing the Commissioner of Insurance and Banking of this State and his successors in office, or any officer or board which may hereafter be clothed with the powers and duties now devolving upon said Commissioner, its duly authorized agent and attorney in fact for the purpose of accepting service for it or being served with citation in any suit brought against it in any court of this State, by any person, or by or to or for the use of the State of Texas, and consenting that the service of any civil process upon him as its attorney for such purpose in any such unit or proceeding shall be taken and held to be valid, waiving all claim and right to object to such service or to any error by reason of such service; and such appointment, agency and power of attorney shall by its terms and recitals provide that it shall continue and remain in force and effect so long as such company continues to do business in this State or to collect premiums of insurance from citizens of this State, and so long as it shall have outstanding policies in this State, and until all claims of every character held by the citizens of this State, or by the State of Texas against such company shall have been settled. And said power of attorney shall be assigned by the president or a vice-president and the secretary of such company, whose signatures shall be attested by the seal of the company, and said officer signing the same shall acknowledge its execution before an officer authorized by the laws of this State to

take acknowledgments; and the said power of attorney shall be embodied in and approved by a resolution of the board of directors of such company, and a copy of such resolution, duly certified to by the proper officers of said company, shall be filed with the said power of attorney in the office of the Commissioner of Insurance and Banking of this State, and shall be recorded by him in a book kept for that purpose, there to remain a permanent record of said department. (R. S., Art. 4773.)

Commissioner Shall Accept Service—Duties When Accepting Same.

61. Whenever the Commissioner of Insurance and Banking of this State shall accept service or be served with citation in any suit pending against any life insurance company in this State as provided by Section 12 of this act, he shall immediately inclose the copy of the citation served upon him, or a substantial copy thereof, in a letter properly addressed to the general manager or general agent of the company against whom such service is had, if it shall have a general manager or general agent within this State, and if not, then to the home office of the company, and shall forward the same by registered mail, postage prepaid, and no judgment by default shall be taken in any such cause until after the expiration of at least ten days after the general agent or general manager of such company, or the company at its home office, as the case may be, shall have received such copy of such citation, and the presumption shall obtain until rebutted that such notice was received by such agent or company in due course of mail after being deposited in the mail at Austin. (R. S., Art. 4774.)

CHAPTER III

INVESTMENT AND PREMIUM RECEIPTS TAXES OF LIFE INSURANCE COMPANIES

Shall Invest.

62. Each and every life insurance company now engaged or that may hereafter engage in transacting the business of life insurance in this State shall, as a condition of its right to transact such business in this State, invest and keep invested in Texas securities, as hereinafter defined and in Texas real estate as hereinafter provided, a sum of money equal to at least 75 per cent of the aggregate amount of the legal reserve required by the laws of the State of its domicile to be maintained on account of its policies of insurance in force written upon the lives of citizens of this State, which reserve is hereinafter denominated as its "Texas Reserves," and each such company securing a certificate of authority to do business in this State shall be deemed to have accepted such certificate subject to all the conditions and requirements of this chapter. (R. S., Art. 4775.)

Note.—Life insurance companies doing a reinsurance business only are not required to invest their reserve in Texas securities. (Opinion of Attorney General, January 17, 1911.)

Texas Securities, Definition of.

63. The phrase "Texas Securities" as used in this chapter shall be held to include bonds of the State of Texas, or of any county, city, town, school district or other municipality or subdivision which is now or may hereafter be constituted or organized and authorized to issue bonds under the Constitution and laws of this State, promissory notes and other obligations, the payment of which is secured by a mortgage, deed of trust or other valid lien upon unincumbered real estate situated in this State, the title to which real estate is valid and the market value for which is double the amount loaned thereon, exclusive of buildings, unless such buildings are insured and kept insured in some company authorized to transact business in this State, and the policy or policies transferred to the company taking such mortgage or lien; the first mortgage bonds of any solvent corporation incorporated under the laws of this State and doing business in this State, which has not in five years next preceding the date of the investment by such company in such mortgage bonds defaulted for more than three months in the payment of interest upon its bonds or indebtedness, the market value of which bonds is equal to the amount invested therein; and loans made to policyholders on the sole security of the reserve values of their policies. And the investments required by this act or any part thereof may be made by the purchase of not more than one building site, and in the erection thereon of not more than one office building or in the purchase at its reasonable market value of such office building already constructed and the ground upon which the same is located in any city of the State, having a population of more than 4000 inhabitants. And all real estate owned by life insurance companies in this State on December 31, 1909, and all thereafter acquired under the provisions of this chapter, or by foreclosure of a lien thereon shall be treated, to the extent of its reasonable market value, as a part of the investments required by this act. And "Texas Securities" as used in the following sections of this act shall be held to include every character of investment authorized by the terms of this article (section). (R. S., Art. 4776.)

Investments Shall Be Made, How.

64. The investments required by this chapter shall be made as follows:

(a) Each life insurance company which had a certificate of authority to transact business in this State April 2, 1909, the total amount of whose investments in Texas securities as of December 31, 1908, was equal to or exceeded 75 per cent of the amount of

its Texas reserves as of that date, shall have so invested not later than January 31st in each year a sum of money equal to 75 per cent of the amount of its Texas reserves as of the preceding December 31st.

(b) Each life insurance company which had a certificate of authority to transact business in this State on April 2, 1909, the amount of whose investments in Texas securities as of December 31, 1908, was less than 75 per cent of the amount of its Texas reserves as of said date, shall have so invested, not later than January 31st in each year, a sum at least equal to 75 per cent of the amount by which its Texas reserves as of December 31st preceding exceeded the amount of its Texas reserves as of December 31, 1908, added to the amount of its total investments in Texas securities as of said date; and each such company shall, in addition, have so invested not later than January 31, 1910, a sum at least equal to 10 per cent of the amount by which 75 per cent of its Texas reserves as of December 31, 1908, exceeded the amount of its investments in Texas securities as of said date, and annually thereafter it shall have invested, not later than January 31st, an additional 10 per cent of the amount of such excess until the total amount of its investments in Texas securities shall at least equal 75 per cent of its Texas reserves.

(c) Each life insurance company not having a certificate of authority to transact business in this State on April 2, 1909, or that may hereafter discontinue writing new business under such certificate, shall, if it again obtain a certificate of authority to transact business in this State, be required to have invested in Texas securities annually as above provided a sum equal to 75 per cent of its Texas reserves; provided, that if on December 31st preceding the issuance of such certificate of authority the amount of its investments in Texas securities was less than 75 per cent of the amount of its Texas reserves, it shall be required to have so invested annually, as above provided, a sum equal to 75 per cent of the increase in its Texas reserves since December 31st last preceding the issuance of its certificate of authority, added to the amount of its total investment in Texas securities as of said date; and in addition it shall, not later than January 31st in each year after the issuance of its certificate of authority, have so invested 10 per cent of the amount by which 75 per cent of its Texas reserves as of December 31st preceding the date of said certificate exceeded the amount of its total investments in Texas securities as of that date, and shall have invested annually thereafter, not later than January 31st, an additional 10 per cent of such excess until the total amount of its investments in Texas securities shall at least equal 75 per cent of the amount of its Texas reserves. The proportionate amount of the Texas reserves required by this section to be invested in Texas securities as of any date, shall

thereafter be maintained; provided, that such investment shall not be required to be made by any life insurance company after it has ceased to do business of life insurance or to write policies of life insurance in this State. (R. S., Art. 4777.)

Shall File Report of Reserve.

65. That each life insurance company doing business in this State shall, not later than ten days after January 31st of each year, file with the Commissioner of Insurance and Banking of this State, on a blank prepared and furnished by him for that purpose, a report showing the entire amount of the reserve on its entire business in force in this State on December 31st preceding, and an itemized schedule of its investments in Texas securities, which report shall be sworn to by either the president or a vice-president and the secretary of such company. Such report shall contain such other information as may be required by the Commissioner to determine whether or not such company has continuously and in good faith complied with this law, and for that purpose the Commissioner may, whenever he shall deem it proper, require such special or supplemental reports as he may deem necessary. (R. S., Art. 4778.)

Shall File Report of Premiums.

66. Each life insurance company not organized under the laws of this State transacting business in this State shall on or before the first day of March make a report to the Commissioner of Insurance and Banking of this State, which report shall be sworn to by either the president or vice-president and secretary or treasurer of such company, and which shall show the gross amount of premiums collected during the year ending on December 31st preceding from citizens of this State upon policies of insurance and each such company shall pay annually an occupation tax equal to 3 per cent of such gross premium receipts; provided, that when the report of the investment in Texas securities, as defined by law, of any such companies, as of December 31st of any year, shall show that it has invested on said date as much as 30 per cent of its total Texas reserves, as defined by law, in promissory notes or other obligations secured by mortgage, deed of trust or other lien on Texas real estate, the rate of occupation tax shall be reduced to 2.6 per cent; and when such report shall show that such company has so invested on said date as much as 60 per cent of its total Texas reserve, the rate of such occupation tax shall be reduced to 2.3 per cent; and when such a report shall show that such company has so invested, on said date, as much as 75 per cent of its total Texas reserve, the rate of such occupation tax shall be reduced to 2 per cent; provided, that all such companies shall in any event make the investments in Texas securities in proportion to the amount of Texas reserves as required by law. Such occupation

taxes shall be for and on account of the business transacted within this State during the calendar year in which such premiums were collected or for that portion thereof during which the company shall have transacted business in this State while this act was in force and effect. (R. S., Art. 4779.)

Note.—(1) Reserves on life insurance policies represent what the company issuing the policies must at all times have on hand to meet its liabilities on its policies. In determining the percentage of total Texas reserves which must be invested in Texas real estate securities to secure a reduction of taxes, no deduction should be made from amount of legal reserve on Texas policies on account of Texas policy loans. (Opinion of Attorney General, May 1, 1914.)

(2) A life insurance company doing business under the assessment or natural premium plan is required to pay occupation taxes, as required by above Section 66. (Opinion of Attorney General, June 27, 1914.)

Commissioner's Duties on Receiving Report.

67. Upon the receipt of sworn statements showing the gross premium receipts of such company the Commissioner of Insurance and Banking of this State shall certify to the Treasurer of this State the amount of taxes due by such company for the preceding year; which taxes shall be paid to the State Treasurer for the use of the State by such company. Upon his receipt of such certificate and the payment of such tax, the Treasurer shall execute a receipt therefor, which receipt shall be evidence of the payment of such taxes and no such life insurance company shall receive a certificate of authority to do business in this State until such taxes are paid. If upon the examination of any company, or in any other manner, the Commissioner of Insurance and Banking shall be informed that the gross premium receipts of any year exceed in amount those shown by the report thereof theretofore made as above provided, it shall be the duty of such Commissioner to file with the State Treasurer a supplemental certificate showing the additional amount of taxes due by such company, which shall be paid by such company upon notice thereof. It shall be the duty of the State Treasurer of this State, if within fifteen days after the receipt by him of any certificate or supplemental certificate provided for by this section the taxes due as shown thereby have not been paid, to report the facts to the Attorney General, who shall immediately institute suit in the proper court of Travis county to recover such taxes. (R. S., Art. 4780.)

Other Occupation Tax Shall Not Be Paid.

68. No occupation tax other than herein imposed shall be levied by the State or any county, city or town upon any life insurance company herein subject to the occupation tax in proportion to its gross premium receipts or its agents. The occupation tax imposed by this act upon life insurance companies shall be the sole occupation tax which any company doing business in this State under the

provisions of this chapter shall be required to pay. (R. S., Art. 4781.)

Companies Accepting Certificate Shall Hereafter Pay Occupation Tax.

69. Each life insurance company not organized under the laws of this State hereafter granted a certificate of authority to transact business in this State shall be deemed to have accepted such certificate and to transact such business thereunder subject to the conditions and requirements that after it shall cease to transact new business in this State under a certificate of authority and so long as it shall continue to collect renewal premiums from citizens of this State it shall be subject to the payment of the same occupation tax in proportion to its gross premiums during any year from citizens of this State as is or may be imposed by law on such companies transacting new business within this State under certificates of authority during such year; provided, that the rate of such tax to be so paid by any such company shall never exceed the rate imposed by this act upon insurance companies transacting business in this State, and each such company shall make the same reports of its gross premium receipts for each such year and within the same period as is or may be required of such companies holding certificates of authority; and shall at all times be subject to examination by the Commissioner of Insurance and Banking or some one selected by him for that purpose, in the same way and to the same extent as is or may be required of companies transacting new business under certificates of authority in this State, the expenses of such examination to be paid by the company examined; and the respective duties of the Commissioner of Insurance and Banking in certifying the amount of such taxes and of the State Treasurer and Attorney General in their collection shall be the same as are or may be prescribed respecting taxes due from companies authorized to transact new business within this State. (R. S., Art. 4782.)

Companies Heretofore, Now or Hereafter Doing Business Shall Report After Ceasing to Do Business.

70. Any life insurance company which has heretofore been, may now be, or may hereafter be engaged in writing policies of insurance upon the lives of citizens of this State which has heretofore ceased or may hereafter cease writing such policies and which does not now or may not hereafter have a certificate of authority to transact the business of life insurance in this State but which has continued or may continue to collect renewal or other premiums upon such policies shall, before it may again obtain a certificate of Authority to transact the business of life insurance in this State, report under oath to the Commissioner of Insurance and Banking of this State, the gross amount of premiums so collected from citizens of this State upon policies of insurance during each

calendar year since the end of the period covered by the last preceding report by such company of gross premium receipts upon which it paid an occupation tax, and shall pay to the State a sum equal to the percentage of its gross premium receipts for each such year that was required by law to be paid as occupation taxes by companies doing business in this State during such year or years and upon the payment of such sum and securing a certificate of authority to do business in this State the penalties provided for the failure to pay such taxes and make such reports in the past shall be remitted. (R. S., Art. 4783.)

May Maintain Agents After Failing to Renew Certificate.

71. Any company which shall fail to renew its certificate of authority or continue to write new business in this State shall, nevertheless, have the right to maintain an agent or agents in Texas for the purpose of collecting renewal premiums on outstanding business written by it under certificate of authority, and also for the purpose of making investments as provided by this act. (R. S., Art. 4784.)

Duties of Commissioner When Company Fails to Comply With Provisions of Law.

72. If any life insurance company, while holding a certificate of authority to transact business in this State, shall fail or refuse to comply with any of the provisions or requirements of this chapter, it shall be the duty of the Commissioner of Insurance and Banking, upon ascertaining such fact, to notify such company by registered letter, properly addressed and mailed, or by any other form, of actual notice in writing delivered to an executive officer of such company, of his intention to revoke its certificates of authority to transact business in this State at the expiration of thirty days after the mailing of such registered letter, or the date upon which such actual notice is served; and if such provision or requirements are not fully complied with upon the expiration of said thirty days, it shall be the duty of the Commissioner of Insurance and Banking to revoke the certificate of authority of such company, and in case of such revocation such company shall not be entitled to receive another certificate of authority for a period of one year and until it shall have fully and in good faith complied with all such provisions and requirements of this act. Any company feeling itself aggrieved by the action of the Commissioner in revoking its certificate of authority to do business in this State may bring suit against him in the court of Travis county having jurisdiction thereof, to annul and vacate the order revoking such certificate. (R. S., Art. 4785.)

Penalty for Failure to Make Investment.

73. If any company shall intentionally fail or refuse to make the investments required by this chapter or make any report re-

quired by this chapter, or to make any special report requested by the Commissioner of Insurance and Banking under the authority of this chapter, or generally to comply with any provision or requirement of this chapter while holding a certificate of authority to transact business in this State, or after it shall cease to write new business or cease to hold such certificate, such failure or refusal shall subject such company, in addition to the penalty provided in the preceding article (Section (72), in cases of which said article (section) may be applicable to the payment of a penalty of \$25 per day for each day that such company shall remain in default after the Commissioner of Insurance and Banking shall notify such company of such default, in the manner provided in the preceding article (Section 72 hereof), to be recovered in a suit to be brought by the Attorney General in behalf of the State in the District Court of Travis County. And in any suit that may be brought to recover such penalty or penalties there shall be a prima facie presumption subject to rebuttal that any default that may have occurred was intentional, and that the notice required by this chapter was given and the burden of proof shall be on the defendant company to prove that the investments required by this chapter were made as herein required whenever the question of whether or not such investments were thus made is in issue. (R. S., Art. 4786.)

Companies Organized In This State May Deposit.

74. Any life insurance company organized under the laws of this State may, at its option, deposit with the Treasurer of this State securities in which its capital stock is invested, or securities equal in amount to its capital stock of the class in which the law of this State permits insurance companies to invest their capital stock, and may, at its option, withdraw the same or any part thereof, first having deposited with the Treasurer in lieu thereof other securities of like class and equal amount and value to those withdrawn. Any such securities before being so originally deposited or submitted shall be approved by the Commissioner of Insurance and Banking, and when any such deposit is made the Treasurer shall execute to the company making such deposit a receipt therefor, giving such description of said stock or securities as will identify the same, and stating that the same are held on deposit as the capital stock investments of such company, and such company shall have the right to advertise such fact or print a copy of the Treasurers' receipt on the policies it may issue; and the proper officers or agent of each insurance company making such deposit shall be permitted at all reasonable times to examine such securities and to detach coupons therefrom and to collect interest thereon, under such reasonable rules and regulations as may be prescribed by the Treasurer and the Commissioner of Insurance

and Banking of this State. The deposit herein provided for, when made by any company, shall thereafter be maintained so long as said company shall have outstanding any liability to its policyholders in this State. (R. S., Art. 4787.)

Note:—See Section 28 and notes thereunder.

Investment in Texas Securities Does Not Apply To.

75. The provisions of this chapter requiring investment in Texas securities shall not apply to any life insurance company the total amount of whose Texas Reserves does not exceed \$5000, or to any such company doing only a reinsurance business in this State, but all of the other provisions of this act shall apply to such companies. (R. S., Art. 4788.)

Fraternal Beneficiary Association Exempt.

76. The provisions of this chapter shall not be held to apply to fraternal beneficiary associations, as defined by the laws of this State. (R. S., Art. 4789.)

Companies Desiring to Loan Funds May Secure Permit.

77. That any life insurance company not desiring to engage in the business of writing life insurance in this State, but desiring to loan its funds in this State, may obtain a permit to do so by complying with the laws of this State relating to foreign corporations engaged in loaning money in this State without being required to secure a certificate of authority to write life insurance in this State. (R. S., Art. 4790.)

CHAPTER IV

ASSESSMENT OR NATURAL PREMIUM COMPANIES

Life and Casualty Companies—Assessment of Natural Premium—Admission of.

78. Companies or associations organized under the laws of any other State of the United States, carrying on the business of life or casualty insurance on the assessment or natural premium plan, and having cash assets of a sum not less than one hundred thousand dollars, invested as required by the laws of this State regulating other insurance companies, shall be licensed by the Commissioner of Insurance and Banking to do business in this State, and be subject only to the provisions of this act; provided, however, that such company or association shall first file with the Commissioner of Insurance and Banking a certified copy of its charter, a written agreement appointing the Commissioner of Insurance and Banking and his successor in office to be its true and lawful attorney, upon whom all lawful process in any action or proceeding against it may be served; certificate under oath of its president and secre-

tary that it is paying, and for the twelve months next preceding has paid, the maximum amount named in its policies or certificates in full, a statement under oath of its president and secretary of its business for the year ending December 31, preceding; a certified copy of its constitution and by-laws and a copy of its policy and application; a certificate from the proper authority in its home State that said company or association is legally entitled to do business in such home State and has at least one hundred thousand dollars surplus assets subject to its indebtedness. It shall be the duty of the Commissioner of Insurance and Banking to issue a license to any company or association complying with the provisions of this act, and every such company or association shall annually thereafter, before such license is renewed, file with the Commissioner of Insurance and Banking, on or before the first day of March, a statement under oath of its president and secretary, or like officers, of its business for the year ending December 31st preceding. (R. S., Art. 4791.)

Note.—(1) Power of attorney to commissioner not revocable. (Attorney General's opinion, December 10, 1900.)

(2) This article does not require \$200,000 assets over all liabilities, but only \$100,000 over all liabilities. (Attorney General's opinion, February 14, 1895, and March 13, 1895.)

(3) The provision in above Section 78, that foreign assessment companies are subject only to the provisions of this Act, means as to admission into the State and does not exempt such companies from taxes and other regulatory laws. (Opinion of Attorney General, June 27, 1914.)

Schedule of Fees.

79. Every such company or association shall pay to the Commissioner of Insurance and Banking, for the use of the State, the following fees: For filing copy of its charter, twenty-five dollars; for filing statement preliminary to admission, twenty dollars; for filing each annual statement after admission, twenty dollars; for license to company or association, one dollar. (R. S., Art. 4792.)

Exemptions.

80. The provisions of this chapter shall in nowise apply to mutual benefit organizations doing business in this State through lodges or councils, such as the order of Chosen Friends, Knights of Honor, or kindred organizations. (R. S., Art. 4793.)

Note.—Exempt from penalty prescribed in Art. 3071, 49 S. W. Rep., 123.

CHAPTER V

CO-OPERATIVE LIFE INSURANCE COMPANIES

Who May Incorporate—Articles of Incorporation Shall Contain.

81. Nine or more persons, residents of the State of Texas, may form a co-operative life insurance company for the purpose of insuring the lives of individuals on the mutual, level premium, legal reserve plan, subject to the conditions and limitations prescribed in this act by executing and acknowledging before some officer authorized to take acknowledgments to conveyances of real estate, articles of incorporation for that purpose. Such articles shall set forth: (1) The name and residence of each of the incorporators; (2) the name of the proposed company, which shall contain the words "Co-operative Life Insurance Company" as a part thereof, and which shall not be so similar to that of any other life insurance company or association transacting business in this State as to mislead the public; (3) the location of the principal office from which the business of the company is to be transacted, and (4) the number of directors and the name and place of residence of each of those who are to serve until the first regular election of directors, as provided by this act. Such articles of incorporation shall be filed with the Commissioner of Insurance and Banking, who shall immediately submit them to the Attorney General for his examination and approval as complying in all respects with the law. If the Attorney General approve them, he shall so certify thereon in writing and return them to the Commissioner of Insurance and Banking, who shall file the same in his office and issue to the company a certificate of authority, to which shall be attached a certified copy of the articles of incorporation, authorizing it to receive applications for insurance as provided in this act and to collect premiums thereon, and to issue receipts therefor, which certificate shall expressly state that such company is not authorized to issue policies of insurance or transact any business other than that specifically authorized therein until it has received bona fide applications for insurance on the lives of at least 200 individuals for not less than \$1000 each, which applications have been approved by a competent physician and on which the first annual premiums at adequate rates have been paid to the company, nor until these facts shall have been fully shown to the Commissioner of Insurance and Banking and he shall have issued to the company a certificate of authority to transact business as a co-operative life insurance company. If this is not made within six months after the date upon which such articles of incorporation are filed with the Commissioner of Insurance and Banking, it shall be his duty to cancel the certificate of authority of such company to receive applica-

tions for insurance and to notify each incorporator of such action. (R. S., Art. 4809.)

Commissioner Shall Examine.

82. When the Commissioner of Insurance and Banking shall be notified that any such company has complied with all the foregoing provisions of this section, he shall make, or cause to be made, at the expense of such company an examination thereof, and if he shall find that the law has been in all respects fully complied with, it shall be his duty to issue to it a certificate of authority to transact business of a co-operative life insurance company, in accordance with the terms of this act. (R. S., Art. 4809.)

Shall Be Controlled By.

83. The business of a co-operative life insurance company shall be controlled and directed by a board of directors consisting of not less than five nor more than nine members, who shall be elected annually as provided in this chapter, those to serve until the first annual election to be named in the charter and who shall hold office until their successors shall be elected and qualified or until they shall be removed for improper practices. Such board of directors shall elect the officers of the company, which shall be a president, and such number of vice-presidents as the by-laws may provide, a secretary, a treasurer, a medical director, and such other officers as the by-laws of the company may provide for, and shall fix the compensation of all such officers. The duties of all officers shall be prescribed by the by-laws. The by-laws governing the society until the date of its first annual meeting, as provided by this chapter, shall be adopted by the board of directors at their first meeting after the certificate of authority shall be issued authorizing the company to transact the business of a co-operative life insurance company. There shall be an annual meeting of all the policyholders of each co-operative life insurance company at the home office of such company on the second Tuesday in January after it shall have received a certificate of authority to transact the business of life insurance and annually thereafter at which the directors shall be elected for the succeeding year and at which by-laws for the government of the company not inconsistent with the provisions of this act or with the laws of this State may be adopted, and at which the existing by-laws may be repealed or amended. At such annual meeting every policyholder shall be entitled to one vote for each \$500 of insurance held by him, and any policyholder may execute his proxy authorizing and entitling the holder to exercise his voting powers, unless such proxy shall be revoked previous to such annual meeting. The president, secretary, and treasurer shall each give a bond for the protection of the company and its policyholders in amount and with securities to be approved by the Commissioner

of Insurance and Banking, conditioned for the faithful performance of their respective duties. (R. S., Art. 4810.)

Note.—The Board of Directors has no power to reinsure the business, nor liquidate affairs of the company until after its policyholders, in a meeting called for that purpose or without such meeting, shall by a four-fifths vote in writing authorize such reinsurance or liquidation. A majority vote on the reinsurance question alone might be sufficient, but if such reinsurance is part of the liquidation, the four-fifths vote would be necessary. (Opinion of Attorney General, December 10, 1913.)

Shall Invest In.

84. Co-operative life insurance companies shall invest their funds only in bonds of the State of Texas, or of some county, city, town, school district, or other subdivision, organized, or which may hereafter be organized, and authorized, or which may hereafter be authorized to issue bonds under the Constitution and laws of this State, or in mortgages upon improved, unencumbered real estate, the title to which is valid, situated within the State of Texas, worth double the amount of the loan thereon exclusive of buildings, unless such buildings are insured in some fire insurance company authorized to transact business under the laws of this State, and the policy or policies transferred to the company, or in not more than one office building located in some city or town of this State in which the home office of such company is located, the actual value of which is not less than the amount invested therein. All moneys of any such company coming into the hands of any officer thereof or subject to his control, when not invested as prescribed in this section, shall be deposited in the name of such company in some bank or banks in this State which are subject to either State or National regulation and supervision, and which have been approved by the Commissioner of Insurance and Banking as depositories therefor. No co-operative life insurance company shall purchase or hold real estate except the building in which it has its home office and the land upon which it stands, or such as it shall acquire in good faith through foreclosure sale or otherwise in satisfaction of debts contracted or loans made in the course of its dealings. Any officer or director of any such company who shall knowingly and willfully violate or assent to the violation of the provisions of this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary for a term of not less than one nor more than five years. (R. S., Art. 4811; P. C., Art. 684.)

Can Only Borrow Money For.

85. No co-operative life insurance company shall have the power to borrow money for any purpose other than the payment of death losses. No such company shall have the power to incur any debt on any account except under policies issued by it or for money

borrowed to pay death losses, for which any portion of its assets over and above that which may represent or be derived from the expense loading of the premiums collected by it, shall in any event be subject to execution upon a judgment therefor. (R. S., Art. 4812.)

Commissioner Shall Make Valuation of Policies.

86. The Commissioner of Insurance and Banking shall annually make valuations of all outstanding policies of co-operative life insurance companies as of December 31st of each year in accordance with the one-year preliminary term method based upon the American Experience Table of Mortality and $3\frac{1}{2}$ per cent interest per annum. (R. S., Art. 4813.)

Net Premiums Shall Be Computed.

87. The net premiums upon all policies issued by any such company shall be computed in accordance with the provisions of this article and no portion of such net premium collected upon any policy, and no portion of the gross premium collected upon any policy except the expense loading shall ever be used or applied for the payment of any expense of the company of any kind or character, or for any other purpose than the payment of death losses, surrender values, or lawful dividends to policyholders, loans to policyholders, or for the purposes of such investments of the company as are prescribed in this chapter. Any officer, director or employe of any co-operative life insurance company who shall knowingly and willfully violate the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term of not less than one nor more than five years. (R. S., Art. 4814; P. C., Art. 685.)

May Set Aside Reserve.

88. Every co-operative life insurance company may maintain and set aside before declaring any dividends to policyholders, in addition to an amount equal to the net value of its policies, computed as required by this chapter, a contingency reserve not exceeding the following respective percentages of said net values, to-wit: When said net values are less than one hundred thousand dollars, twenty per centum thereof, or the sum of ten thousand dollars, whichever is the greater; when said net values are greater than one hundred thousand dollars, the percentage thereof measuring the contingency reserve shall decrease one-half of one per cent for each one hundred thousand dollars of said net values up to one million dollars; and thereafter one-half of one per centum for each additional one million dollars; provided, that as the net values of said policies increase the maximum percentages measuring the contingency reserve decrease such company may maintain the contingency reserve already accumulated hereunder, although

for the time being it may exceed the maximum percentage herein prescribed, but may not add to the contingency reserve when the addition will bring it beyond the maximum percentage. (R. S., Art. 4815.)

Shall Make Apportionment of Surplus.

89. Every co-operative life insurance company organized under this act shall make an annual apportionment and accounting of divisible surplus to each policyholder after the end of the second policy year on all policies issued; and each such policyholder shall be entitled to and credited with or paid, in a manner hereafter provided, such a portion of the entire divisible surplus as has been contributed thereto by his policy. Upon the 31st day of December of each year, or as soon thereafter as may be practicable, every such company shall well and truly ascertain the surplus earned by it during such year, and after setting aside from such surplus the contingency reserve provided in this chapter it shall apportion to its policies upon which all premiums due and payable for the first two years thereof have been paid the proportion of the remainder of such surplus which has been contributed by each such policy, and shall immediately submit a detailed report of such apportionment, under the oath of its president, or secretary, to the Commissioner of Insurance and Banking. If such Commissioner shall find such apportionment to be equitable and just to the policyholders to be in accordance with the provisions of this chapter, he shall approve the same, and it shall become effective, and if he shall not approve such apportionment he shall make such changes therein as he shall deem equitable and just and necessary to make the same comply with the provisions of this chapter, and shall certify such changes to such company, whereupon such apportionment as changed by the Commissioner shall become effective. The dividends declared as aforesaid shall be applied toward the payment of any premium or premiums upon such policy which shall become effective. (R. S., Art. 4816.)

Note.—Dividends must be used for no other purpose than application toward payment of premium. (Department ruling.)

Transact Business Only in Texas.

90. Co-operative life insurance companies are authorized to transact business only within the State of Texas, and shall issue no policies other than whole life or twenty-payment life policies on the annual dividend plan, and the forms of all policies issued by any such company shall be prescribed by the Commissioner of Insurance and Banking, and all such policies shall have plainly printed both on the face and the reverse side thereof the words, "The form of this policy is prescribed by the Commissioner of Insurance and Banking of the State of Texas," and it shall be the duty of the

Commissioner to revoke the certificate of authority of any company which shall issue any policy except upon such form so prescribed. All such policies may provide for not more than one-year preliminary term insurance. No such company shall issue any policy or policies by which it shall be bound for more than five thousand dollars, upon any one life at any time when the amount of its total insurance in force is less than ten million dollars. (R. S., Art. 4817.)

Medical Examination, Shall Make.

91. No co-operative life insurance company shall enter into any contract of insurance upon life of any person without having previously made, or caused to be made, a detailed medical examination, prescribed by its medical director and approved by its board of directors, of the insured by a duly qualified and licensed medical practitioner, and without his certificate that the insured was in sound health at the date of examination. Any officer or agent or employe of such company violating the provisions of this section or effecting or attempting to effect a contract of insurance contrary to the provisions hereof shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment in the county jail for not less than six months or by both such fine and imprisonment. (R. S., Art. 4818; P. C., Art. 686.)

Policies May Provide.

92. The policies issued by a co-operative life insurance company may provide that the premiums thereon may be paid annually, semi-annually, quarterly or monthly; and in the event that such premiums are payable other than annually no deduction shall be made from the amounts due on any policy in the event that the death of the policyholder shall occur prior to the completion of a full policy year. It shall be the duty of the company to mail from its home office to each policyholder a notice of the date upon which each premium is to become due at least thirty days prior to such date if the premium is payable annually, semi-annually or quarterly, and at least ten days prior to such date if the same is payable monthly; provided, that local agents may be authorized and empowered by the board of directors to collect premiums and to give the notice required by this article. (R. S., Art. 4819.)

After Three Full Years Owner May Borrow on Policy.

93. After three full years' premiums have been paid upon any policy in a co-operative life insurance company, the owner thereof shall be entitled on proper assignment of such policy and on the sole security to borrow from the company a sum not greater than the reserve value thereof, and apply the same in payment of any premiums due or to become due upon such policy. In the event of

default in the payment of any premium after three full years' premiums have been paid upon any policy, the owner within one month after any default may elect to accept the value of such policy in cash, or to have the insurance continued in force from the date of default, without future participation and without the right to loan, for its face amount less any indebtedness to the company thereon, or to purchase non-participating paid-up insurance, payable at the same time and on the same conditions as such policy. The cash value will be the reserve at the date of default computed in accordance with the provisions of this act less such surrender charge as may be provided in the policy, not exceeding $2\frac{1}{2}$ per centum of the amount insured thereby and less any existing indebtedness to the company on such policy. Payment of such cash value may be deferred by the company for not exceeding six months after the application therefor is made. The term for which the insurance will be continued, or the amount of the paid-up policy will be such as the cash value will purchase as a net single premium at the attained age of the insured according to the American Experience Mortality Table and interest at the rate of $3\frac{1}{2}$ per cent per annum. If the owner shall not within one month from such default surrender the policy to the company at its home office for a cash surrender value of paid-up insurance, the company shall continue the insurance as above provided. (R. S., Art. 4820.)

Note.—Loans may be reserved upon policies only for the purpose of paying premiums. (Department ruling.)

Certificate Shall Expire—Report Shall Render—Fees for Filing Statement.

94. The original certificate of authority to transact the business of a co-operative life insurance company issued to any such company by the Commissioner of Insurance and Banking shall expire on March 1st next succeeding the date of its issuance. Each such company is required to render annually under oath by its president or a vice-president and its secretary or treasurer, and file not later than February 15th of each year in the office of the Commissioner of Insurance and Banking a statement, in such form and upon such blanks as may be prescribed by the Commissioner of Insurance and Banking, accompanied by a filing fee of \$10, showing the condition of the company on the 31st day of December next preceding, which shall include a statement in detail showing the class and character of its assets and liabilities on said date, the amount and character of business transacted, moneys received and disbursed during the preceding calendar year and the number and amount of its policies in force on said date, and such other facts as may be required by the Commissioner of Insurance and Banking. When such annual statement is filed with the Commissioner of Insurance and Banking, upon receipt of a fee of \$1.00

(one dollar), if he is satisfied that the company has in all respects complied with the laws of the State, he shall issue a certificate of authority to such company for the year beginning March 1st after filing of such statement. (R. S., Art. 4821.)

Agents Shall Have Certificates.

95. No agent or other person shall solicit or receive applications for insurance in a co-operative life insurance company without a certificate of authority from the Commissioner of Insurance and Banking, which shall expire on March 1st next after the date of its issuance. Such certificate of authority shall not be issued by such Commissioner except upon application therefor, signed by the president or secretary of the company, which application shall state that the contract between the company and such agent has been made in writing and that a true copy of such contract is attached to and made a part of such application, and that such contract fully shows the entire compensation that such agent is to receive, directly or indirectly, on account of any services to be rendered by him for such company, and no such certificate of authority shall be issued by such Commissioner unless it shall be shown that the compensation to be paid such agent, together with all other expenses of any sort likely to be incurred in connection with or attributable to the obtaining of new insurance through such agent, shall not exceed eighty per centum of the expense loading in the premiums to be collected therefor. (R. S., Art. 4822.)

Commissioner Shall Examine.

96. It shall be the duty of the Commissioner of Insurance and Banking to have made at least once in each calendar year a thorough and full examination of the affairs of each co-operative life insurance company, the report of which examination shall be made to such Commissioner under oath, which shall be accompanied by a list of all policyholders as shown by the books of the company, together with the postoffice address of each, and it shall be the duty of the Commissioner of Insurance and Banking, if he shall approve the report of such examination, after having given the officers of the company an opportunity to be heard, to mail a printed copy of such report to each such policyholder. The expense of each such examination and of mailing the copies of such reports to the policyholders shall be borne by the company examined. (R. S., Art. 4823.)

Commissioner May Make Additional Examination.

97. If at any time the Commissioner of Insurance and Banking deems it necessary to make an additional examination of any such company, he may do so, and if as a result of any such examination or from other information he shall have the opinion that the operations of the company are unsafe or hazardous to the policy-

holders' interests, or in violation of any law of this State, he shall suspend its certificate of authority, and direct its officers to call a special meeting of its policyholders and direct them to cease the further issuance of policies until such meeting is held. At such meeting of the policyholders, the Commissioner of Insurance and Banking shall present the facts for such action as the policyholders may deem advisable. If in the opinion of the Commissioner of Insurance and Banking such action of the policyholders when taken will not fully protect the interests of all policyholders he shall apply to the district court of the county in which the home office of the company is situated, or to the judge thereof in vacation, for the appointment of a receiver to take temporary charge of the business and affairs of such company, who shall receive the compensation allowed by law to State bank examiners, and who shall have all power and authority of the board of directors to manage and control the business and affairs of such company, subject to the orders of the district court or judge in vacation, until the reasons for his appointment shall in the opinion of the judge appointing him have been removed. At any time when the liabilities of any such company, computing its reserve liability upon the American Experience Table of Mortality and $3\frac{1}{2}$ per cent interest per annum, shall be in excess of its assets, the company shall cease the issuance of new policies until the impairment in its reserve shall be made good. Whenever the liabilities of such company, computing its reserve liability upon the American Experience Table of Mortality and $4\frac{1}{2}$ per cent per annum, exceed its assets, the Commissioner of Insurance and Banking may request the Attorney General to file suit in the name of the State in the district court of the county in which such company is located for the appointment of a receiver to wind up its affairs, and such action may be maintained. In any such action such district court or judge thereof, in vacation, shall have the power, if in his opinion the interest of the policyholders of such company require it, to enter an order providing for the reinsurance of all outstanding risks of such company in some other life insurance company authorized to do business in this State upon such terms and conditions as may be approved by the Commissioner of Insurance and Banking, and by such court or the judge thereof, in vacation, and such court or judge may for that purpose direct the conveyance of the entire assets of any such company or of any portion thereof to such reinsuring company in consideration of such reinsurance. (R. S., Art. 4824.)

Taxes—How Calculated.

98. For the purpose of State, county and city taxation the amount of the reserve and contingency reserve of all co-operative life insurance companies shall be treated as debts due by them to

their policyholders, and the total value of their property for such purposes shall be ascertained by deducting from the total amount of their gross assets the amount of such reserves and contingency reserves. (R. S., Art. 4825.)

CHAPTER VI

MUTUAL ASSESSMENT ACCIDENT INSURANCE—HOME COMPANIES

Incorporation of.

99. Any number of persons, not less than five, may organize a corporation for the purpose of transacting business of accident insurance, upon the co-operation or mutual assessment plan, without capital stock, by complying with the provisions of this chapter; provided, that all such persons shall be bona fide citizens and residents of the State of Texas. (R. S., Art. 4794.)

Note.—A mutual assessment liability accident insurance company cannot be lawfully organized in Texas under the provisions of the law authorizing the organization of mutual accident insurance companies. (Opinion of Attorney General, April 27, 1915.)

Charter, Requirements of.

100. Such persons must sign and acknowledge before an officer duly authorized to take acknowledgments of deeds a written charter setting forth

(1) The name of such corporation, which name must not so resemble the name of any other company engaged in the insurance business in this State as to cause a probability of confusion.

(2) The number of its directors and the names and residence of those who are to act as such for the first year.

(3) The location of its principal office, which must be within the State of Texas.

(4) It shall state that said corporation shall have no capital stock, and shall give the purpose for which same is organized and the plan upon which it proposes to do business by stating that its said business shall be conducted upon the assessment plan without lodges.

(5) The term for which it is to exist, which shall not be for more than fifty years. (R. S., Art. 4795.)

Charter and Affidavits Presented to Attorney General—Two Hundred Bona Fide Applicants Representing One Hundred Thousand Dollars Insurance Must Sign Application—Bank Certify to Deposit.

101. Said charter shall be presented to the Attorney General of this State, accompanied by affidavits of all said incorporators, showing that they are bona fide citizens of this State, by bona fide applications for insurance in said company for not less than two

hundred applicants, for not less than one hundred thousand dollars insurance by an affidavit of one of its incorporators showing that each of said applicants has deposited with affiant at least eighty cents on each thousand dollars insurance so applied for by him, and by a certificate of some solvent bank showing that all such advance funds are deposited therein, to be turned over to the treasurer of such corporation when organized. Said Attorney General shall carefully examine all said instruments and if he finds the same are in conformity with the requirements of this chapter, he shall give his approval, and file the same with the Commissioner of Insurance and Banking. (R. S., Art. 4796.)

Charter Filed With Commissioner With Approval of Attorney General, Accompanied by a Filing Fee of \$20—Certified Copy of Charter Fee of \$1—Association of Body Corporate.

102. When said charter has been filed with the Commissioner, with the approval of the Attorney General, accompanied by a filing fee of \$20, the Commissioner shall record the said charter and certificate of the Attorney General in a book kept for that purpose, and shall, upon the receipt of fee for certified copy of charter, of one dollar, furnish a certified copy of such charter and certificate of the Attorney General to the corporators, and shall return to such corporators all such applications for membership, also a certificate that such charter has been filed and recorded in his office, and that said company is duly incorporated under the laws of the State of Texas and authorized to transact the business set forth in its charter, stating same; upon the filing and recording of which charter said association shall become a body politic and corporate, with the right to transact its said business in this State and elsewhere, according to the provisions of this charter, to hold property and alienate same, to contract, sue and be sued under its corporate name, and by that name shall have succession, and may by its board of directors make by-laws not inconsistent with law and shall carry on its business subject to the provisions of this act. (R. S., Art. 4797.)

Shall Be Deemed to Be Engaged in the Business of Mutual Assessment Accident Insurance When—Subject Only to the Provisions of This Act.

103. Any corporation which issues any certificate, policy or other evidence of interest to its members whereby upon his death or total disability any money is to be paid by such corporation to such member or beneficiary designated by him, which money is derived from voluntary contributions or from admission fees, dues and assessments or any of them collected or to be collected from the members thereof, and interest and accretions upon, and wherein the paying of such money is conditioned upon the same being realized in the manner aforesaid, and wherein the money so realized is applied to the uses and purposes of said corporation and the

expense of the management and prosecution of its business, and which has no subordinate lodges or similar bodies, shall be deemed to be engaged in the business of mutual assessment accident insurance as contemplated by this chapter, and shall be subject only to the provisions of this chapter. (R. S., Art. 4798.)

Note.—A mutual assessment accident insurance company may provide in its by-laws that the money from which its policy obligations are to be paid shall be by dues paid by the members instead of assessments, and in such case, the by-laws may also provide that no extra assessments shall ever be levied upon those members who join the association after the passage of such by-law. (Opinion of Attorney General, April 11, 1914.)

No Stock Certificates—No Dividends—Pay No Profits—Annual Meetings.

104. Such corporations shall issue no certificates of stock, shall declare no dividends, shall pay no profits, and the salaries of all officers shall be designated in its by-laws, and such by-laws shall provide for annual members' meetings in which each member shall be entitled to vote only in person to the amount of insurance held by him. (R. S., Art. 4790.)

Members and Directors to Vote on Adoption of By-Laws or Amendments Thereto; Provided.

105. Every such corporation must, before the adoption of any by-law or amendment thereto, cause the same to be mailed to all the members and directors of such association together with the notice of the time and place when the same shall be considered, and same shall be so mailed at least ten days before the time for such meeting; provided, that the provisions of this article shall not apply to by-laws adopted within sixty days after the incorporation of such company. (R. S., Art. 4800.)

Books and Papers Subject to Examination.

106. All books and papers of such corporation shall at all reasonable times be open for examination by members and their representatives. (R. S., Art. 4801.)

Commissioner to Examine Financial Conditions Annually.

107. The Commissioner of Insurance and Banking shall annually, or as often as he deems necessary, in person, or by one or more examiners, commissioned in writing, visit each and every such corporation and examine its financial condition and its ability to meet its liabilities. He shall have free access to all books and papers of the corporation or agents thereof, and shall have power to examine, under oath, the officers, agents and employees of such corporation. He may revoke or modify any certificate of authority issued by him, when any conditions prescribed by law for granting it no longer exist. The expense of every such examination shall be paid by the corporation so examined. (R. S., Art. 4802.)

**Statement to Be Filed with the Commissioner—What It Must Show—
Filing Fees \$10—Each Certificate or Certified Copy Thereof \$1.**

108. Every such corporation shall, on the first day of January of each year, or within sixty days thereafter, make and file with the Commissioner of Insurance and Banking of this State a report of its affairs and operations during the year ending on the thirty-first day of December immediately preceding. Such reports shall be upon blank forms, to be provided by such Commissioner, and shall be verified by the oath of the secretary of such corporation and shall contain answers to the following questions

- (1) Number of certificates or policies issued or members admitted during the year.
- (2) Amount of indemnity affected thereby.
- (3) Number of death losses.
- (4) Number of death losses paid.
- (5) Number of other losses.
- (6) Number of other losses paid.
- (7) The amount received from each assessment in each class.
- (8) Total amount paid for loss.
- (9) Number of death claims for which assessment has been made.
- (10) Number of death claims compromised or resisted, and brief statements of reasons.
- (11) Number of other claims for which assessment has been made.
- (12) Number of other claims compromised or resisted, and brief statement of reasons.
- (13) Does company charge annual dues, and, if so, how much?
- (14) Total amount received and the disposition thereof.
- (15) Does the company use moneys received for payment of claims to pay expenses of the company in whole or in part, and, if so, state the amount so used?
- (16) Give total amount of all salaries paid officers and name of each salaried officer and the amount paid him.
- (17) Does the company guarantee fixed amount to be paid regardless of amounts realized from assessments, dues, admission fees, etc.?
- (18) If so, state amount guaranteed and the security therefor.
- (19) Has the company a reserve fund?
- (20) If so, how is it created and for what purpose; the amount thereof, and in what form, and how invested.
- (21) Has the company more than one class of members?
- (22) If so, how many and what, and give amount of indemnity in each.
- (23) Give number of members in each class.
- (24) State when the company was organized.
- (25) Number of policies or membership lapsed during the year.

(26) Number of policies of each class at beginning and at end of year.

(27) All assets applicable to payment of insurance, other than reserve fund, and how invested.

(28) Amount received from all sources for payment or losses and the dispositions thereof.

And in case such corporation fail or refuse to make such report in full within said time, its charter and franchise shall be forfeited as provided in Section 61 of this Digest. The following fees shall be paid annually Filing annual statement, \$10; certificate of authority to corporation, \$1; each certified copy thereof, \$1. (R. S., Art. 4803.)

What Each Certificate of Membership Must Show—Company May Create a Reserve Fund, May Charge a Membership Fee Which May Be Used for Expenses—60 Per Cent of Amounts Realized from All Sources Must Be Used in Payment of Losses.

109. Each certificate of membership, policy or other contract of insurance issued by such company shall bear on its face in red letters the following words "The payment of the benefit herein provided for is conditioned upon its being collected by this company from assessments and other sources as provided in its by-laws"; provided, that nothing in this chapter shall be construed to prevent the creation of a reserve fund by any such organization, which fund, or its accretions, or both, are to be used only for the payment of losses or benefits, as provided in the by-laws of such corporation; provided, further, that such corporation may charge a membership or admission fee of not exceeding three dollars upon each policy issued, the proceeds of which may be placed in the expense fund, and that at least sixty per cent of all amounts realized from any other sources shall be used only for the payment of losses or benefits as they occur, or the balance thereof remaining after paying such losses or benefits transferred to such reserve fund; provided, further, that such membership fee may also apply as a payment or credit upon the initial assessment or premium, if the by-laws of the corporation so provide. (R. S., Art. 4804 as amended by Sec. 1, Chap. 149, Acts 34th Leg.)

May Insure Against Disability Arising from Sickness or Disease, and May Pay Funeral Benefit not Exceeding \$100.

110. Any corporation now existing or hereafter organized under the provisions of this chapter for the purpose of transacting the business of a mutual assessment accident insurance company shall have and is hereby vested with the authority under its corporate powers to engage in the business, on the assessment plan, as defined in this chapter, of insuring against disability resulting from sickness or disease, and to pay to the beneficiaries of its deceased members a funeral benefit which shall not exceed the sum of one

hundred (\$100) dollars in event of death of any member resulting from sickness or disease. Provided, however, that in enforcing compliance with the requirements of Article 4796 (Section 357), applications for insurance against disability or death resulting from sickness or disease shall not be taken into consideration. (R. S., Art. 4804a, as contained in Sec. 2, Chap. 149, Acts 34th Leg.)

Note.—All voluntary contributions, admission fees, dues and assessments collected from a policyholder by a mutual assessment accident association constitute the premium or assessment in consideration of which the policy is issued; and all such collections must, under the law, be divided and used in the proportion of 60 per cent for losses and not more than 40 per cent for expenses. Such an association which collects a specified amount under the name of "admission fees" must divide such admission fee in the same proportion, and the admission fee cannot lawfully be deducted from the dues or assessments and used for expenses only, but must be divided in the same proportion as other assessments, 60 per cent to be used for paying losses and only 40 per cent for expenses. (Opinion of Attorney General, September 13, 1913.)

Notices of Assessment Must Show What.

111. Each notice of assessment made by such corporation upon its members or any of them shall truly state the cause and purpose of such assessment, amount paid on the last claim paid, the cause of disability or death, the name of the member for whose death or disability such payment was made, the maximum face value of the certificate or policy, and in case of disability the maximum amount provided for in such policy or certificate for such disability, and if not paid in full the reason therefor. (R. S., Art. 4805.)

The Right, With Consent of Corporation, to Change Name of Beneficiary.

112. Any member of such corporation shall have the right at any time, with the consent of such corporation, to change the beneficiary in his policy or certificate, without requiring the consent of such beneficiary, and such corporation shall give consent under such regulations as may be prescribed by its by-laws. (R. S., Art. 4806.)

Amount to Be Paid on Policy Must Be Stipulated—Corporation Must Pay in Full—Subject to Legal Defenses; Provided.

113. Every policy or certificate issued by any such corporation shall specify the sum of money which it promises to pay upon the contingency insured against, and the number of days after the receipt of satisfactory proof of the happening of such contingency at which such payment shall be made; and upon the happening of such contingency such corporation shall be liable for the payment of such amount in full at the time so specified, subject to such legal defenses as it may have against same; provided, that if the sum realized by it from assessments made in accordance with its by-laws to meet such payments, together with such other sums as

its by-laws may provide shall be used for that purpose, shall be insufficient to pay such sum in full for which it is so liable, then the payment of the full amount so realized shall discharge such corporation from all liability by the reason of the happening of such contingency, and in that event such corporation shall be liable for the amount so actually realized. (R. S., Art. 4807.)

Must Comply With Requirements of This Chapter or Forfeit Charter.

114. If any corporation not incorporated under this chapter shall engage in any branch of mutual assessment life or accident insurance as herein defined, or if any corporation organized under the provisions of this chapter shall transact business in any manner except as herein authorized, such corporation shall in either event be subject to the forfeiture of its charter and franchise and the Attorney General of this State shall immediately institute suit to forfeit its charter and dissolve it. (R. S., Art. 4808.)

Officers and Employees Failing to Comply with the Provisions of This Law Subject to Imprisonment.

115. Any officer and other employe of a mutual insurance company who shall use or appropriate, or knowingly permit to be used or appropriated by another, any money belonging to such mutual insurance company in any manner other than is herein provided, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the State penitentiary for any length of time not less than two nor more than ten years. (R. S., Art. 680; Penal Code, —.)

CHAPTER VII

WORKMEN'S COMPENSATION ACT*

An Act to amend Chapter 179 of the General Laws of the State of Texas passed at the regular session of the Thirty-third Legislature, entitled, "An act relating to employers' liability and providing for the compensation of certain employes, and their representatives and beneficiaries, for personal injuries sustained in the course of employment, and for deaths resulting from such injuries, and to provide and determine in what cases compensation shall be paid, and to make the payment thereof more certain and prompt by the creation of an insurance association to insure and guarantee such payments and of an industrial accident board for the investigation of claims and for the adjudication thereof for consenting parties, fixing the membership and powers of said board and its compensation and duties, and the method of its appointment, and the term of office of its members and fixing also the powers, duties and liabilities of said insurance association and the extent of control over same to be exercised by the Commissioner of Banking and Insur-

*For notes on Industrial, Accident and Liability Insurance, see page 479.

ance, and providing also for the insurance of payments of compensation to employes by certain other insurance companies and organizations, and declaring an emergency," and declaring an emergency.

Section 1. That Chapter 179, entitled: "An act relating to employers' liability and providing for the compensation of certain employes, and their representatives and beneficiaries for personal injuries sustained in the course of employment, and for deaths resulting from such injuries, and to provide and determine in what cases compensation shall be paid, and to make the payment thereof the more certain and prompt by the creation of an insurance association to insure and guarantee such payments and of an industrial accident board for the investigation of claims and for the adjudication thereof for consenting parties, fixing the membership and powers of said board and its compensation and duties, and the method of its appointment, and the term of office of its members, and fixing also the powers, duties and liabilities of said insurance association and the extent of control over the same to be exercised by the Commissioner of Banking and Insurance, and providing also for the insurance of payments of compensation to employees by certain other insurance companies and organizations, and declaring an emergency," be and the same is hereby amended so as to hereafter read as follows:

Part I

Modification of Remedies and General Provisions

Section 1. In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employe was guilty of contributory negligence.
2. That the injury was caused by the negligence of a fellow employe.
3. That the employe had assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the willful intention of the employe to bring about the injury, or was so caused while the employe was in a state of intoxication.
4. Provided, however, that in all such actions against an employer who is not a subscriber, as defined hereafter in this act, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment.

Section 2. The provisions of this act shall not apply to actions to recover damages for the personal injuries nor for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to employes of any firm, person or corporation having in his or

their employ less than three (3) employes, nor to the employes of any person, firm or corporation operating any steam, electric, street, or interurban railway as a common carrier. Provided, that any employer of three or more employes at the time of becoming a subscriber shall remain a subscriber subject to all the rights, liabilities, duties and exemptions of such, notwithstanding after having become a subscriber the number of employes may at times be less than three.

Section 3. The employes of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employes shall have no right of action against such subscribing employer for damages for injuries resulting in death, but such employes and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for; provided that all compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims, and no such right of action and no such compensation and no part thereof or of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void.

Section 3a. An employe of a subscriber shall be held to have waived his right of action at common law or under any statute of this State to recover damages for injuries sustained in the course of his employment if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed said right or if the contract of hire was made before the employer became a subscriber, if the employe shall not have given the said notice within five (5) days of notice of such subscription. An employe who has given notice to his employer that he claimed his right of action at common law or under any statute may thereafter waive such claim by notice in writing, which shall take effect five (5) days after its delivery to his employer or his agent; provided further, that any employe of a subscriber who has not waived his right of action at common law or under any statute to recover damages for injury sustained in the course of his employment, as above provided in this section, shall, as well as his legal beneficiaries and representatives have his or their cause of action for such injuries as now exist by the common law and statutes of this State, which action shall be subject to all defenses under the common law and statutes of this State.

Section 3b. If an employe who has not given notice of his claim of common law or statutory rights of action, as provided in Section 3a, Part I, of this act, or who has given such notice and waived the same, sustains an injury in the course of his employment, he shall be paid compensation by the association as hereinafter provided, if his employer is a subscriber at the time of the injury.

Section 4. Employes whose employers are not at the time of the injury subscribers to said association, and the representatives and beneficiaries of deceased employes who at the time of the injury were working for non-subscribing employers can not participate in the benefits of said insurance association, but they shall be entitled to bring suit and may recover judgment against such employers, or any of them, for all damages, sustained by reason of any personal injury received in the course of employment or by reason of death resulting from such injury, and the provisions of Section 1 of this act shall be applied in all such actions.

Section 5. Nothing in this act shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife, heirs of his or her body, or such of them as there may be of any deceased employe whose death is occasioned by homicide from the willful act or omission or gross negligence of any person, firm or corporation from the employer of such employe at the time of the injury causing the death of the latter. Provided, that in any suit so brought for exemplary damages the trial shall be de novo, and no presumption shall exist that any award, ruling or finding of the Industrial Accident Board was correct; and in such suit brought by the employe or his legal heirs or representatives against such association or employer, such award, ruling or finding shall neither be pleaded nor introduced in evidence.

Section 6. No compensation shall be paid under this act for an injury which does not incapacitate the employe for a period of at least one week from earning full wages, but if incapacity extends beyond one week compensation shall begin to accrue on the eighth day after the injury. Provided, however, the medical aid, hospital services, and medicines, as provided for in Section 7 hereof, shall be supplied as and when needed and according to the terms and provisions of said Section 7. And provided further, that if incapacity does not follow at once after the infliction of the injury or within eight (8) days thereof but does result subsequently that compensation shall begin to accrue with the eighth day after the date incapacity commenced. In any event the employe shall be entitled to the medical aid, hospital services and medicines as provided elsewhere in this act.

Section 7. During the first two weeks of the injury, dating from the date of its infliction, the association shall furnish reasonable medical aid, hospital services and medicines. If the association fails to so furnish same as and when needed during the time specified, after notice of the injury to the association or subscriber, the injured employe may provide said medical aid, hospital services and medicines at the cost and expense of the association. The employe shall not be entitled to recover any amount expended or incurred by him for said medical aid, hospital services or medicines nor shall any person who supplied the same be entitled to recover of the asso-

ciation therefor, unless the association or subscriber shall have had notice of the injury and shall have refused, failed or neglected to furnish it or them within a reasonable time. Provided, however, that at the time of the injury or immediately thereafter, if necessary, the employe shall have the right to call in any available physician or surgeon to administer first-aid treatment as may be reasonably necessary at the expense of the association. During the second or any subsequent week of continuous total incapacity requiring the confinement to a hospital, the association shall, upon application of the attending physician or surgeon certifying the necessity therefor to the Industrial Accident Board and to the association, furnish such additional hospital services as may be deemed necessary, not to exceed one week, unless at the end of such additional week the attending physician shall certify to the necessity for another week of hospital services, or so much thereof, as may be needed; provided, however, that such additional hospital services as are provided for in this paragraph shall not be held to include any obligation on the part of the association to pay for medical or surgical services not ordinarily provided by hospitals as a part of their services.

Section 7a. If it be shown that the association is furnishing medical aid, hospital services and medicines provided for by Section 7 hereof in such manner that there is reasonable ground for believing that the life, health or recovery of the employe is being endangered or impaired thereby, the board may order a change in the physician or other requirements of said section, and if the association fails promptly to comply with such order after receiving it, the board may permit the employe or some one for him to provide the same at the expense of the association under such reasonable regulations as may be provided by said board.

Section 7b. All fees and charges under Sections 7 and 7a hereof shall be fair and reasonable, shall be subject to regulation of the board and shall be limited to such charges as are reasonable for similar treatment of injured persons of a like standard of living where such treatment is paid for by the injured person himself or some one acting for him. In determining what fees are reasonable, the board may also consider the increased security of payment afforded by this act. Where such medical aid, hospital service or medicines are furnished by a public hospital or other institution, payment thereof shall be made to the proper authorities conducting the same, and the amount so paid shall be promptly reported to the board.

Section 7c. All fees of attorneys for representing claimants before the board under the provisions of this act shall be subject to the approval of the board. No attorney's fees for representing claimants before the board shall be allowed or approved against any party or parties not represented by such attorney, nor exceeding an amount equal to fifteen per cent of the amount of the first one

thousand dollars or fraction thereof recovered, nor ten per cent of the excess of such recovery, if any, over one thousand dollars. And in addition to the reasonable expenses incurred by the attorney in the preparation and presentation of the said claim before the Board, such expenses to be allowed by the Board; further provided that where an attorney represents only a part of those interested in the allowance of a claim before the Board and his services in prosecuting such claim and obtaining an award therein inures to the benefit of others jointly interested therein, then the Board may take these facts into consideration and allow the attorney a reasonable charge, to be assessed against the interest of those receiving benefits of the service of such attorney. The attorney's fees herein provided for may be redeemed by the association by the payment of a lump sum or may be commuted by agreement of the parties subject to the approval of the board, but not until the claim represented by said attorney has been finally determined by the board and recognized and accepted by the association. After the approval, as first above provided for, if the association be notified in writing of such claim or agreement for legal services, the same shall be a lien against any amount thereafter to be paid as compensation; provided, however, that where the employe's compensation is payable by the association in periodical installments the board shall fix at the time of approval the proportion of each installment to be paid on account of said legal services.

Section 7d. For representing the interest of any Claimant in any manner carried from the Board into the Courts, it shall be lawful for the attorneys representing such interest to contract with any of the beneficiaries under this act for an attorney's fee for such representation, not to exceed one-third ($\frac{1}{3}$) of the amount recovered, such fee for services so rendered to be fixed and allowed by the trial court in which such matter may be heard and determined.

Section 8. If death should result from the injury, the association hereinafter created shall pay the legal beneficiaries of the deceased employe a weekly payment equal to sixty per cent of his average weekly wages, but not more than \$15.00 nor less than \$5.00 a week, for a period of three hundred and sixty weeks from the date of the injury.

Section 8a. The compensation provided for in the foregoing section of this act shall be for the sole and exclusive benefit of the surviving husband who has not for good cause and for a period of three years prior thereto abandoned his wife at the time of the injury, the wife who has not at the time of the injury without good cause and for a period of three years prior thereto abandoned her husband and the minor children, without regard to the question of dependency, dependent parents and dependent grandparents and dependent step-mothers and dependent children or dependent broth-

ers and sisters of the deceased employe, and the amount recovered thereunder shall not be liable for the debts of the deceased nor the debts of the beneficiary or beneficiaries, and shall be distributed among such beneficiaries as may be entitled to same as hereinbefore provided according to the laws of descent and distribution of this State; and provided such compensation shall not pass to the estate of the deceased to be administered upon, but shall be paid directly to said beneficiaries when the same are capable of taking, under the laws of the State, or to their guardian or next friend, in case of lunacy, infancy or other disqualifying cause of any beneficiary. And the compensation provided for in this act shall be paid weekly to the beneficiaries herein named and specified, subject to the other provisions of this act.

Section 8b. In case death occurs as a result of the injury after a period of total or partial incapacity, for which compensation has been paid, the period of incapacity shall be deducted from the total period of compensation and the benefits paid thereunder from the maximum allowed for the death, respectively stated in this act.

Section 9. If the deceased employe leaves no legal beneficiaries, the association shall pay all expenses incident to his last sickness as a result of the injury and in addition a funeral benefit not to exceed \$100.00; provided, however, that where any deceased employe leaves legal beneficiaries, but who is buried at the expense of his employer or any other person, the expense of such burial, not to exceed \$100.00, shall be payable out of the compensation due the beneficiary or beneficiaries of such deceased employe, subject to the approval of the Board.

Section 10. While the incapacity for work resulting from injury is total, the association shall pay the injured employe a weekly compensation equal to sixty per cent of his average weekly wages, but not more than \$15.00 nor less than \$5.00, and in no case shall the period covered by such compensation be greater than four hundred and one (401) weeks from the date of the injury.

Section 11. While the incapacity for work resulting from the injury is partial, the association shall pay the injured employe a weekly compensation equal to sixty per cent of the difference between his average weekly wages before the injury and his average weekly wage earning capacity during the existence of such partial incapacity, but in no case more than \$15.00 per week; and the period covered by such compensation to be in no case greater than three hundred weeks; provided that in no case shall the period of compensation for total and partial incapacity exceed four hundred and one (401) weeks from the date of the injury.

Section 11a. In cases of the following injuries, the incapacity shall conclusively be held to be total and permanent, to-wit:

- (1) The total and permanent loss of the sight in both eyes.
- (2) The loss of both feet at or above the ankle.

- (3) The loss of both hands at or above the wrist.
- (4) A similar loss of one hand and one foot.
- (5) An injury to the spine resulting in permanent and complete paralysis of both arms or both legs or of one arm and one leg.
- (6) An injury to the skull resulting in incurable insanity or imbecility.

In any of the above enumerated cases it shall be considered that the total loss of the use of a member shall be equivalent to and draw the same compensation during the time of such total loss of the use thereof as for the total and permanent loss of such member.

The above enumeration is not to be taken as exclusive, but in all other cases the burden of proof shall be on the claimant to prove that his injuries have resulted in permanent, total incapacity.

Section 12. For the injuries enumerated in the following schedule the employe shall receive in lieu of all other compensation except medical aid, hospital services and medicines as elsewhere herein provided, a weekly compensation equal to sixty per cent of the average weekly wages of such employe, but not less than \$5.00 per week nor exceeding \$15.00 per week, for the respective periods stated herein, to-wit:

For the loss of a thumb sixty per cent of the average weekly wages during sixty weeks.

For the loss of a first finger, commonly called the index finger, sixty per cent of the average weekly wages during forty-five weeks.

For the loss of a second finger 60 per cent of the average weekly wages during 30 weeks.

For the loss of a third finger 60 per cent of the average weekly wages during 21 weeks.

For the loss of a fourth finger, commonly known as the little finger, 60 per cent of the average weekly wages during 15 weeks.

The loss of the second or distal phalange of the thumb shall be considered to be equal to the loss of one-half of such thumb; the loss of more than one-half of such thumb shall be considered to be equal to the loss of the whole thumb.

The loss of the third or distal phalange of any finger shall be considered to be equal to the loss of one-third of such finger.

The loss of the middle or second phalange or any finger shall be considered to be equal to the loss of two-thirds of such finger.

The loss of more than the middle or distal phalange of any finger shall be considered to be equal to the loss of the whole finger; provided, however, that in no case shall the amount received for the loss of a thumb and more than one finger on the same hand exceed the amount provided in this schedule for the loss of a hand.

For the loss of the metacarpal bone (bone of palm) for the corresponding thumb, finger, or fingers above, add ten weeks to the number of weeks as above, subject to the limitation that in no

case shall the amount received for the loss or injury to any one hand be more than for the loss of the hand.

For ankylosis (total stiffness of) or contracture (due to sears or injuries) which make the fingers useless, the same number of weeks shall apply to such finger or fingers or parts of fingers (not thumb) as given above.

For the loss of a hand 60 per cent of the average weekly wages during 150 weeks.

For the loss of an arm at or above the elbow 60 per cent of the average weekly wages during 200 weeks.

For the loss of one of the toes, other than the great toe, 60 per cent of the average weekly wages during 10 weeks.

For the loss of the great toe 60 per cent of the average weekly wages during 30 weeks.

The loss of more than two-thirds of any toe shall be considered to be equal to the loss of the whole toe.

The loss of less than two-thirds of any toe shall be considered to be equal to the loss of one-half of the toe.

For the loss of a foot 60 per cent of the average weekly wages during 125 weeks.

For the loss of a leg at or above the knee 60 per cent of the average weekly wages during 200 weeks.

For the total and permanent loss of the sight of one eye 60 per cent of the average weekly wages during 100 weeks.

In the foregoing enumerated cases of permanent, partial incapacity, it shall be considered that the permanent loss of the use of a member shall be equivalent to and draw the same compensation as the loss of that member.

For the complete and permanent loss of the hearing in both ears 60 per cent of the weekly wages during 150 weeks.

For the loss of an eye, and leg above the knee 60 per cent of the average weekly wages during a period of 350 weeks.

For the loss of an eye, and an arm above the elbow 60 per cent of the average weekly wages during a period of 350 weeks.

For the loss of an eye and a hand 60 per cent of the average weekly wages during a period of 325 weeks.

For the loss of an eye and a foot 60 per cent of the average weekly wages during a period of 300 weeks.

Where the employe sustains concurrent injuries resulting in concurrent incapacities, he shall receive compensation only for the injury which produces the longest period of incapacity; but this section shall not affect liability for the concurrent loss or the loss of the use thereof of more than one member, for which member's compensation is provided in this schedule; compensation for specific injuries under this act shall be cumulative as to time and not concurrent.

In all cases of permanent, or partial, incapacity it shall be consid-

ered that the permanent loss of the use of the member be equivalent to and draw the same compensation as the loss of that member; but the compensation in and by said schedule provided shall be in lieu of all other compensation in such cases.

In all other cases, partial incapacity, including any disfigurement which will impair the future usefulness or occupational opportunities of the injured employe, compensation shall be determined according to the percentage of incapacity, taking into account, among other things, any previous incapacity, the nature of the physical injury or disfigurement, the occupation of the injured employe and the age at the time of the injury; the compensation paid therefor shall be 60 per cent of the average weekly wages of the employe, but not to exceed \$15.00 per week, multiplied by the percentage of incapacity caused by the injury for such period as the board may determine, not exceeding 300 weeks. Whenever the weekly payments under this paragraph would be less than \$3.00 per week, the period may be shortened, and the payments correspondingly increased by the board.

Section 12a. If the injured employe refuses employment reasonably suited to his incapacity and physical condition, procured for him in the locality where injured or at a place agreeable to him, he shall not be entitled to compensation during the period of such refusal, unless in the opinion of the board such refusal is justifiable. This section shall not apply in cases of specific injuries for which a schedule is fixed by this act.

Section 12b. In all claims for hernia resulting from injury sustained in the course of employment, it must be definitely proven to the satisfaction of the board.

First. That there was an injury resulting in hernia.

Second. That the hernia appeared suddenly and immediately following the injury.

Third. That the hernia did not exist in any degree prior to the injury for which compensation is claimed.

Fourth. That the injury was accompanied by pain.

In all such cases where liability for compensation exists, the association shall provide competent surgical treatment by radical operation. In case the injured employe refuses to submit to the operation, the board shall immediately order a medical examination of such employe by a physician or physicians of its own selection at a time and place to be by them named, at which examination the employe and the association, or either of them, shall have the right to have his or their physician present. The physician or physicians so selected shall make to the board a report in writing, signed and sworn to, setting forth the facts developed at such examination and giving his or their opinion as to the advisability or non-advisability of an operation. If it be shown to the board by such examination and the written report thereof and the expert

opinions thereon that the employe has any chronic disease or is otherwise in such physical condition as to render it more than ordinarily unsafe to submit to such operation he shall, if unwilling to submit to the operation, be entitled to compensation for incapacity under the general provisions of this act. If the examination and the written report thereof and the expert opinions thereon then on file before the board do not show to the board the existence of disease or other physical condition rendering the operation more than ordinarily unsafe and the board shall unanimously so find and so reduce its findings to writing and file the same in the case and furnish the employe and the association with a copy of its findings, then if the employe with the knowledge of the result of such examination, such report, such opinions and such findings, thereafter refuses to submit within a reasonable time, which time shall be fixed in the findings of the board, to such operation, he shall be entitled to compensation for incapacity under the general provisions of this act, for a period not exceeding one year.

If the employe submits to the operation and the same is successful, which shall be determined by the board, he shall in addition to the surgical benefits herein provided for be entitled to compensation for 26 weeks from the date of the operation. If such operation is not successful and does not result in death, he shall be paid compensation under the general provisions of this act the same as if such operation had not been had; other than in determining the quantum of compensation to be paid to the employe, the board may take into consideration any minor benefits that accrued to the employe by reason thereof or any aggravation or increased injury which accrued to him by reason thereof.

If the hernia results in death within one year after it is sustained, or the operation results in death, such death shall be held a result of the injury causing such hernia and compensated accordingly under the provisions of this act. This paragraph shall not apply where the employe has willfully refused to submit to an operation which has been found by the examination herein provided for not to be more than ordinarily unsafe.

Section 12c. If an employe who has suffered a previous injury shall suffer a subsequent injury which results in a condition of incapacity to which both injuries or their effects have contributed, the association shall be liable because of such injury only for the compensation to which the subsequent injury would have entitled the injured employe had there been no previous injury.

Section 12d. Upon its own motion or upon the application of any person interested showing a change of conditions, mistake, or fraud, the board at any time within the compensation period may review any award or order, ending, diminishing or increasing compensation previously awarded within the maximum and minimum provided in this act, or change or revoke its previous order sending

immediately to the parties a copy of its subsequent order or award. Review under this section shall be only upon notice to the parties interested.

Section 12e. In all cases where liability for compensation exists for an injury sustained by an employe in the course of his employment and a surgical operation for such injury will effect a cure of the employe or will materially and beneficially improve his condition the association or the employe may demand that a surgical operation be had upon the employe as herein provided, and the association shall provide and pay for all necessary surgical treatment, medicines and hospital services incident to the performance of said operation, provided the same is had. In case either of said parties demands in writing to the board such operation the board shall immediately order a medical examination of the employe in the same manner as is provided for in the section of this act relating to hernia. If it be shown by the examination, report of facts and opinions of experts, all reduced to writing and filed with the board, that such operation is advisable and will relieve the condition of the injured employe or will materially benefit him, the board shall so state in writing and upon unanimous order of said board in writing, a copy of which shall be delivered to the employe and the association, shall direct the employe at a time and place therein stated to submit himself to an operation for said injury. If the board should find that said operation is not advisable, then the employe shall continue to be compensated for his incapacity under the general provisions of this act. If the board shall unanimously find and so state in writing that said operation is advisable, it shall make its order to that effect, stating the time and place when and where such operation is to be performed, naming the physicians therein who shall perform said operation, and if the employe refuses to submit to such operation, the board may order or direct the association to suspend the whole or any part of his compensation during the time of said period of refusal. The results of such operation, the question as to whether the injured employe shall be required to submit thereto and the benefits and liabilities arising therefrom shall attach, be treated, handled and determined by the board in the same way as is provided in the case of hernia in this act.

Section 12f. In all cases where a subscriber or the association has in his or its employ a physician or physicians regularly paid in any manner whatsoever by such subscriber or association to administer to or treat injured employes, the name or names of such physicians at the date of employment of the same shall be filed with the board together with a copy of the contract of such employment. If the contract of such physician or physicians is not in writing, then the same shall be reduced to writing and a copy thereof filed with the board. Such contract shall state fully the extent and scope of the

employment and the compensation to be paid such physician or physicians. If the association or subscriber willfully fails or refuses to comply with this provision of this act, then an injured employe or any person acting for him shall have the right to provide hospital services, medical aid and medicine for said injured employe, at the expense of and the same shall be charged to the association, and the subscriber or association shall notify the employe at or before the time of injury what physician or physicians are contracted with to treat his or its employes.

Section 12g. It shall be unlawful for any subscriber or any employer who seeks to comply with the provisions of this act to either directly or indirectly collect of or from his employes by any means or pretense whatever any premium under this act or part thereof paid or to be paid upon any policy of such insurance under this act which covers such employes, or any intended policy of such insurance designed to cover such employes, and, if any such subscriber or any employer of labor in this State violates this provision of this act, then any employe or the legal beneficiary of any employe of such employer or subscriber shall be entitled to all the benefits of this act and in addition thereto shall have a separate right of action to recover damages against such employer without regard to the compensation paid or to be paid to such employe or beneficiary under this act, and the association shall in nowise be responsible because of such separate action by such employe or beneficiary against such employer on such separate cause of action.

Section 12h. Every contract or agreement of an employer, the purpose of which is to indemnify him from loss or damage on account of the injury of an employe by accidental means or on account of the negligence of such employer or his officer, agent or servant, shall be absolutely void unless it also covers liability for the payment of the compensation provided for by this act. Provided, that this section of this act shall not apply to employers of labor who are not eligible under the terms of this act to become subscribers thereto, nor to employers whose employes have elected to reject the provisions of this act, nor to employers eligible to come under the terms of this act who do not elect to do so, but who choose to carry insurance upon their employes independently of this law and without attempting in such insurance to provide compensation under the terms of this act; but further provided that any evasion of this section whereby an insurance company shall undertake, under the guise of writing insurance against the risk of the employers who do not see proper to come under this act, to write insurance substantially or in any material respect similar to the insurance provided for by this act, that such insurance shall be void as provided for by the foregoing provisions of this section.

Section 12i. If it be established that the injured employe was a minor when injured and that under normal conditions his wages

would be expected to increase, the fact may be considered in arriving at his average weekly wages and compensation may be fixed accordingly. This section shall not be considered as authorizing the employment of a minor in any hazardous employment which is prohibited by any statute of this State.

Section 13. If any injured employe is mentally incompetent or is a minor or is under any other disqualifying cause at the time when any rights or privileges accrue to him or exist under this act, his guardian or next friend may in his behalf claim and exercise such rights and privileges except as otherwise herein provided.

In case of partial incapacity or temporary total incapacity payment of compensation may be made direct to the minor and his receipts taken therefor, if the authority to so pay and receipt for said compensation is first obtained from the board.

Section 14. No agreement by any employe to waive his rights to compensation under this act shall be valid.

Section 15. In cases where death or total permanent incapacity results from an injury, the liability of the association may be redeemed by payment of a lump sum by agreement of the parties thereto, subject to the approval of the Industrial Accident Board hereinafter created. This section shall be construed as excluding any other character of lump sum settlement save and except as herein specified; provided, however, that in special cases where in the judgment of the board manifest hardship and injustice would otherwise result, the board may compel the association in the cases provided for in this section to redeem their liability by payment of a lump sum as may be determined by the board.

Section 15a. In any case where compensation is payable weekly at a definite sum and for a definite period, and it appears to the board that the amount of compensation being paid is inadequate to meet the necessities of the beneficiary the board shall have the power to increase the amount of compensation by correspondingly decreasing the number of weeks for which the same is to be paid allowing such discount to the company increasing such payments as is applicable in cases of lump sum settlement.

Section 16. In all cases of injury resulting in death, where such injury was sustained in the course of employment, cause of action shall survive.

Section 17. Non-resident, alien beneficiaries and resident alien beneficiaries shall be entitled to compensation under this act. Non-resident alien beneficiaries may be officially represented by the consular officers of the nation of which such alien or aliens may be citizens or subjects, and in such cases the consular officers shall have the right to receive for distribution for such non-resident, alien beneficiaries all compensation awarded hereunder, and the receipt of such consular officers shall be a full discharge of all sums paid to and received by them. The association may at any time, subject

to the approval of the board, commute all future installments of compensation payable to alien beneficiaries, not residents of the United States, by paying to such alien beneficiaries the sum agreed upon and filing receipts therefor with the board.

Section 18. It is the purpose of this act that the compensation herein provided for shall be paid from week to week and as it accrues and directly to the person entitled thereto, unless the liability is redeemed as in such cases provided elsewhere herein, and, if the association willfully fails or refuses to pay compensation as and when the same matures and accrues, the board shall notify said association that such is the course it is pursuing and if after such notice the association continues to willfully refuse and fail to meet these payments of compensation as provided for in this act, the board shall have the power to hold that such association is not complying with the provisions of this act. And shall certify such fact to the Commissioner of Insurance and Banking and said certificate shall be sufficient cause to justify said Commissioner of Insurance and Banking to revoke or forfeit the license or permit of such association to do business in Texas; provided, said power of the board shall not be held to deny the association the right to bring suit or suits to set aside any ruling, order or decision of the board.

Section 19. If an employe who has been hired in this State sustained injury in the course of his employment he shall be entitled to compensation according to the law of this State, even though such injury was received outside of the State.

Part II

The Industrial Accident Board

Section 1. There shall be an Industrial Accident Board consisting of three members, and the same is hereby created to be appointed by the Governor, one of whom shall be chairman, and said board shall have the powers, duties and functions hereinafter conferred. Beginning with September 1, 1917, one member thereof shall be appointed for a term of two years, one for four years and one for six years; thereafter the term of office for members of the board shall be six years. Appointments to fill vacancies on the board shall be for the unexpired terms.

Section 2. One member of the Industrial Accident Board shall be at the time of his appointment an employer of labor in some industry or business covered by this act; one shall be at the time of his appointment employed in some business industry as a wage earner, and the third member shall be at the time of his appointment a practicing attorney of recognized ability, said member to act in the capacity of legal adviser to the board, in addition to his other duties as a member thereof, and to be chairman of said board.

Section 3. The salaries and expenses of the Industrial Accident Board shall be paid by the State. The salaries of the said members

of the board shall be as follows: For the chairman of said board \$3000.00 per year, and for each of the other members thereof \$2500.00, payable in equal monthly installments. The board may appoint a secretary at a salary not to exceed \$2000.00 a year. And may appoint such other clerical and other assistants as may be necessary to properly administer this act. It shall also be allowed an annual sum, the amount to be determined by the Legislature, for clerical and other services, office equipment, traveling and all other necessary expenses. The board shall be provided suitable offices in the capitol or some convenient building in the city of Austin where its records shall be kept.

The members of said board, or any employe thereof, shall have the right to travel upon free railroad transportation in the prosecution of the duties of their respective offices in the State of Texas without violating any provision of the anti-pass laws of this State, and any railroad company issuing such transportation shall not be deemed nor held to have violated any law of this State by reason thereof.

Section 4. The board may make rules not inconsistent with this act for carrying out and enforcing its provisions, and may require any employe claiming to have sustained injury to submit himself for examination before such board or some one acting under its authority at some reasonable time and place within the State, and as often as may be reasonably ordered by the board to a physician or physicians authorized to practice under the laws of this State. If the employe or the association requests, he or it shall be entitled to have a physician or physicians of his or its own selection present to participate in such examination. Refusal of the employe to submit to such examination shall deprive him of his right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension. If any employe shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery, or shall refuse to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the board may in its discretion order or direct the association to reduce or suspend the compensation of any such injured employe. No compensation shall be reduced or suspended under the terms of this section without reasonable notice to the employe and an opportunity to be heard.

The association shall have the privilege of having any injured employe examined by a physician or physicians of its own selection, at reasonable times, at a place or places suitable to the condition of the injured employe and convenient, and accessible to him; provided, however, that the association shall pay for such examination and the reasonable expense incident to the injured employe in submitting thereto; and provided, further, that the injured employe

shall have the privilege to have a physician or physicians of his own selection, at the expense of such injured employe, present to participate in such examination.

Process and procedure shall be as summary as may be under this act. The board or any member thereof shall have power to subpoena witnesses, administer oaths, inquire into matters of fact, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. All rulings and decisions of the board relating to disputed claims shall be upon questions of fact and in accord with the provisions of this act.

Section 4a. Unless the association or subscriber have notice of the injury, no proceeding for compensation for injury under this act shall be maintained unless a notice of the injury shall have been given to the association or subscriber within thirty (30) days after the happening thereof, and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of same; or, in case of death of the employe or in the event of his physical or mental incapacity within six (6) months after the death or the removal of such physical or mental incapacity. Provided that for good cause the board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing the claim before the board.

Section 5. All questions arising under this act, if not settled by agreement of the parties interested therein and within the terms and provisions of this act, shall, except as otherwise provided, be determined by the board. Any interested party who is not willing and does not consent to abide by the final ruling and decision of said board shall within twenty days after the rendition of said final ruling and decision by said board give notice to the adverse party and to the board that he will not abide by said final ruling and decision. And he shall within twenty days after giving such notice bring suit in some court of competent jurisdiction in the county where the injury occurred to set aside said final ruling and decision and said board shall proceed no further toward the adjustment of such claim, other than as hereinafter provided; provided, however, that whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provisions of this act, and the suit of the injured employe or person suing on account of the death of such employe shall be against the association if the employer of such injured or deceased employe at the time of such injury or death was a subscriber as defined in this act. If the final order of the board is against the association then the association and not the employer shall bring suit to set aside said final ruling and decision of the board, if it so desires, and the court shall in either event determine the issues in such cause, instead of the board, upon trial denovo and the burden of proof shall be upon the party claiming compensation. In case of recovery the same shall not exceed the

maximum compensation allowed under the provisions of this act. If any party to any such final ruling and decision of the board, after having given notice as above provided, fails within said twenty days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto, and, if the same is against the association, it shall at once comply with such final ruling and decision, and failing to do so the board shall certify that fact to the Commissioner of Insurance and Banking, and such certificate shall be sufficient cause to justify said Commissioner of Insurance and Banking to revoke or forfeit the license or permit of such association to do business in Texas.

Section 5a. In all cases where the board shall make a final order, ruling or decision as provided in the foregoing Section 5 hereof, and against the association, and the association shall fail and refuse to obey or comply with the same and shall fail or refuse to bring suit to set the same aside as in said Section 5 is provided, then in that event, the claimant in addition to the rights and remedies given him and the board in said Section 5 may bring suit in some court of competent jurisdiction where the injury occurred, upon said order, ruling or decision, and if he secures a judgment in said court sustaining such order, ruling or decision in whole or in part, he shall also be entitled to recover the further sum of twelve per cent as damages upon the amount of compensation so recovered in said judgment, together with a reasonable attorney's fee for the prosecution and collection of such claim.

It is further provided that where the board has made an award against an association requiring the payment to an injured employe or his beneficiaries of any weekly or monthly payments, under the terms of this act, and such association should thereafter fail or refuse, without justifiable cause, to continue to make said payments promptly as they mature, then the said injured employe or his beneficiaries, in case of his death, shall have the right to mature the entire claim and to institute suit thereon in any court of competent jurisdiction where the injury occurred to collect the full amount thereof, together with twelve per cent penalties and attorney's fees, as provided for in the foregoing paragraph of this section. Suit may be brought under the provisions of this section of the act, either in the county where the accident occurred, or in any county where the claimants reside, or where one or more of such claimants may have his place of residence at the time of the institution of the suit.

Section 6. If any subscriber to this act with the purpose and intention of avoiding any liability imposed by the terms of the act sublets the whole or any part of the work to be performed or done by said subscriber to any sub-contractor, then in the event any employe of such sub-contractor sustains an injury in the course of his employment he shall be deemed to be and taken for all pur-

poses of this act to be the employe of the subscriber, and in addition thereto such employe shall have an independent right of action against such sub-contractor, which shall in no way be affected by any compensation to be received by him under the terms and provisions of this act.

Section 6a. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employe may at his option proceed either at law against that person to recover damages or against the association for compensation under this act, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under the provisions of this act; if compensation be claimed under this act by the injured employe or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employe in so far as may be necessary and may enforce in the name of the injured employe or of his legal beneficiaries or in its own name and for the joint use and benefit of said employe or beneficiaries and the association the liability of said other person, and in case the association recovers a sum greater than that paid or assumed by the association to the employe or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recovered shall be paid to the injured employe or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employe or his beneficiaries, and the approval of the board, upon a hearing thereof.

Section 7. Every subscriber shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employes in the course of their employment. Within eight days after the occurrence of an accident resulting in an injury to an employe, causing his absence from work for more than one day, a report thereof shall be made in writing to the board on blanks to be procured from the board for that purpose. Upon the termination of the incapacity of the injured employe, or if such incapacity extends beyond a period of sixty days, the subscriber shall make a supplemental report upon blanks to be procured for that purpose. The said report shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employe and the character of work in which he was engaged at the time of the injury, and shall state the date and hour of receiving such injury and the nature and cause of the injury, and such other information as the board may require. Any employer willfully failing or refusing to make any such report

within the time herein provided, or willfully failing or refusing to give said board any information demanded by said board relating to any injury to any employe, which information is in the possession of or can be ascertained by the employer by the use of reasonable diligence, shall be liable for and shall pay to the State of Texas a penalty of not more than one thousand dollars for each and every offense, the same to be recovered in a suit to be instituted and prosecuted in Travis county by the Attorney General or by the district or county attorney under his direction in a district court thereof.

Section 8. A majority of the board shall constitute a quorum to transact business, and the act or decision of any two members of the board shall be held the act or decision of the board, except as otherwise herein specifically provided. No vacancy shall impair the right of the remaining member or members of the board to exercise all the powers of the board. The board shall provide itself with a seal for the authentication of its orders, awards or proceedings on which shall be inscribed the words "Industrial Accident Board, State of Texas, Official Seal." And any order, award or proceeding of said board when duly attested and sealed by the board or its secretary shall be admissible as evidence of the act of said board in any court of this State.

Section 9. Upon the written request and payment of the fees therefor, which fees shall be the same as those charged for similar services in the Secretary of State's office, the board shall furnish to any person entitled thereto a certified copy of any order, award, decision or paper on file in the office of said board, and the fees so received for such copies shall be covered into the Treasury of the State of Texas into the fund for assistant clerical hire in the department of the Industrial Accident Board, and so much thereof as may be necessary may be used by said department upon proper voucher therefor to pay the necessary clerks to make such copies, and any excess that may exist at the end of any fiscal year in such fund shall lapse into the general revenue fund of this State, and no fee or salary shall be paid to any clerk or other person in said department for making such copies in excess of the fees charged for such copies.

Section 10. Said board or any member thereof may hold hearings or take testimony or make investigations at any point within the State of Texas, reporting the result thereof, if the same is made by one member, to the board, or it can employ or use the assistance of an inspector or adjuster for the purpose of adjusting and settling claims for compensation or developing the facts relating to any claim for compensation.

Section 11. When the association suspends or stops payment of compensation, it shall immediately notify the board of that fact, giving to said board the name, number and style of the claim, the

amount paid thereon, the date of the suspension or stopping of payment thereon and the reason for such suspension or stopping of payment of compensation.

Section 12. The board upon application of either party may, in its discretion, having regard to the welfare of the employe and the convenience of the association, authorize compensation to be paid monthly or quarterly.

In any case where the liability of the association or the extent of the injury of the employe is uncertain, indefinite or incapable of being satisfactorily established the board may approve any compromise, adjustment, settlement or commutation thereof made between the parties.

Part III

The Texas Employers' Insurance Association

Section 1. The "Texas Employers' Insurance Association" is hereby created, a body corporate with the powers provided in this act and with all the general corporate powers incident thereto.

Section 2. The Governor shall appoint a board of directors or the association consisting of twelve members, who shall serve for a term of one year or until their successors are elected by ballot by the subscribers at such time and for such term as the by-laws shall provide; provided that at any annual meeting of subscribers the number of directors may be increased or decreased by resolution duly recorded in the minutes of such meeting.

Section 3. Until the first meeting of the subscribers, the board of directors shall have and exercise all the powers of the subscribers and may adopt by-laws, not inconsistent with the provisions of this act, which shall be in effect until amended or repealed by the subscribers.

Section 4. The board of directors shall immediately choose by ballot a president, who shall be a member of the board, a secretary, a treasurer, and such other officials as the by-laws may provide.

Section 5. Seven or more of the directors shall constitute a quorum for the transaction of business. Vacancies in any office may be filled in such manner as the by-laws shall provide.

Section 5a. The board of directors may appoint an executive committee which may have and exercise all of the powers of the board of directors except when the board is in session.

Section 6. Any employer of labor in this State may become a subscriber except as provided in Section 2, Part I, of this act.

Section 7. The board of directors shall, within thirty days of the subscription of twenty-five employers, call the first meeting of the subscribers by a notice in writing mailed to each subscriber at his residence or place of business not less than ten days before the date fixed for the meeting.

Section 8. In any meeting of the subscribers each subscriber

shall have one vote, and if a subscriber has 500 employes to whom the association is bound to pay compensation he shall be entitled to two votes and he shall be entitled to one additional vote for each additional 500 employes to whom the association is bound to pay compensation, but no subscriber shall cast, by his own right or by right of proxy, more than 20 votes.

Section 9. No policies shall be issued by the association until not less than 50 members have subscribed, who have not less than 2,000 employes to whom the association may be bound to pay compensation.

Section 10. No policies shall be issued by the association until a list of the subscribers with the number of employes of each, together with such information as the Commissioner of Insurance and Banking may require, shall have been filed with the Department of Insurance and Banking, nor until the president and secretary of the association shall have certified under oath that every subscription on the list so filed is genuine and made with an agreement with each subscriber that he will take the policy so subscribed for by him within thirty days of the granting of a license to the association by the Commissioner of Insurance and Banking to issue policies.

Section 11. If the number of subscribers falls below fifty, or the number of employes to whom the association may be bound to pay compensation falls below 2,000, no further policies shall be issued until other employers have subscribed who, together with existing subscribers, amount to not less than fifty, who have not less than 2,000 employes to whom the association may be bound to pay compensation, said subscriptions to be subject to the provisions of the preceding section.

Section 12. Upon the filing of the certificates provided for in the two preceding sections, the Commissioner of Insurance and Banking shall make such investigations as he may deem proper and, if his findings warrant it, grant a license to the association to issue policies.

Section 13. The board of directors may distribute the subscribers into groups for the purpose of segregating the experience of each such group as to premiums and losses, and for the purpose of determining dividends payable to and assessments payable by the subscribers within each group, but for the purpose of determining the solvency of the association the funds of the association shall be deemed one and indivisible. The board of directors shall have power to re-arrange any of the groups by withdrawing any subscriber and transferring him wholly or in part to any group and to set up new groups at its discretion.

Section 14. The association may, in its by-laws and policies, fix the limit of liability of the subscribers for the payment of assessments hereinafter provided for, but such limit of liability of the

subscribers shall not, except by special agreement in writing between the association and subscriber, be fixed at an amount greater than an amount equal to and in addition to an annual premium.

Section 15. If the association, at the end of any calendar year, is not possessed of admitted assets in excess of unearned premiums sufficient for the payment of its incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses, first upon the subscribers within each group whose earned premiums compared with its incurred losses and expenses shows a deficiency for the group, and second, only upon the subscribers within each group whose earned premiums compared with its incurred losses and expenses shows a surplus, and in no event shall it make an assessment for any aggregate amount more than is needed to pay losses and expenses. Every subscriber shall, in accordance with the law and his contract, pay his proportionate part of any assessment which may be levied by the association on account of losses and expenses incurred during any calendar year while he is a subscriber.

Section 16. The board of directors may by vote from time to time fix the amount to be paid as dividends on the policies in force during each calendar year after retaining sums sufficient to pay all compensation which may be payable on account of injuries sustained and expenses incurred during the calendar year. Dividends and assessments shall be fixed by and for groups, but the entire assets of the association, including the liability of the subscriber to assessment within the limits fixed by the by-laws or by special agreement in writing as authorized, shall be subject to the payment of any approved claim for compensation against the association.

Section 16a. Whenever the association shall have accumulated at the end of any calendar year an admitted surplus in excess of incurred losses, expenses and unearned premiums amounting to the sum of two hundred thousand dollars, the liability of its members to assessment shall be suspended during the ensuing calendar year, or for such further period as the association shall maintain unimpaired such surplus of two hundred thousand dollars or more, and the certificate of the Commissioner of Insurance and Banking, after an examination and report, shall be conclusive evidence as to the fact in any proceeding in which the fact may be an issue.

Section 16b. Whenever by reason of having qualified under Section 16a, Part III, to issue policies which are not subject to assessment, the association may issue policies which will not entitle the holder to participate in any distribution or surplus.

Section 16c. The board of directors shall determine hazards by classes, and fix the rates of premium which shall be applicable to the pay roll in each of such classes at the lowest possible rate consistent with the maintenance of solvency and the creation of ade-

quate reserves and a reasonable surplus, and for such purpose may adopt a system of schedule and experience rating in such a manner as to take account of the peculiar hazard of each individual risk.

Section 17. Any proposed rate of premium, assessment or dividend or any distribution of subscribers shall not take effect until approved by the Commissioner of Insurance and Banking after such investigation as he may deem necessary.

Section 18. The association shall make and enforce reasonable rules for the prevention of injuries on the premises of subscribers and for this purpose the inspector of the association or of the board shall have free access to all such premises during regular working hours. Any subscriber aggrieved by such rule or regulation may petition the board for a review and it may affirm, amend or annul the rule or regulation.

Section 18a. Whenever any employer of labor in this State becomes a subscriber to this act, he shall immediately notify the board of such fact, stating in such notice his name, place of business, character of the business, approximate number of employes, estimated amount of his pay roll and the name of the insurance company carrying his insurance, the date of issuing the policy and the date when the same will expire, and whenever any policy is renewed that fact shall be made known to the board and the notice thereof shall contain the above facts. The association shall also report the same to the board, giving the name of the employer, place of business, character of the business, approximate number of employes, estimated amount of pay roll, date of issuance and date of expiration of said policy. Any employer or association willfully failing or refusing to make any such report shall be liable for and shall pay to the State of Texas a penalty of not more than one thousand dollars (\$1,000.00) for each and every offense, the same to be recovered in a suit to be instituted and prosecuted in Travis County by the Attorney General or by the district or county attorney under his direction in the district court thereof.

Section 19. Every subscriber shall, as soon as he secures a policy, give notice in writing or print, or in such manner or way as may be directed or approved by the board, to all persons under contract of hire with him that he has provided for payment of compensation for injuries with the association.

Section 20. Every subscriber shall, after receiving a policy, give notice in writing or print, or in such manner or way as may be directed or approved by the board to all persons with whom he is about to enter into a contract of hire that he has provided for payment of compensation for injuries by the association. If any employer ceases to be a subscriber, he shall on or before the date on which his policy expires, give notice to that effect in writing or print or in such other manner or way as the board may direct or approve to all persons under contract of hire with him. In case

of the renewal of his policy no notice shall be required under this act. He shall file a copy of said notice with the board.

Section 21. If a subscriber who has complied with all the rules, regulations and demands of the association is required by any judgment of a court at law to pay any employe any damages actual or exemplary, on account of any personal injury sustained by such employe in the course of his employment during the period of subscription, the association shall pay to the subscriber the full amount of the judgment and the cost assessed therewith, if the subscriber shall have given the association notice of the bringing of the action upon which the judgment was recovered and an opportunity to appear and defend same in his or its name.

Section 22. The corporate powers of the association shall not expire because of failure to issue policies or to make insurance.

Section 23. The association shall set up and maintain reserves adequate to meet anticipated losses and carry all claims to maturity and policies to termination, which reserves shall be computed in accordance with such rules as shall be approved by the Commissioner of Insurance and Banking.

Part IV.

Definitions

Section 1. The following words and phrases as used in this act shall, unless a different meaning is plainly required by the context, have the following meanings, respectively:

“Employer” shall mean any person, firm, partnership, association of persons or corporations or their legal representatives that makes contracts of hire.

“Employe” shall mean every person in the service of another under any contract of hire, expressed or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of trade, business, profession or occupation of his employer.

The words “legal beneficiaries” as used in this act shall mean the relatives named in Section 8a, Part I, of this act. “Association” shall mean the “Texas Employers’ Insurance Association” or any other insurance company authorized under this act to insure the payment of compensation to injured employes or to the beneficiaries of deceased employes.

“Subscriber” shall mean any employe who has become a member of the association by paying the required premium; provided that the association holds a license issued by the Commissioner of Insurance and Banking, as provided for in Section 12, Part III, of this act.

“Average weekly wages” shall mean:

1. If the injured employe shall have worked in the employment in which he was working at the time of the injury, whether for

the same employer or not, substantially the whole of the year immediately preceding the injury, his average annual wages shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

2. If the injured employe shall not have worked in such employment during substantially the whole of the year, his average annual wages shall consist of three hundred times the average daily wage or salary which an employe of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed.

3. When by reason of the shortness of the time of the employment of the employe, or other employe engaged in the same class of work in the manner and for the length of time specified in the above sub-sections 1 and 2, or other good and sufficient reasons, it is impracticable to compute the average weekly wages as above defined, it shall be computed by the board in any manner which may seem just and fair to both parties.

4. Said wages shall include the market value of board, lodging, laundry, fuel, and other advantage which can be estimated in money, which the employe receives from the employer as part of his remuneration. Any sums, however, which the employer has paid to the employe to cover any special expenses entailed on him by the act of his employment shall not be included.

5. The average weekly wages of an employe shall be one-fifty-second ($1/52$) part of the average annual wages.

The terms "injury" or "personal injury," as used in this act, shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result therefrom.

The term "injury sustained in the course of employment," as used in this act, shall not include:

1. An injury caused by the act of God, unless the employe is at the time engaged in the performance of duties that subject him to a greater hazard from the act of God responsible for the injury than ordinarily applies to the general public.

2. An injury caused by an act of a third person intended to injure the employe because of reasons personal to him and not directed against him as an employe, or because of his employment.

3. An injury received while in a state of intoxication.

4. An injury caused by the employe's willful intention and attempt to injure himself, or to unlawfully injure some other person, but shall include all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employe while engaged in or about the furtherance of the affairs or business of

his employer whether upon the employer's premises or elsewhere.

Section 1a. The president, vice-president or vice-presidents, secretary or other officers thereof provided in its charter or by-laws and the directors of any corporation which is a subscriber to this act shall not be deemed or held to be an employee within the meaning of that term as defined in the preceding section hereof.

Section 2. Any insurance company which term shall include mutual and reciprocal companies, lawfully transacting a liability or accident business in this State shall have the same right to insure the liability and pay the compensation provided for in Part I of this act, and when such company issues a policy conditioned to pay such compensation, the holder of such said policy shall be regarded as a subscriber so far as applicable under this act, and when such company insures such payment of compensation it shall be subject to the provisions of Parts I, II, and IV and of Sections 10, 17, 18a, and 21 of Part III of this act, and shall file with the Commissioner of Insurance and Banking its classification of hazards with the rates of premium respectively applicable to each, none of which shall take effect until the Commissioner of Insurance and Banking has approved same as adequate to the risks to which they respectively apply and not less than charged by the association, and such company may have and exercise all of the rights and powers conferred by this act on the association created hereby, but such rights and powers shall not be exercised by a mutual or reciprocal organization unless such organization has at least fifty subscribers who have not less than 2,000 employees.

Section 3. Any subscriber who has paid a premium as provided in Section 1, Part IV, of this act may upon application to the board and to the association and after a showing satisfactory to the board that he has notified all of his employees in such manner as may be required by the board cease to be a subscriber and be entitled to a refund of the unearned portion of his premium, subject, however, to any rule approved by the Commissioner of Insurance and Banking as to the minimum premiums or short rate cancellation.

Section 3a. Any subscriber who shall willfully misrepresent the amount of his pay roll to the association writing his insurance upon which any premium under this act is to be based shall be liable to the association insuring the compensation of his employees in an amount not to exceed ten times the amount of the difference between the premium which he paid and the amount which said subscriber should have paid had his pay roll been correctly computed; and the liability to said association for such misrepresentation if it was deceived thereby, may be enforced in a civil action in any court of competent jurisdiction in this State.

Section 3b. No inchoate, vested, matured, existing or other rights, remedies, powers, duties or authority, either of any em-

ploye or legal beneficiary, or of the board, or of the association, or of any other person shall be in any way affected by any of the amendments herein made to the original law hereby amended, but all such rights, remedies, powers, duties, and authority shall remain and be in force as under the original law, just as if the amendments hereby adopted had never been made, and to that end it is hereby declared that said original law is not repealed, but the same is, and shall remain in full force and effect as to all such rights, remedies, powers, duties and authority; and further this act in so far as it adopts the law of which it is an amendment is a continuation thereof, and only in other respects a new enactment.

Section 3c. Any reference to any employe herein who has been injured shall, when the employe is dead, also include the legal beneficiaries, as that term is herein used, of such employe to whom compensation may be payable. Whenever the word "board" is used in this act it shall be construed to mean Industrial Accident Board created by this act. Whenever in this act the singular is used, the plural shall be included; whenever the masculine gender is used, the feminine and neuter shall be included.

Section 4. Should any part of this act for any reason be held to be invalid, unconstitutional or inoperative, no other part or parts thereof shall be held affected thereby, and if any exception to or any limitation upon any general provision herein contained shall be held to be unconstitutional or invalid or ineffective the general provisions shall nevertheless stand effective and valid as if it has been enacted without limitation or exceptions.

Section 5. In cases of emergency or impending necessity the association may make advance payments of compensation to any employe during the period of his incapacity or to his beneficiaries within the terms of this act, and when the same is either directed or approved by the board it shall be credited as against any unaccrued compensation due said employe or beneficiaries.

Section 6. The reports of accidents required by this act to be made by subscribers shall not be deemed and considered as admissions and evidence against the association or the subscriber in any proceedings before the board or elsewhere in a contested case where the facts set out therein or in any one of them is sought to be contradicted by the association or subscriber.

Section 7. The law as it now stands being wholly inadequate to protect the rights of industrial employes who may be injured in industrial accidents and the beneficiaries of such employes who may be killed in such accidents creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended, and this act shall take effect from and after its passage, and it is so enacted.

(Approved March 28, 1917. Became a law March 28, 1917.)

ACCIDENT AND HEALTH INSURANCE

Notes on Industrial Accident and Liability Insurance (See 15 Cyc., 1035)

Constitutional Law—Vested Rights 1

Constitutionality of Workmen's Compensation Act

(a) Common Law Rights 2

(b) Vested Rights 3

(c) Privileges or Immunities and Class Legislation 4

(d) Unreasonable Classification 5

Employers' Indemnity Insurance for Cities 6

Compensation of Agent 7

Renewal 8

Application of General Rules of Construction 9

Duration of Risk 10

Amount of Premium 11, 12

Actions for Premium 13

Waiver of Limitations 14

Implied Waiver in General 15

Participating in Adjustment of Loss 16

Liability Incurred for Personal Injury or Loss of Life, 17, 18, 19, 20

Wrongful Acts of Insured 21

Liabilities Incurred for Injuries to Persons 22

Damages Incurred or Paid 23

Time for Notice and Proof 24

Waiver as to Notice and Proofs—Denial of Liability 25

Interest on Amount of Loss 26

Measure of Damages for Fraudulent Representations to Employee as to Accident Insurance 27

Plea, Answer or Affidavit of Defense 28

Weight and Sufficiency of Evidence 29

Instructions 30

Constitutional Law—Vested Rights.

1. A master has no vested right to the defenses of fellow servant, assumed risk, and contributory negligence.—*Middleton v. Texas Power & Light Co.*, 185 S. W. 556.

Constitutionality of Workmen's Compensation Act. (a) Common Law Rights.

2. Acts 33rd Leg. ch. 179, relating to the liability of employers and compensation of workmen for personal in-

juries which deprives servants of an employer who came under act of all common law rights of action, but awarded them fixed compensation, held valid.—*Middleton v. Texas Power & Light Co.*, 185 S. W. 556.

(b) Vested Rights.

3. While a servant has vested right to a cause of action for master's negligence, which has already accrued, he has no vested right to common-law remedies provided for recovery for injury from master's negligence.—*Id.*

(c) Privileges or Immunities, and Class Legislation.

4. Classification for the purpose of a law is a legislative function, and the classification will be sustained, unless without any reasonable basis.—*Middleton v. Texas Power & Light Co.*, 185 S. W. 556.

(d) Unreasonable Classification.

5. Acts 33rd Leg. ch. 179, fixing the liability of employers and compensation for injured workmen which exempted railroad employees, etc., held not invalid as prescribing an unreasonable classification.—*Middleton v. Texas Power & Light Co.*, 185 S. W. 556.

Employers' Indemnity Insurance For Cities.

6. A city held not estopped from asserting that a contract of insurance was not binding on it, because not accepted as required by city charter.—*London Guarantee & Accident Co. v. City of Beaumont*, 139 S. W. 894.

Facts held not to show ratification by a city of an indemnity insurance policy issued in its favor.—*Id.*

84—Compensation of Agent. (See 28 Cent. Dig. Insurance, §§ 111-114.)

7. In an action by a life insurance broker for commissions for securing liability business for defendant, evidence held insufficient to establish any agreement for the payment of commissions.—*Aetna Life Ins. Co. v. Farrell*, 154 S. W. 1164. See 28 Cent. Dig. Insurance, §§ 111-114.

145—Renewal. (See 28 Cent. Dig. Insurance, §§ 276-291.)

8. Where a contractor orally arranged that an industrial policy should be extended on payment of premiums, he is not bound by a limitation of liability in the new policy, which was not delivered, and which the agent merely told him was more extensive.—*Southwestern Surety Co. v. Thompson*, 180 S. W. 947.

146—Application of General Rules of Construction. (See 28 Cent. Dig. Insurance, §§ 292-298.)

9. A contract of insurance will be construed strictly against the insurer and liberally in favor of the insured.—*Aetna Life Ins. Co. v. El Paso Electric Ry. Co.*, 184 S. W. 628.

176—Duration of Risk. (See 28 Cent. Dig. Insurance, §§ 372-383.)

10. Where an accident policy is issued in consideration of an order on insured's employer, directing payment of

\$3.75 for each of four consecutive months, and reciting that the first payment makes the policy good for two months, the second for four months, the third for seven months, and the fourth for twelve months, from date of order and policy, and the policy declares that the premiums specified in the order are for consecutive periods of two, two, three and five months, and each shall apply only to its corresponding insurance period, and that the insurer will not be liable for any injuries sustained by insured during any period for which its respective premium has not been paid, the policy is not a contract of insurance for an entire period of a year, but for separate periods; and the employer having, after making two of the payments, returned the order to the insurer with refusal of payment because, and with notice that, insured had left its employment, and nothing was due him that month, the policy ceased to operate after the expiration of the periods for which premiums had been paid, though notice was not given insured, and the order was not returned to him; and it is immaterial that insured re-entered the employment so that pay was due him the next month.—*Employers' Liability Assur. Corp. of London v. Rochelle*, 35 S. W. 869.

183—Amount of Premium. (See 28 Cent. Dig. Insurance, § 394.)

11. Under an employee's liability policy stating that the premium placed therein was estimated upon data in the schedule and that the premium would be subject to further adjustment if the compensation paid employees was greater or less than the estimated amount, held, that insurer could recover any additional amount shown to be due.—*Fidelity & Casualty Co. of New York v. J. W. Crowder Drug Co.*, 166 S. W. 1186.

183—Same.

12. Failure of assured under an employer's liability policy to include the salaries of its manager and bookkeeper in reports to the insurer of compensation paid held not to entitle the insurer to recover premiums based thereon.—*Fidelity & Casualty Co. v. Tyler Cotton Oil Co.*, 184 S. W. 304.

188—Actions for Premium. (See 28 Cent. Dig. Insurance, §§ 245, 402.)

13. In suit by an employer's liability insurer for a premium, evidence held sufficient to support the finding that defendant rendered true statements of its pay roll in compliance with its policies, and paid all premiums from it under the policies.—*Fidelity & Casualty Co. v. Tyler Cotton Oil Co.*, 184 S. W. 304.

Waiver of Limitations. (See Cent. Dig. vol. 23, cols. 2514, 2515, §1543; cols. 2524-2527, §§ 1551-1552.)

14. An insurer, indemnifying an employer against damage for injuries to its employees, does not, by denying liability prior to the procurement of a judgment against the employer for injuries received by an employee, waive the stipulation in the policy that no action shall lie against the insurer, except for loss sustained by payment of a judgment against the employer for injuries received by an employee, nor subject itself to a proper demand for the payment of the policy before that time.—Texas Short Line Ry. Co. v. Waymire, 89 S. W. 452.

322—Implied Waiver in General. (See 23 Cent. Dig. Insurance, §§ 1026-1057.)

15. An insurer, having refused to defend actions against an employer in accordance with the policy, held estopped to set up that provision of the policy declaring that no suit should be maintained but for the expense incurred in satisfying the final judgment.—Southwestern Surety Ins. Co. v. Thompson, 180 S. W. 947.

397—Participating in Adjustment of Loss. (See 23 Cent. Dig. Insurance, §§ 1078-1082.)

16. Employers' Indemnity Company held not estopped from denying liability under the policy, where its adjuster's act did not injure or mislead the injured employer.—Aetna Life Ins. Co. v. Tyler Box & Lumber Co., 149 S. W. 283.

425—Liability Incurred for Personal Injury or Loss of Life. (See 23 Cent. Dig. Insurance, § 1144.)

17. Under employer's liability policy issued to plaintiff street railway and to an engineering company, injury to plaintiff's employee while engaged in repair work for engineering company through negligence of plaintiff's motorman held within its terms.—Aetna Life Ins. Co. v. El Paso Electric Ry. Co., 184 S. W. 628.

435—Same.

18. Under provisions of employer's liability policy issued to plaintiff railway and to an engineering company, held, that it was immaterial whether an employee, when injured was in the employ of the plaintiff or of the other insured.—Id.

435—Same.

19. A provision in a policy indemnifying an employer against damage for

injury to its employees, binding the insurer on the summons in an action against the employer for injuries received by an employee being forwarded to it, to defend the suit at its own cost, does not bind the insurer to become a party to the action, nor authorize the employer to make it a party, in view of another provision that no action shall lie against the insurer, except for loss sustained in payment of a judgment against the employer for injuries received by an employee.—Texas Short Line Ry. Co. v. Waymire, 89 S. W. 452.

435—Same.

20. A policy of employer's liability insurance covered loss from liability for damages on account of injuries suffered by any employee of insured while on duty within the factory, shop, or yards mentioned in the schedule in and during the operation of the trade or business described in the schedule. The schedule, under the head of "Trade or Kinds of Business," recited, "Manufacturing cotton seed oil, including refining and cotton ginning." The policy provided that the insurer should not be liable for any injury to any person unless he was "on duty at the time of the accident in an occupation described" at the place mentioned. The policy excluded from its scope additions to or alterations in any building, but permitted ordinary repairs. Insured paid a judgment against it on account of the death of an employee during the term of the policy. The deceased had been employed in the construction of the plant and installing the machinery which had been fully completed at the time of his death. While removing some scaffolding in the water tower, which was a part of the plant, the water tank crushed through and killed deceased. He was a carpenter, and a few days before his death had been placed on insured's list of operatives, the services of a carpenter being necessary in the operation of the plant. His duties were to assist the superintendent in regulating the machinery and to make any changes or repairs necessary during the operation. The scaffolding had been put in during the installation of the machinery, and it was necessary to take it down. On the day of the accident no oil was being made, but the machinery was being operated to fill the water tank. Held, that deceased, at the time he was killed, was pursuing an operation or business covered by the policy.—Fidelity & Casualty Co. of New York v. Lone Oak Cotton Oil & Gin Co., 80 S. W. 541, 35 Tex. Civ. App. 260.

437—Wrongful Acts of Insured.

21. There was no liability under an employer's indemnity policy providing

that the indemnity company should not be liable for injuries to persons employed in violation of law as to age, where the injured employee was only 13 years of age, and was working at 7:30 p. m., in violation of Acts 28th Leg. ch. 28.—*Aetna Life Ins. Co. v. Tyler Box & Lumber Mfg. Co.*, 149 S. W. 283.

512—Liabilities Incurred for Injuries to Persons.

22. One insured in an industrial policy held entitled, in a cross action in the employee's suit, having contracted for expenses in defending an action, to recover the amount of such expenses, together with a conditional judgment for the amount of the indemnity in case the employee should recover.—*Southwestern Surety Ins. Co. v. Thompson*, 180 S. W. 947.

514—Damages Incurred or Paid. (See 28 Cent. Dig. Insurance, § 1293.)

23. Where the insurer, having notice of an accident to the insured's employee, disclaims any liability and refuses to make any defense, it cannot when sued by insured, complain of a just settlement with the injured party.—*United States Fidelity & Guaranty Co. v. Pressler*, 185 S. W. 326.

539—Time for Notice and Proof. (See 28 Cent. Dig. Insurance, §§ 1328-1336.)

24. Under Rev. Civ. St. Art. 5714, notice by insured of accident 16 days after it occurred held to satisfy the requirement of the policy for immediate notice.—*United States Fidelity & Guaranty Co. v. Pressler*, 185 S. W. 326.

559—Waiver as to Notice and Proofs; Denial of Liability. (See 28 Cent. Dig. Insurance, §§ 1391, 1392.)

25. Declaration made by an insurance company to a third person, denying its liability on a policy, will not avail the beneficiary on the question of waiver of notice required to be given the company.—*Employers' Liability Assur. Corp. of London v. Rochelle*, 35 S. W. 869.

598—Interest on Amount of Loss. (See 28 Cent. Dig. Insurance, § 1494.)

26. Under employer's liability policy, insured recovering by reason of its

payment of judgment obtained by insured's employee held entitled to interest on its judgment from date of employee's judgment against it, rather than from the date of its payment thereof.—*Aetna Life Ins. Co. v. El Paso Electric Ry. Co.*, 184 S. W. 628.

Measure of Damages for Fraudulent Representations to Employee as to Accident Insurance.

27. Where defendant fraudulently represented to its employees, including plaintiff, that in consideration of a deduction from their wages defendant was carrying accident insurance for their benefit, when in fact defendant only carried liability insurance, and it appeared that no company issued any such policy as it was alleged that defendant promised to secure for its employees, whereby the latter would be paid a certain sum in case of accident, plaintiff could only recover the amount deducted from his wages, and was not entitled to indemnity from his injuries or for loss of time. Judgment, 114 S. W. 167, affirmed.—*Williams v. Detroit Oil & Cotton Co.*, 123 S. W. 405.

640—Plea, Answer or Affidavit of Defense. (See 28 Cent. Dig. Insurance, §§ 1554, 1609-1614.)

28. In action under employer's liability policy, held, that any defense available under a provision of the policy was an affirmative defense which it was necessary to plead.—*Aetna Life Ins. Co. v. El Paso Electric Ry. Co.*, 184 S. W. 628.

665—Weight and Sufficiency of Evidence. (See 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.)

29. Evidence, in a contractor's action on a policy of casualty insurance to recover the amount paid an employee, held to show that the judgment in favor of the employee against the insured was not the result of collusion and fraud.—*United States Fidelity & Guaranty Co. v. Pressler*, 185 S. W. 326.

669—Instructions. (See 28 Cent. Dig. Insurance, §§ 1556, 1771-1784.)

30. In an action on an employee's indemnity policy, an instruction concerning the intention of the parties held inapplicable to the evidence.—*Southwestern Surety Ins. Co. v. Thompson*, 180 S. W. 947.

Accident and Health Insurance

Definition and Nature 483

To Transact No Other Kind of Insurance—Statutory Regulations 483

Insurance Companies 483 (See pages 8, 276, 530)

Incorporation of Insurance Companies—Statutory Regulations 483
Life, Health and Accident Insurance Companies—Statutory Regulations 484

Foreign Companies—Statutory Regulations 485

Foreign Companies—Shall File Power of Attorney 485

Investment in Texas Securities 485

Foreign Corporations Are Held to Accept the Provisions of Title 71—
General Provisions—Statutory Regulations 485

Foreign Assessment Companies—Statutory Regulations 485

Mutual Assessment Accident Insurance Home Companies—Statutory
Regulations 486

(a) *Notice of By-Laws—Statutory Regulations 487*

(b) *Notice of Assessment Must Show, What—Statutory Regulations 487*

(c) *Constitution and By-Laws 487*

Statutory Regulations as to Fraternal Benefit Companies in General 487

(a) *Provisions Shall Apply to All Companies 487*

(b) *Chapter 15 of the Revised Statutes of 1914 Does Not Apply*
to Fraternal Beneficiary Companies 487

(c) *No Level Premium Policies Shall Be Issued 488*

(d) *Companies Shall Not Discriminate 488*

(e) *Companies Shall Not Misrepresent Policies 488*

Insurance Agents and Brokers 488 (See pages 12, 283, 536)

Statutory Regulations 488

(a) *Agents Must Be Authorized to Solicit Insurance 488*

(b) *Who Are Agents 488*

(c) *Policies Must Be Issued Only Through Resident Agents,*
Except 488

(d) *Solicitor of Insurance to Be Deemed Agent of Com-*
pany 488

(e) *Persons Debarred from Acting as Agent 489*

(f) *Revocation of Agent's Authority 489*

ii (482) ACCIDENT AND HEALTH INSURANCE

The Contract in General 489 (See pages 21, 296, 543)

Nature, Requisites and Validity 489

Policies Governed by the Laws of Texas—Statutory Regulations 489

Policies of Life Insurance Shall Contain the Entire Contract—Statutory Regulations 489

Policies Must Be Accompanied by Copy of Questions—Statutory Regulations 489

Statutory Regulation of Mutual Assessment Companies—Policy Shall Specify, What 489

Application or Offer and Acceptance 490

Validity in General 490

Incorporation of Constitution, By-Laws or Rules of Insurer 490

Deliverance and Acceptance 490

Reformation 490

Construction and Operation 491

Application and General Rules of Construction 491

What Law Governs 491

Construing Together Policy and Accompanying Papers 491

Construing Statutes and Charter, By-Laws or Rules of Insurer as Part of Policy 491

Parties to Contract and Relations Between Them 492

Premiums, Dues and Assessments 492 (See pages 37, 306, 564)

Payment of Premiums 492

Cancellation, Surrender, Abandonment or Rescission of Policy 493

(See pages 40, 317, 562)

Rights of Insurer to Cancel Certificate or Policy 493

Validity of Cancellation 493

Remedies for Wrongful Cancellation 494

Rescission by Insured 494

Avoidance of Policy for Misrepresentation, Fraud or Breach of Warranty or Condition 494 (See pages 43, 322, 551-

Statutory Provisions 494

(a) *Misrepresentation Must Be Material to Avoid Contract 494*

(b) *No Defense Based Upon Misrepresentation Valid, Unless 494*

(c) *Policy Shall Not Be Defeated Because of Misrepresentation 495*

Health and Physical Conditions of Insured 495

Habits 496

ACCIDENT AND HEALTH INSURANCE (482) iii

Forfeiture of Policy for Breach of Promissory Warranty, Covenant or Condition Precedent 496 (See pages 60, 332, 568)

Notice and Proceedings to Give Effect to Forfeiture 496

Default in Payment of Premiums or Assessments as Ground of Forfeiture in General 496

Extension of Time for Payment of Premium 497

Additional Insurance as Ground of Forfeiture 497

Rights of Insured After Default—Reinstatement 497

Estoppel, Waiver or Agreement Affecting Right to Avoid or Forfeit Policy 498 (See pages 92, 344, 556)

Estoppel of Insurer by Acts, Conduct or Statements of Officers or Agents 498

Powers of Officers or Agents Respecting Waiver in General 498

Insertion of False Answers in Application by Agent or Under His Direction 499

Estoppel or Waiver Affecting Right of Forfeiture 499

Construction and Operation of Express Waiver 499

Issuance and Delivery of Policy Without Objections 500

Failure to Assert Forfeiture or to Cancel Policy 500

Acceptance and Retention of Premiums 500

Risks and Causes of Loss 501 (See pages 111, 354)

Risks and Exceptions in Policy in General 501

What Constitutes an Accident 503

External, Violent and Accidental Means of Death 503

External and Visible Signs of Injury 503

Risks of Occupation 503

Voluntary or Unnecessary Exposure to Danger 504

Intentional Injuries 504

Proximate Cause of Injury or Death 505

Extent of Loss and Liability of Insurer 505 (See pages 113, 356)

Total Disability 505

Particular Injuries Specified in Policy 507

Continuous and Permanent Disability 507

Limitation of Liability by Provisions of Policy 508

Classification of Risk 508

Notice and Proof of Loss 509 (See pages 121, 357, 590)

Persons to Whom Notice or Proof of Loss May Be Given or Made 509

Time for Notice and Proof 509

iv (482) **ACCIDENT AND HEALTH INSURANCE**

Inspection of Person of Insured After Injury or Death 510
Proofs of Death or Injury to Insured 510
Misrepresentations Shall Not Constitute Defense, Unless Shown—
 Statutory Provisions 510
Misstatements in Notice and Proof 511
Estoppel or Waiver as to Notice and Proofs 511
Denial of Liability 511
Estoppel of Insurer to Deny Authority of its Agent After Adjust-
 ment of Loss 512

Right to Proceeds 512 (See pages 133, 359, 591)

Designation of Beneficiary 512
May Change Name of Beneficiary 512
Exemption of Proceeds 512

Payment or Discharge, Contribution and Subrogation 512 (See pages 138, 364)

Time of Payment 512
Interest on Amount of Loss 513
Losses Shall Be Paid Promptly—Statutory Regulations 513
Damages for Refusal of Payments 513
Subrogation of Insurer 514
Reduction of Loss by Insurance 514

Actions 514 (See pages 143, 371, 596)

Defenses in General 514
Venue of Suits 515
Venue (Case Law) 515
Limitations by Provisions of Policy 515
 a. Time Within Which Action Must Be Brought 515
Service of Process—Statutory Regulations 516
Jurisdiction as Dependent on the Amount in Controversy 516
Joinder of Causes of Action 516
Abatement of Cause of Action 517
Waiver of Limitation in Policy 517
Petition 517
 (a) Form and Requisites in General 517
 (b) Loss and Cause Thereof 517
 (c) Anticipating Defenses 518
Issues, Proof and Variance 518
Presumption and Burden of Proof 519
Admissibility of Evidence 519
 (a) In General 519

ACCIDENT AND HEALTH INSURANCE (482) v

(b) *Death of or Injury to Person Insured and Cause There-
of* 521

(c) *Refusal to Pay Claim* 521

Weight and Sufficiency of Evidence 522

Amount of Recovery 524

Questions for the Jury 524

Instructions 525

Verdict and Findings 527

Judgment 527

Appeal and Error 527

Costs 528

Cross References

Fire Insurance—Index vii

Life Insurance—Index 275-i

Fraternal Benefit Insurance—Index 528-i

Industrial Accident and Liability Insurance—Index 479

Livestock Insurance—Index 676

Burglary Insurance—Index 674

Fidelity, Guaranty and Surety Insurance—Index 656

Casualty Insurance—Index 670

ACCIDENT AND HEALTH INSURANCE

DEFINITION AND NATURE

Accident insurance is a contract whereby the insurer agrees to pay, in case the insured receives any personal injury through accident, a weekly amount for the period of disability, resulting from such accident, or a fixed amount in case of certain specified injuries, or of injuries resulting in the death of insured. (1 C. J. Par. 1-2.)

The contract is not one of indemnity but is an investment by the insured. (Id.)

It has been considered that accident insurance is akin to life insurance; and essentially the same principles underlie, and the same rules govern both kinds of insurance, and indeed, where an accident policy in addition to the usual provision for indemnity against loss by reason of bodily injury by accidental causes, stipulates for the payment of a certain sum to a person named in case of death of the insured by accident, it would seem clear that it is, in that aspect, a "life insurance policy." (1 C. J. Par. 2.)

The Revised Statutes of Texas have defined an accident insurance company as being "a corporation doing business under any charter involving the payment of money or other thing of value, conditioned upon the injury, disablement or death of persons resulting from traveling or general accidents by land or water." (Rev. St. 1914, Art. 4724.)

A health insurance company shall be deemed to be a corporation doing business under any charter involving the payment of any amount of money, or other thing of value, conditioned upon loss by reason of disability due to sickness or ill health. (R. S. 1914, Art. 4724.)

To Transact no Other Kind of Insurance—Statutory Regulations.—Companies doing a life, accident or health business shall not take risks for any other kind of insurance. (Art. 4748, Rev. St. 1914.) The forms of policies shall be filed with the Department of Insurance and Banking within five days after issuance.

Incorporation of Insurance Companies—In General—Statutory Regulations.—Any number of persons desiring to form a company for the purpose of transacting insurance business shall adopt and sign articles of incorporation, and submit the same to the attorney general; and, if said articles shall be found by him to be in accordance with the law of this state, and of the United States, he shall attach thereto his certificate to that effect, whereupon such articles shall be deposited with the commissioner of insurance and banking. (Art. 4705, Rev. St. 1914.)

(This article in its origin was, as in its language it is, a general provision applicable to all insurance corporations, except such as may be excluded by Articles 4793, 4830, 4855 and 4860. *State v. Burgess*, 109 S. W. 923, 101 Texas 524.)

The articles of incorporation shall contain (1) The name of the company, (2) the place of the principal business office, (3) the kind of insurance to be transacted, (4) the amount of capital stock, to be in no case less than one hundred thousand dollars. (Art. 4706, Rev. St. 1914.) The commissioner of insurance shall then examine into the company and the company must certify under oath that the capital is bona fide its property. The stock shall be divided into shares of one hundred dollars each, and the capital stock shall consist of (1) lawful money, (2) bonds, state, county, city or national bank stock or (3) in first mortgages on real estate. The surplus money of a company may be invested in or loaned upon the pledge of stocks, bonds of the United States or any of the states or those of any solvent dividend paying corporations or in bills of exchange. (Art. 4712, Rev. St. 1914.) The affairs of the company shall be managed by not more than thirteen and not fewer than seven directors, who shall choose a president and other officers.

“The laws relating to and governing corporations in general shall apply to and govern insurance companies incorporated in this state in so far as the same may not be inconsistent with the provisions of this title.” (Arts. 4723 and 4733, Rev. St. 1914.)

Life, Health and Accident Insurance Companies—Statutory Regulations.—Any three or more citizens of this state may associate themselves together and form a company to transact any one or more of these different kinds of insurance and the signed and acknowledged articles of incorporation shall contain (a) the name and residence of each one of the incorporators (b) the name of the company, (c) location of home office, (d) kind of insurance to be transacted, (e) amount of capital stock, to be not less than one hundred thousand dollars, (f) period of time it is to exist, (g) number of shares of capital stock, (h) other provisions which incorporators may deem proper to insert. (Art. 4725, Rev. St. 1914.) These articles shall be filed with the commissioner of insurance who shall submit them to the attorney general for approval. If they are approved they are then filed and recorded and the new company may then complete its organization. (Art. 4726, Rev. St., 1914.) After this is done the insurance commissioner then makes a thorough examination and if satisfied he issues a certificate of authority to the company to transact the kind of insurance desired in this state. (Art. 4728, Rev. St. 1914.) The company may sue or be sued but only the commissioner of insurance may enjoin. (Art. 4732, Rev. St. 1914.)

Under Article 4762, Rev. St. 1914, companies may be formed with

but \$25,000 capital stock to transact life, health and accident insurance business in Texas only, on the weekly or monthly premium plan and writing policies in amounts of one and two thousand dollars.

Foreign Companies—Statutory Regulations.—Foreign insurance companies desiring to do business in this state shall furnish a sworn statement by the president, vice-president, treasurer or secretary of such company to the commissioner of insurance showing: The name of the company; the amount of the capital stock; the amount of the capital stock paid up; the assets of the company; amount of liabilities of the company; losses adjusted and due; losses adjusted and not due; losses adjusted; losses in suspense and for what cause; all other claims against the company, describing same. (Art. 4765, Rev. St. 1914.) Such statement shall be accompanied by a certified copy of its articles of incorporation, with all amendments and by-laws, together with names and residences of each of its officers and directors, all sworn to under the hand of the president or secretary of the company. (Art. 4766, Rev. St. 1914.) Each such foreign insurance company must be possessed of at least \$100,000 paid up in cash money capital stock. All mutual companies must be possessed of at least \$100,000 of net surplus assets invested according to law. (Art. 4767, Rev. St. 1914.)

Foreign Companies—Shall File Power of Attorney.—Each life insurance company doing business in this state must file a power of attorney with the commissioner of insurance empowering him to accept service for it in any suit that may be pending. (Art. 4773, Rev. St. 1914.)

Investment in Texas Securities.—All life insurance companies transacting business in this state shall invest in Texas securities and Texas real estate a sum of money equal to at least seventy-five per cent of the aggregate amount of legal reserve required by law. (Arts. 4775-4790, Rev. St. 1914.) This does not apply to fraternal beneficiary associations or to companies the total amount of whose Texas reserves does not exceed \$5000. (See, also, page 219.)

Foreign Corporations Are Held to Accept the Provisions of Title 71—General Provisions—Statutory Regulations.—The provisions of this title are conditions upon which foreign insurance corporations shall be permitted to do business within this state and such corporations are held to have assented thereto as a condition precedent to its right to engage in such business in this state. (Art. 4972, Rev. St. 1914.)

Foreign Assessment Companies—Statutory Regulations.—Foreign companies having cash assets of not less than \$100,000, invested according to the laws of this state may be licensed to do business in Texas subject to the provisions of Chapter 4. (Rev. St. 1914, Art. 4791-4793.) Such a company must first file with the commissioner of insurance the following: A copy of its charter, a power

of attorney to the commissioner of insurance, a sworn certificate that it is paying and has paid for the past twelve months the full amount named in its policies, a sworn statement of its business for the previous fiscal year ending December 31st, a certified copy of its constitution and by-laws and a copy of its policy and application, a certificate from the proper authority of its home state that it is legally entitled to do business there and has at least \$100,000 surplus assets subject to its indebtedness. An annual report is also required. (See *National Life Assn. v. Hagelstein*, 156 S. W. 353.) The provisions of this chapter do not apply to mutual benefit associations.

Mutual Assessment Accident Insurance Home Companies—Statutory Regulations.—Any number of bona fide citizens and residents of Texas, not less than five, may organize a corporation to transact accident insurance business upon the co-operative or mutual assessment plan, without capital stock. The charter of such a company shall contain: The name of such company, the number of its directors with their names and residences, the location of its principal office, the fact that such company has no capital stock, its purpose and plan of doing business—that it is to be conducted upon the assessment plan without lodges, and lastly, the term of years (not more than fifty) for which it is to exist. (Arts. 4794, 4795, Rev. St. 1914.) Such charter must be presented to the attorney general and must be accompanied by affidavits of the incorporators showing that they are bona fide citizens of the state, by bona fide applications of two hundred applicants for not less than \$100,000 insurance, by an affidavit by one of the incorporators showing that each of said applicants has deposited with the applicant at least eighty cents on each one thousand dollars insurance so applied for, and by a certificate of some solvent bank showing that all such advance funds are deposited therein to be turned over to the treasurer upon organization. (Art. 4796, Rev. St. 1914.) Upon approval by the attorney general the charter is filed with the commissioner of insurance who furnishes the new company with a certificate authorizing it to do business.

Upon this being done the company is a body politic and corporate with the right to transact its business in this state and elsewhere, to hold and alienate property, to contract, sue and be sued, to have succession, to make by-laws by its board of directors and to carry on its business subject to the provisions of Chapter V of the Revised Statutes 1914, Article 4797.

Such a company shall be deemed to be doing business when it issues any certificate, policy or other evidence of interest to its members, whereby upon death or total disability any money is to be paid to such member or his beneficiary, such money being derived from admission fees, dues and assessments. (Art. 4798, Rev. St. 1914.) Companies of this kind must not issue certificates of

stock, declare dividends or pay profits. (Art. 4799, Rev. St. 1914.)

(A) Notice of By-Laws—How Given—Statutory Regulations.—Such corporations must, before the adoption of any by-laws or amendments cause the same to be mailed to all the members and directors, together with the notice of the time and place when the same will be considered, the same to be mailed at least ten days before the time of such meeting. However, the provisions of this article do not apply to by-laws adopted within sixty days after the incorporation of the company. (Art. 4800, Rev. St. 1914.)

(B) Notice of Assessment Must Show What—Statutory Regulations.—Each notice of assessment must state the cause and purpose of the same, amount paid on the last claim paid, the cause of disability or death, the name of the member for whose death or disability the payment was made, the maximum face value of the certificate or policy, and, in case of disability, the maximum amount provided for in such policy or certificate, and, if not paid in full, the reason therefor. (Art. 4805, Rev. St. 1914.)

(C) Constitutions and By-Laws.—Before the by-laws of a mutual assessment accident association may be amended the corporation must mail such by-laws or amendments to each member of such association at least ten days before the meeting which shall consider them, giving notice of the time and place when same shall be considered. (Rev. St. 1914, Art. 4800.) It is not sufficient to merely give the day of the month.¹ As to such notice too it is immaterial that a member knew the location of the company's home office.²

Statutory Regulations—As to Accident and Health Companies in General—(A) Provisions Shall Apply to All Companies.—All the provisions of the laws of this state applicable to life, fire, marine, inland, lightning or tornado insurance companies apply so far as the same are applicable to all companies transacting any other kind of insurance business in this state, so far as they are not in conflict with the provisions made specially applicable thereto. (Art. 4955, Rev. St. 1914.)

(B) Chapter 15 of the Revised Statutes of 1914 Does Not Apply to Fraternal Beneficiary Companies.—The chapter entitled "General Provisions" (Chapter 15) does not apply to fraternal beneficiary associations nor does it apply to companies carrying on the

ACCIDENT AND HEALTH INSURANCE—(B) MUTUAL COMPANIES.

54.—Constitutions and By-Laws. (See 28 Cent. Dig. Insurance, §66.)

1. A notice to members of a mutual assessment accident association that amendments to the by-laws would be considered at the next regular meeting of the board of directors, Saturday, December 9th, is insufficient under Rev. St. 1911, art. 4800, requiring the

notice to specify the time and place of consideration.—*Hackler v. International Travelers' Ass'n*, 165 S. W. 44. See 28 Cent. Dig. Insurance, § 66.

2. Where the notice that amendments to the by-laws of a mutual assessment accident association would be acted upon was defective because not specifying the place of meeting, it is immaterial that a member, asserting the invalidity of the amendment as to him, knew the location of the home office of the association at which place the meeting actually was held.—*Id.*

business of life or casualty insurance on the assessment or annual premium plan. (Art. 4957, Rev. St. 1914.)

(C) No Level Premium Policies Shall Be Issued.—It is now unlawful for level premium policies providing for more than one year preliminary term insurance to be sold in this state. (Art. 4952, Rev. St. 1914.)

(D) Companies Shall Not Discriminate.—Life insurance companies are forbidden to discriminate in favor of individuals of the same class and of equal expectation of life in the amount of or payment of premiums charged or in other benefits. Neither are they or their agents permitted to offer rebates of premiums or to offer any inducements under penalties provided in the Penal Code. (Art. 4954, Rev. St. 1914.)

(E) Companies Shall Not Misrepresent Policies.—Life insurance companies or their officers or agents must not issue or circulate any estimate, illustration, circular or statement misrepresenting the terms of any policy issued by it or benefits or advantages promised therein. (Art. 4958, Rev. St. 1914.)

INSURANCE AGENTS AND BROKERS

Statutory Regulations—(A) Agents Must Be Authorized to Solicit Insurance.—Agents before soliciting insurance for any company must first procure a certificate from the commissioner of insurance. (Art. 4960, Rev. St. 1914.)

(B) Who Are Agents.—A person is held to be an agent of an insurance company who solicits insurance, who takes or transmits an application for or policy of insurance, or who advertises or gives notice that he will do so, who receives or delivers a policy, who examines or inspects any risk, who collects or transmits any premium, who makes or forwards any diagram of any building or buildings, who performs any other act in the consummating of a contract of insurance, or who shall examine into or adjust any loss. This, however, does not make citizens who arbitrate in the adjustment of losses agents nor does it cover attorneys at law. (Art. 4961, Rev. St. 1914.)

(C) Policies Must Be Issued Only Through Resident Agents, Except.—All companies of whatsoever kind are prohibited from authorizing or allowing any person or agent who is a non-resident of Texas to issue or deliver any policy of insurance on persons or property located in this state. It is provided that this does not apply to common carriers or to persons who on oath state that they cannot obtain insurance on their person or property through agents in this state. (Art. 4963, Rev. St. 1914.)

(D) Solicitor of Insurance to Be Deemed Agent of Company.—A person who solicits an application for life insurance is to be regarded as the agent of the insurer in any controversy arising

but such an agent does not have the power to waive, change or alter any of the terms or conditions of the application or policy. (Art. 4968, Rev. St. 1914.)

(E) Persons Debarred From Acting as Agent.—No corporation or stock company can be the agent of a life insurance company. (Art. 4969, Rev. St. 1914.)

(F) Revocation of Agent's Authority.—An agent's authority to solicit insurance may be revoked for violation of any of the insurance laws, for knowingly deceiving or defrauding a policy holder or for unreasonably failing and neglecting to pay over to the company the premiums collected by him. (Art. 4971, Rev. St. 1914.)

THE CONTRACT IN GENERAL—NATURE, REQUISITES AND VALIDITY

Policies Governed By the Laws of Texas, Notwithstanding Stipulations to the Contrary—Statutory Regulations.—All contracts of insurance payable to any citizen of this state are held to be contracts entered into by virtue of the laws of this state and governed thereby although such policy may provide that the contract was executed and is payable together with the premiums outside this state or at the home office of the company issuing the same. (Art. 4950, Rev. St. 1914.)

Policies of Life Insurance Shall Contain the Entire Contract—Statutory Regulations.—All life insurance policies now sold in Texas are to contain the entire contract between the insurer and insured and the application for such policy may be made a part thereof. (Art. 4953, Rev. St. 1914.)

Policies Must Be Accompanied By Copy of Questions—Statutory Regulations.—A copy of the questions and answers of the application shall accompany every policy—either photographic or printed. However, this provision does not apply to life policies with provisions making the policies indisputable after two years, providing the premiums are paid. (Art. 4951, Rev. St. 1914.)

Statutory Regulation of Mutual Assessment Companies—Policy Shall Specify What.—The policy must specify the amount it promises to pay upon the contingency insured against, the number of days after the receipt of satisfactory proof of the happening of such contingency at which such payment shall be made. Upon the happening of such contingency the corporation shall be liable for the payment of the full amount at the time specified, subject to such legal defenses as it may have. However, if the assessments made in accordance with the by-laws to meet such payment are not sufficient then the amount so raised and paid over shall be considered as fully discharging such corporation from liability. (Art. 4807, Rev. St. 1914.)

Application or Offer and Acceptance.—There is no contract where an application permits an applicant to reject the policy within a stated time.³

Validity in General.—An applicant is bound by the answers in an application and he should read them over before signing. If he accepts a policy he is bound by its provisions whether he reads them or not, providing of course, fraud or mistake do not enter in.⁵

Incorporation of Constitution, By-Laws or Rules of Insurer.—The constitutions and by-laws control in the description of injuries for which losses are payable.⁶

Deliverance and Acceptance.—Where an application so provides a policy does not take effect until the application has been accepted by the company and the company is not estopped to deny its liability for any injuries prior to such acceptance.⁷ Where an applicant refused to accept a certificate the contract never took effect.⁸

Reformation.—To reform a policy to conform to the actual intent of the parties there must be mutual mistake or mistake on one side and fraud on the other.⁹

V.—THE CONTRACT IN GENERAL.
(See 1 Cyc. § 243.) (A) NATURE,
REQUISITES AND VALIDITY

130.—Application or Offer and Acceptance. (See 28 Cent. Dig. Insurance, §§ 195-202.)

3. Where the application under which an accident policy was issued permitted applicant to reject and return the policy, if not satisfactory, there was no contract, where applicant rejected the policy within the time provided.—*Business Men's Accident Ass'n of Texas v. Webb*, 163 S. W. 380. See 28 Cent. Dig. Insurance, § 195.

135.—Validity in General. (See 28 Cent. Dig. Insurance, §§ 246-249.)

5. In absence of fraud or mistake, the applicant for insurance, accepting the policy, is bound by its provisions, whether read or not.—*Great Eastern Casualty Co. v. Thomas*, 178 S. W. 603.

135.—Incorporation of Constitution, By-Laws, or Rules of Insurer. (See 28 Cent. Dig. Insurance, § 218.)

6. Limitations as to losses in the constitutions and by-laws of an accident fraternity held to control the description of injuries for which losses were payable.—*Eminent Household of Columbian Woodmen v. Hancock*, 174 S. W. 657.

136.—Deliverance and Acceptance. (See 28 Cent. Dig. Insurance, §§ 219-230.)

7. Where the application expressly made a part of the policy provides that the company shall not be liable for injury or death happening prior to the "receipt and acceptance" of the application and membership fee, the contract does not take effect until acceptance, and the company is not estopped to deny liability for death occurring prior thereto by having received the application and retained the fee.—*Coker v. Atlas Acc. Ins. Co.* 31 S. W. 703.

8. Where, under a provision of the application, providing that, if the certificate of membership was not satisfactory, applicant might return it to the association and receive back his membership fee, the applicant refused to accept the certificate, so that the contract never took effect, the association was not estopped to deny liability because it insisted on proof of loss and did not return the membership fee.—*Business Men's Accident Ass'n of Texas v. Webb*, 163 S. W. 380. See 28 Cent. Dig. Insurance, §§ 75, 253.

143.—Reformation. (See 28 Cent. Dig. Insurance, §§ 265-272.)

9. An insurance policy will not be reformed to conform to the alleged actual intent of parties, unless there was mutual mistake, or mistake on one side and fraud on other.—*Great Eastern Casualty Co. v. Thomas*, 178 S. W. 603.

CONSTRUCTION AND OPERATION

Application of General Rules of Construction.—The general rule that a policy should be construed most favorably to the beneficiary does not apply where no ambiguity or uncertainty exists in the language of a policy.¹⁰ The Supreme Court has also held that although the construction most favorable to the insured and which makes the insurer liable usually obtains yet a policy should not be so construed as to make a new contract in disregard of the plain and unambiguous language of the parties.¹¹ As a general rule, however, it is almost universally held that a contract of insurance should be construed most favorably to the insured and towards holding the insurer liable.¹²

What Law Governs.—The statute of the local forum governs in all actions for the recovery of damages and attorneys' fees even though the contract of insurance was made in a foreign state.¹³

Construing Together Policy and Accompanying Papers.—The rule is that where the application, policy and premium notes are executed at the same time they are regarded as parts of the same transaction and should be construed together.¹⁴

Construing Statutes and Charter, By-Laws or Rules of Insurer as Part of Policy.—A by-law will not be permitted to override the plain letter of the policy and the latter will govern—otherwise the insurer would be able to limit its liability indefinitely and as it may see fit.¹⁵ The statute (Art. 4807, Rev. St. 1914) expressly provides that the insurer shall be liable for the payment of the amount in full and this amount is the amount in the certificate or

(B) CONSTRUCTION AND OPERATION (See 1 CYC. 243.)

146—Application of General Rules of Construction. (See 28 Cent. Dig. Insurance, §§292-294-298.)

10. The rule that a policy must be construed most liberally in favor of the beneficiary has no application where there is no ambiguity nor uncertainty in the language sought to be construed. Judgment 99 S. W. 877, reversed.—Continental Casualty Co. v. Wade, 105 S. W. 35.

11. While an accident insurance policy should be construed most favorably to insured, and so as to make the insurer responsible for the loss if the policy is fairly susceptible of such construction, yet it cannot be so construed as to make a new contract, in disregard of the plain and unambiguous language used by the parties. Judgment 72 S. W. 1047, reversed.—Maryland Casualty Co. v. Hudgins, 76 S. W. 745, 97 Tex. 124.

12. A contract of insurance should be construed most favorably to the insured, and where its language is fairly

susceptible of any construction making the insurer responsible for the loss of injury, it is the duty of the court to so construe it.—Western Indemnity Co. v. MacKechnie, 185 S. W. 615.

147—What Law Governs. See 28 Cent. Dig. Insurance, § 293.

13. Though a contract of accident insurance was made in a foreign state, the statute of the forum providing for the recovery of damages and attorneys fees governs an action thereon.—Traveler's Ins. Co. v. Harris, 178 S. W. 816.

151—Construing Together Policy and Accompanying Papers. (See 28 Cent. Dig. Insurance, §§ 308-311.)

14. Where an application for insurance, the policy issued thereon, and the notes given for the premiums were executed contemporaneously, the instruments were parts of one transaction, and must be construed together in ascertaining the terms of the contract.—North American Acc. Ins. Co. v. Bowen, 102 S. W. 163.

policy stated.¹⁷ Following out the general rule, it is held that where a provision in a constitution is susceptible of two constructions, the one most favorable to the insured will be adopted, and further, the court will examine other provisions as an aid in arriving at its meaning.¹⁸ Of course, the policyholders in an association in agreeing to be bound by future by-laws which may be passed, intend only such by-laws as the association has power to pass.¹⁵

Parties to Contract and Relations Between Them.—A policy purporting to insure persons only between eighteen and sixty-five years of age is void when issued to a man over sixty-five.²⁰

PREMIUMS, DUES AND ASSESSMENTS

Payment of Premiums.—It would appear that the insurer has a right to determine how payments of premiums shall be made to a certain extent as it has been held that the mailing of a check for dues is not payment until it is received.²² Payment is not made when a letter containing the remittance is deposited in the post-office but when it is received by the association, unless the insurer has authorized remittance by mail.²³ As to when payments must be made it cannot be said that time is of the essence of an accident policy.²¹

152—Construing Statutes and Charter, By-Laws or Rules of Insurer as Part of policy. (See 28 Cent. Dig. Insurance, § 312.)

15. Policyholders in an insurance association, agreeing to be bound by future by-laws passed, held to intend only such by-laws as the association has power to pass.—*Eaton v. International Travelers' Ass'n of Dallas*, 136 S. W. 817. See 28 Cent. Dig. Insurance, § 312.

16. A by-law of an accident insurance association, limiting the recovery to \$500 for death resulting from apoplexy caused by accident, held unavailable to limit the amount recoverable for apoplexy resulting from accident, under a certificate providing for the payment of \$5,000 in case of death, and not referring to the by-law.—*International Travelers' Ass'n v. Brannum*, 169 S. W. 389.

17. Under Rev. St. art. 4807, providing that an accident insurance corporation shall be liable for the payment of the amount specified in full, etc., such amount is the amount specified in the certificate, which is promised to be paid on the happening of the contingency insured against; and hence the insurer may not limit such amount by any by-law.—*Id.*

18. If a provision of the constitution is susceptible of two constructions, it must be given the interpretation most favorable to the beneficiary, and the court will look to any other provision which will aid it in arriving at its meaning. *Judgment Travelers'*

Protective Ass'n of America v. Roth, 108 S. W. 1039, affirmed.—*Roth v. Travelers' Protective Ass'n of America*, 115 S. W. 31, 102 Tex., 241. See 28 Cent. Dig. Insurance, §§1870-1872.

19. A clause in a certificate, providing that the association shall not be liable in case of disability when caused by any bodily or mental infirmity or disease, dueling, fighting, wrestling, war, or riot, applies to a case of disability only.—*Id.*

156—Parties to Contract and Relations Between Them. (See 28 Cent. Dig. Insurance, §§ 316-322.)

20. An accident policy provided that: "This ticket does not insure any person under 18 or over 65 years old, nor any women except against death only." Held, that such policy issued to a man over 65 years of age was void; the words "except against death only" not applying to him.—*Perry v. Standard Life & Accident Ins. Co. of Detroit, Mich.*, 125 S. W. 374. See 28 Cent. Dig. Insurance, §§316-322.

VI—PREMIUMS, DUES AND ASSESSMENTS.

186—Payment of Premiums. (See 28 Dig. Insurance, §§ 396-398.)

21. Whether time for payment of premiums on an accident policy is of the essence depends on the wording thereof, and it cannot be said that as a matter of law time is of the essence.—*North American Ins. Co. v. Jenkins*, 184 S. W. 307.

CANCELLATION, SURRENDER, ABANDONMENT OR RESCISSION OF POLICY

Right of Insurer to Cancel Certificate or Policy.—A board of directors of an association has authority to cancel a membership where they deem a member to have become a more hazardous risk.^{22a}

Validity of Cancellation.—The death of the insured revokes all offers of cancellation made by him prior to his death, and not accepted by the insurer prior thereto.^{23c} The rights of the parties become fixed by the death of the insured and the insurer cannot accept his previous offer to cancel by withdrawing its claim on his wages in payment of the premium due.^{23b} And in such a case the wife of the insured would not be estopped by her conduct in receiving the full amount of her husband's wages, from enforcing collection of the policy, the agreement between the insured and insurance company having been that sufficient funds should be left with the employer of the insured to pay the premium each month.^{23d}

22. The mailing of a check by a member for the amount of his dues is not payment until it is received. Judgment *Travelers' Protective Ass'n of America v. Roth*, 108 S. W. 1039, affirmed.—*Roth v. Travelers' Protective Ass'n of America*, 115 S. W. 31, 102 Tex. 241. See 28 Cent. Dig. Insurance, § 1887.

23. Where it does not appear that an accident insurance association had authorized remittances of dues by mail, payment is not made when the letter containing the remittance is deposited in the post office, but when received by the association.—Id.

CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION.

228—**Right of Insurer to Cancel.** (See 28 Cent. Dig. Insurance, §§492-499.)

22a. The constitution of a beneficial association, organized under the laws of Missouri, authorized the directors to cancel any membership if deemed advisable by them, and there were other provisions of the constitution of the order as well as of the laws of Missouri which authorized expulsion of a member for the commission of any felonious offense, habitual drunkenness, or violation of any agreement of his membership. Held, that the board of directors had authority to cancel a membership owing to insured having lost an eye, which rendered him a more hazardous risk, the provision authorizing the directors to cancel a membership as deemed advisable not being in conflict with the

other provisions relative to expulsion. —*Travelers' Protective Ass'n of America v. Dewey*, 78 S. W. 1087, 34 Tex. Civ. App. 419. See Cent. Dig. vol. 28, cols. 3022, 3023, § 1877.

233—**Validity of Cancellation.** See 28 Cent. Dig. Insurance, § 505.

23b. Where an insurance company, in pursuance to the terms of a policy, sent in its claim for a premium to insured's employer, and, before its payment, insured, who had requested a cancellation, died, the rights of the parties having then become fixed, the insurance company could not alter them, and accept insured's offer of cancellation, by withdrawing its claim on his wages.—*Travelers' Ins. Co. v. Jones*, 73 S. W. 978.

23c. Death of insured revokes all offers of cancellation made by him prior to his death, and not accepted by insurer prior thereto.—*Travelers' Ins. Co. v. Jones*, 73 S. W. 978.

23d. Plaintiff's husband took out an accident policy which provided that insured should leave with his employer sufficient funds earned in the preceding month to pay premium installments. Insured, shortly after receiving the policy, sent it to defendant's state agent, asking that it be canceled. This the agent refused to do, and sent in a claim to his employer for a premium thereon. Before payment of the same, insured was killed, and defendant thereupon wired the paymaster to return to it the order for the premium, which was done. Plaintiff received the full amount of wages earned by her husband for that month.

Remedies for Wrongful Cancellation.—In case there is a mere refusal to pay sick benefits and nothing more the insured's measure of damages under a health policy is the amount of payments to which he is entitled.²⁴ Where there is a complete repudiation of such a policy the insured may rescind and recover as damages all premiums paid, with interest, less any payments made to him while ill.²⁵

Rescission By Insured.—In a case where the insured offered to rescind but the insured continued to send in its claim for the premium, such action amounted to a rejection of the offer.²⁶

AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD OR BREACH OF WARRANTY OR CONDITION

Statutory Provisions—(A) Misrepresentation Must Be Material to Avoid Contract.—Any provision in any contract or policy of insurance issued or contracted for in this state, which provides that the answers or statements made in the application for such contract, or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case. (Art. 4947, Rev. St. 1914.)

(B) No Defense Based Upon Misrepresentation Valid, Unless.—No defense based upon misrepresentation made in the applications for or in securing a contract of insurance, shall be valid, unless

It was not shown that plaintiff knew that defendants agent had not canceled the policy, or that she knew that defendant had sent in its order to the paymaster for the first installment of premiums. Held, that plaintiff was not estopped, by her conduct in receiving her husbands wages, from enforcing collection of the policy.—*Travelers' Ins. Co. v. Jones*, 73 S. W. 978.

237—**Remedies for Wrongful Cancellation.** (See 28 Cent. Dig. Insur. ance, §§ 513-515.)

24. Where there is a mere refusal, not amounting to total repudiation of the contract, to pay sick benefits to which insured is entitled under a policy of health insurance, his measure of damages is the amount of the payments to which he is entitled.—*Amer-*

ican Nat. Ins. Co. v. Wilson, 176 S. W. 623.

25. Complete repudiation by insurance company of policy of health insurance held to entitle plaintiff to rescind and to recover as damages amount of premiums paid, with interest, less any payments made to him while ill.—*Id.*

248—**Rescission By Insured or Beneficiary.**

26. Where an insurance policy provided that insured should leave with his employer each month sufficient funds to meet the premiums thereon, and insured wrote to insurer, offering to rescind the contract, but insurer nevertheless sent in its claim for the premium to insured's employer, such action on its part was a rejection of insured's offer of rescission.—*Travelers' Ins. Co. v. Jones*, 73 S. W. 978.

the defendant shall show on the trial that, within a reasonable time after discovering the falsity of such misrepresentations so made, it gave notice to the insured or to the beneficiaries under said contract, that it refused to be bound by such contract or policy. Ninety days is defined as a reasonable time. It is provided further that this article shall not be construed to render available any immaterial misrepresentation, nor to in anywise affect Article 4947. (Art. 4948, Rev. St. 1914.)

(C) Policy Shall Not Be Defeated Because of Misrepresentations, Unless.—A recovery upon a life, accident or health insurance policy shall not be defeated because of misrepresentation in the application which is of an immaterial fact and which does not affect the risks assumed. (Art. 4959, Rev. St. 1914.)

It is also provided that no defense based upon misrepresentation made in the application upon the life of any person in this state shall be valid in any suit brought on such contract two years or more after the date of its issuance, when the premiums have been duly paid and received without notice is given by the insurer to the insured of its intention to rescind on account of misrepresentation unless it is shown on the trial that such misrepresentation was material to the risk and intentionally made. (Art. 4951, Rev. St. 1914.)

Health and Physical Condition of Insured.—The rule is that in determining the question of falsity of answers in an application for insurance such answers must be construed liberally in favor of insured.²⁷ Failure or omission to make certain statements does not always constitute a breach of warranty, as, a warranty that applicant was in whole and sound condition, mentally and physically, is not breached by his failure to state that he had a leg amputated at the knee.²⁸ Warranties are specially important in so far as they might affect the risk and render him more or less desirable,²⁹ and the insurer contemplates all such facts as affect the risk being fully stated in the application.

**AVOIDANCE OF POLICY FOR MIS-
REPRESENTATION, FRAUD, OR
BREACH OF WARRANTY OR
CONDITION. (See 1 Cyc.
§ 248.)**

291.—Health and Physical Condition.
(See 28 Cent. Dig. Insurance, §§
631.690-694.696.)

27. In determining the question of falsity, the questions and answers in the application for insurance must be construed liberally in favor of the insured.—Great Eastern Casualty Co. v. Smith, 174 S. W. 687.

28. A warranty in an insurance application that applicant was in whole and sound condition, mentally and

physically, is not breached by failure to state that he had a leg amputated at the knee.—Id.

29. Where insured, in his application for accident insurance, warranted that he had never had "paralysis, fits of any kind, brain disorder, diabetes, hernia, varicose veins, or any bodily or mental infirmity, injuries or wounds," or suffered any loss of a limb or an eye, except as stated, and that he had never been ruptured or "otherwise injured," the words "injuries or wounds" and "otherwise injured" should be construed to refer only to such serious other wounds or injuries not specified as might affect the risk.—Trenton vs. North American Acc. Ins. Co., 89 S. W. 276.

Habits.—All statements as to insured's habits are construed with reference to such habits at the time of his application only.³⁰

FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY COVENANT, OR CONDITION SUBSEQUENT

Notice and Proceedings to Give Effect to Forfeiture.—Under the statutes which prescribe 90 days as being a reasonable time within which insurer may give notice of its refusal to be bound under a policy by reason of misrepresentations of insured, such misrepresentations are regarded as no defense where such notice is not given within the time stated.³¹

Default in Payment of Premiums or Assessments as Ground of Forfeiture in General.—The rule is that when a policy provides that premiums shall be paid at the time and in the way prescribed, default in the payment of such premiums or any one of them will put an end to the policy immediately and without notice to the insured.³² However, where benefits under a policy have accrued, the policy cannot be forfeited for non-payment of premiums as the premiums may be deducted from the claims due.^{33 33a}

297.—**Habits.** (See 28 Cent. Dig. Insurance, § 676.)

30. A statement by insured as to his habits with reference to intoxicants must be construed as to his habits at the time of his application, not before or after.—Order of United Commercial Travelers v. Simpson, 177 S. W. 169.

**FORFEITURE OF POLICY FOR
BREACH OF PROMISSORY WAR-
RANTY, COVENANT, OR CON-
DITION SUBSEQUENT.**
(See 1 Cyc. § 246.)

310.—**Grounds in General.—Notice and Proceedings to Give Effect to Forfeiture.** (See 28 Cent. Dig. Insurance, §§ 703, 761, 780, 826, 840, 904.)

31. Under Vernon's Sayles' Ann. Civ. St. 1914, Art. 4948, misrepresentations of insured held not a defense where notice of insurer's refusal to be bound was not given within 90 days after notice of the misrepresentations.—Commonwealth Bonding & Casualty Ins. Co., v. Wright, 171 S. W. 1043.

349.—**Non-payment of Premiums or Assessments.—Default as Ground of Forfeiture in General.** (See 28 Cent. Dig. Insurance, §§ 891, 895, 902, 913.)

32. An accident policy stipulated for the payment of premiums in four equal installments in one, two, three and four months, and declared that the notes were for premiums for consecutive periods of time and each was to

apply only to its corresponding period. The application recited that the insured agreed that the policy should embrace four separate contracts and should not be in force after maturity of the first note, except by actual payment of the first and succeeding premium notes at maturity in their consecutive order. The first note provided that, if it was not paid at maturity, the policy should terminate on that date, and each of the other notes provided that, if the same was not paid at maturity, the policy should terminate. Held, that a failure to pay any one of the premium notes at the maturity thereof put an end to the policy without notice to the insured or formal cancellation.—North American Acc. Ins. Co. v. Bowen, 102 S. W. 163. See 28 Cent. Dig. Insurance, §§ 891-904.

33. Where under a sick benefit certificate, benefits on account of sickness accrue while the policy is in force, the policy cannot be forfeited thereafter for non-payment of dues, since the dues must be deducted from the claims due, and this though the policy expressly provide that no such deduction shall be made.—Royal Fraternal Union v. Stahl, 126 S. W. 920. See 6 Cent. Dig. Ben. Assoc. §§ 22-26.

33a. An accident policy stipulated for the payment of the premium in four equal installments, in one, two, three, and four months, and declared that claims for injuries received during any period for which the installment of the premium was not paid

Extension of Time for Payment of Premium.—An agent may have the authority to extend the time of payment of premium notes in the absence of a limitation by the insurer of his authority.³⁷

Additional Insurance as Ground of Forfeiture.—Where insured took out two policies at the same time and in the same company the insurer may declare one of them void even after injury of insured although it did not tender premium back to insured on one of his policies before the accident.^{37a} In an accident policy of this kind which permits but one policy to each person, the insurer must return premiums on policies in excess of this number on demand.^{37b} It is not a warranty, forfeiting the policy for breach, where such policy stipulates that insured warrants that he will report to the insurer any other insurance taken out by him.^{37c}

Rights of Insured After Default—Reinstatement.—It has been held that where a member was injured at a time when he was under suspension for non-payment of dues but was afterwards reinstated and died from the injuries so received his beneficiary was

should be forfeited, except that the insured agreed that, if a valid claim arose before the first note matured, the amount due for the claim should be first applied to the payment of the other notes. The insured acquired a claim after payment of the first note and while the policy was in force. The agent of the insurer extended the time of the payment of the other notes, and at the date of the expiration of the extension the exact amount for which the insurer was liable to the insured was undetermined, but the minimum amount was sufficient to pay the remaining notes. Held, that it was the duty of the insurer to apply so much of the sum due the insured to the payment of the unpaid notes as was necessary for that purpose to prevent a forfeiture of the policy.—*North American Acc. Ins. Co. v. Bowen*, 102 S. W. 163. See 28 Cent. Dig. Insurance, §§ 931, 934, 937-939.

358—Non-payments of Premiums or Assessments—Extension of Time for Payment—By Agent or Broker.

37. An agent of an insurer was its managing agent within designated territory, and was empowered to take applications for insurance, countersign, issue, and deliver policies on the credit of the insured's notes, collect premiums, and appoint subagents within the territory. He took an insured's application and notes for the premium, and countersigned and delivered to the insured on the same day the policy. He retained, as he was authorized to do, the notes for collection and collected the amount of the first note some 30 days after it became due, which was received and retained by

the insurer. Held, that the agent had authority to extend the time of the payment of the premium notes in the absence of a limitation by the insurer of his authority and actual knowledge thereof by the insured.—*North American Acc. Ins. Co. v. Bowen*, 102 S. W. 163. See 28 Cent. Dig. Insurance, § 915.

336—Additional Insurance. (See 28 Cent. Dig. Insurance, §§ 856-873.)

37a. The fact that the insurer did not, before the injury of the insured, tender to him the premium paid on one of the policies, did not affect its rights under the policies to have one of them declared void.—*Wilkinson v. Travelers' Ins. Co.*, 72 S. W. 1016.

37b. Where accident policies issued to the same person at the same time for the same period contained a stipulation that insurance on any person for a single period is limited to one ticket, and the insurer will return on demand to the insured premiums paid for tickets in excess thereof, one of the policies was void, in the absence of any proof of waiver of the stipulation or estoppel.—*Wilkinson v. Travelers' Ins. Co.*, 72 S. W. 1016.

37c. Where a policy stipulates that assured, on acceptance of it, warrants certain statements to be true, among which is a statement that he will report to the insurer any other insurance taken out by him, the obligation not to take such further insurance without notice cannot be held a warranty, imposing forfeiture for breach.—*Fidelity & Casualty Co. of New York v. Carter*, 57 S. W. 315, 23 Tex. Civ. App. 359.

entitled to benefits, even though the policy provided that a delinquent or his beneficiary shall receive no benefits while so delinquent.³⁹

ESTOPPEL, WAIVER OR AGREEMENT AFFECTING RIGHT TO AVOID OR FORFEIT POLICY

Estoppel of Insurer by Acts, Conduct or Statements of Officers or Agents.—It has been decided that the insurer is not in a position to claim a forfeiture for non-payment of premium where an employee of a railroad, who had directed its payment out of his wages in writing, demanded his full wages and received them, such employee being ignorant of the exact amount of wages due.⁴⁰

Powers of Officers or Agents Respecting Waiver in General.—The rule is that even though a policy has been forfeited for failure to pay premiums yet an authorized agent may waive such for-

365—Rights of Insured after Default—Reinstatement. (See 28 Cent. Dig. Insurance, §§ 932-933.)

39. The word "killed" as used in the constitution, providing that a benefit shall be paid to the beneficiaries named in the certificate "in case of death by accident," but that, if a member suspended for non-payment of dues shall be "injured" during his delinquency, the delinquent shall receive no indemnity therefor "nor shall his beneficiaries receive anything should he be 'killed' during such period of delinquency", and providing for reinstatement of the delinquent members, refers to the result of the accident, and not to the accident from which death ensues; and where the death of a member occurred after his reinstatement, and while he was in good standing, his beneficiary was entitled to benefits, though the accident from which death ensued occurred during the member's delinquency. Judgment *Travelers' Protective Ass'n of America v. Roth*, 108 S. W. 1039, affirmed.—*Roth v. Travelers' Protective Ass'n of America*, 115 S. W. 31, 102 Tex. 241. See 28 Cent. Dig. Insurance, § 1924.

39a. A constitutional provision of an accident insurance association that beneficiaries of a member killed while dues are delinquent shall receive nothing, as to the word "killed," refers to the time of the act producing death, rather than to the time of death produced by the act, and denies recovery by a beneficiary of a member who was in default at the time he sustained the injury resulting in his death, though at his death he had been reinstated,

and was in good standing. *Travelers' Protective Ass'n of America v. Roth*, 108 S. W. 1039, affirmed.—*Roth v. Travelers' Protective Ass'n of America*, 115 S. W. 31, 102 Tex. 241. See 28 Cent. Dig. Insurance, § 1919.

ESTOPPEL, WAIVER, OR AGREEMENT AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

373—Liability of Insurer to Estoppel By Acts, Conduct, or Statements of Officers or Agents.

40. A policy, insuring a railroad employee against accident, was stated to be in consideration of the "order (on the railroad) which is to be considered an assignment of moneys therein specified." The railroad company was the agent of the insurance company, and insured had been told by the insurance agent that he need only give the assignment, directing the railroad company to pay the premiums, and they would be deducted as his hospital fees. The order having been given, the insured, who could read but little, demanded of the railroad company all due him, and received it, without deduction of a premium due. He did not know what was due him, and thought the premium had been deducted. Held, that the company was not in a position to claim a forfeiture under a clause, stipulating that the policy should be void, if the insured failed to leave with the company any installment of premiums.—*Johnson v. Standard Life & Accident Ins. Co.*, 97 S. W. 831. See 28 Cent. Dig. Insurance, § 947.

feiture and reinstate the policy.⁴¹ However, the agent must have the authority to waive forfeitures and the company is not bound by any statements of an agent not so authorized.⁴²

Insertion of False Answers in Application by Agent or Under His Direction.—An insurer is estopped to defend on the ground that the answers in an application were false where such answers were correctly given by the insured but either fraudulently or negligently inserted by the agent of insurer.⁴³

Estoppel or Waiver Affecting Right of Forfeiture.—Though where an insurer with knowledge of a breach of warranty, requires an insured to furnish proofs of loss, it will be held to have waived the forfeiture, yet where an insured abandons his claim, the fact that before abandonment he incurred trouble and expense in making out his proof of injury in compliance with the association's request, will not operate in favor of his beneficiary as a waiver of the insured's failure to pay dues.^{43a}

Construction and Operation of Express Waiver.—While negotiations were pending for additional protection on a policy and the insurer attempted to forfeit the old policy for non-payment of premium, all parties being cognizant of the status of the matter, the payment of the premium was waived on the date specified in the policy.⁴⁴ In general, the rule is that a waiver may be inferred

375—Powers of Officers or Agents Respecting Waiver. (See 28 Cent. Dig. Insurance, §§ 948-965.)

41. Though an insurance policy has been forfeited by a failure to pay premiums according to its terms, an agent duly authorized may waive the forfeiture and reinstate the policy. —North American Acc. Ins. Co. v. Bowen, 102 S. W. 163. See Cent. Dig. Insurance, §§948-951, 953-965.

42. A health policy having excepted liability for an illness contracted before the policy had been in force 30 days, and insured having contracted an illness within such time, that the agent authorized to issue receipts, but not to issue policies, continued the policy, and issued receipts for premiums, and assured insured that he would get his money, held not a waiver of the exception. —American Nat. Ins. Co. v. Roberts, 146 S. W. 326.

379—Insertion of False Answers in Application By Agent or Under His Direction. (See 28 Cent. Dig. Insurance, §§ 999-1015.)

43. Where an agent of an insurance company authorized to solicit insurance either fraudulently or negligently inserts in an application false answers to questions correctly answered by the applicant, the agent's wrong would be imputed to the insurer and it was estopped to defend on the ground that the answers written

were false. —North American Acc. Ins. Co. v. Trenton, 99 S. W. 740. See 28 Cent. Dig. Insurance, §§ 999, 1000, 1011.

ESTOPPEL ON WAIVER AFFECTING RIGHT OF FORFEITURE.

43a. Though where insurer, with knowledge of a breach of a condition of warranty requires insured to furnish proof of loss, it will be held to have waived its right to insist on the defense arising out of such breach, yet, where a claim made by a member of an accident insurance association was voluntarily abandoned by him, the fact that before it was abandoned, in compliance with the association's demand, he incurred trouble and expense in making proof of his injury, ought not to be held to operate in favor of a claim by his beneficiary for his death as a waiver of such member's failure to pay dues. Travelers' Protective Ass'n v. Roth, 108 S. W. 1039, reversed. —Roth v. Travelers' Protective Ass'n of America, 116 S. W. 31, 102 Tex. 241. See 28 Cent. Dig. Insurance, §§1907-1916.

387—Construction and Operation of Express Waiver. (See 28 Cent. Dig. Insurance, §1025.)

44. Plaintiff applied to defendant's agent for a renewal policy, to which when delivered plaintiff objected because it did not provide for sick

from any circumstances which show that both parties understood that payment would not be required at the specified date.⁴⁵ A fully authorized agent has the same power in the matter of a forfeiture of a policy as an individual insurer might have if present.⁴⁶

Issuance and Delivery of Policy Without Objection.—An insurer is estopped from relying on a misrepresentation which would otherwise cause a forfeiture when it with knowledge of such misrepresentation issues the policy and receives the premium.⁴⁷

Failure to Assert Forfeiture or to Cancel Policy.—The statutes (Rev. St. 1914, Art. 4948) state explicitly that an insurance company cannot defend on the ground of misrepresentations where it does not, within ninety days after discovering the falsity of such representations, give notice to the insured.⁴⁸

Acceptance and Retention of Premiums.—Where the insurer accepts and retains the premiums with knowledge that it can declare a forfeiture of the policy, the forfeiture is waived.⁴⁹

benefits. The agent, after assuring plaintiff that he would be protected in the meantime, returned the policy and was informed by defendant's general agents that a new application would be required, and that on its receipt the old policy would be cancelled and a new one issued, knowing that unless the premium was paid on the next day the old policy would be forfeited according to its terms. The soliciting agent made no demand for the premium, and testified that he knew plaintiff was solvent and able to pay the premium when demanded. Defendant's managing agents retained the old policy, and did nothing until plaintiff was injured before a new policy was issued or the premium collected, when a forfeiture was claimed. Held, that such facts established a waiver of payment on the date specified in the policy.—*Continental Casualty Co. v. Bridges*, 113 S. W. 170. See 28 Cent. Dig. Insurance, §§1026-1030, 1035, 1040 and 1057.

45. A waiver may be inferred from any circumstances which show that both parties understood that payment of the premium would not be required at a specified date.—*Id.*

46. An estoppel against forfeiture of a policy for non-payment is the same where the agent has actual authority to solicit insurance, take and forward the application, deliver the policy and to collect the premium, and to continue negotiations for a proposed change in the policy as it would be in case of an individual insurer who is himself present and acting.—*Id.*

389—Issuance and Delivery of Policy Without Objection. (See 28 Cent. Dig. Insurance, §§ 1028-1031.)

47. Receiving the premium and issuing a policy with knowledge of the existence of other insurance estops insurer from relying on a misrepresentation by insured as to the existence of such additional insurance.—*Standard Life & Accident Ins. Co. v. Davis*, 45 S. W. 826.

390—Failure to assert Forfeiture or to Cancel or Rescind Policy. (See 28 Cent. Dig. Insurance, §§ 1037 to 1038.)

48. Under the direct provisions of Vernon's Sayles' Ann. Civ. St. 1914, art. 4948, an insurance company cannot defend on the ground of misrepresentations, where it did not within 90 days after discovering the falsity of the representations, give notice to plaintiff.—*Order of United Commercial Travelers v. Simpson*, 177 S. W. 169.

392—Demand, Acceptance, or retention of Premiums or Assessments. (See 28 Cent. Dig. Insurance, §§1041-1056, 1058-1070.)

49. Where an accident policy contains no stipulation that overdue premiums shall be considered as earned, and the company fails to exercise the power, given by the policy, to declare it void for nonpayment of premiums when due, but refuses a request that the policy be canceled and insured released from payment of such premiums, and receives the premiums, the forfeiture is waived.—*Continental Casualty Co. v. Jennings*, 99 S. W. 423. See 28 Cent. Dig. Insurance, 1041-1070.

RISKS AND CAUSES OF LOSS

Risks and Exceptions in Policy in General.—An insurer may stipulate against liability for certain risks and injuries and the courts have been called on frequently to decide whether certain injuries came within the prohibited exceptions or not. In one case where the policy excepted injuries sustained on a railway grade it was held that this did not include injuries received while insured was necessarily on a railway roadbed attempting to enter a train.⁵⁰ ⁵¹ Where a health policy specified an indemnity for confining illness and a subsequent clause provided for one fifth of such benefits for disability resulting from paralysis and other specified diseases both clauses were given effect, the latter being regarded in the nature of an exception.⁵² An exception prohibiting liability for injuries while hunting will not excuse liability to insured who was injured while bringing a log to make a fire while on a hunting expedition.⁵³ A railroad employee who pays an extra high premium on account of the hazard involved is entitled to the benefit of the exception allowing railroad employees to board a moving train though he had just before his accident become a farmer.⁵⁴ In construing exceptions the word "injury" is held to include fatal injuries.⁵⁵ Sunstroke is regarded as a form of personal injury rather than a disease.⁶⁰ A stipulation is valid excepting liability for ill-

RISKS AND CAUSES OF LOSS. (See 1 Cyc. § 248.)

451.—Risks and Exceptions in Policy in General. (See 28 Cent. Dig. Insurance, §§1171, 1172.)

50. An accident policy, excepting injuries while on a railway grade or roadbed, did not except injuries where insured was necessarily on a railway roadbed in attempting to enter a train.—*Travelers' Ins. Co. v. Harris*, 178 S. W. 816.

51. Insured, who was killed while attempting to attract the attention of a porter and get him to open the vestibule of a train, held not unnecessarily on the roadbed within the policy, excepting accidents occurring on a railway roadbed.—*Id.*

52. A health policy specified an indemnity for confining illness, and a subsequent clause provided for one-fifth of the specified benefits for disability from paralysis and other specified diseases. Held, that the clauses were both effective and not repugnant; the latter being in the nature of an exception or qualification of the former.—*General Accident Ins. Co. v. Hayes*, 113 S. W. 990. See 28 Cent. Dig. Insurance, §§ 1171-1172.

53. A stipulation in an accident policy, exempting the insurer from liability for injuries received by the insured while hunting, does not relieve

the insurer from liability for injuries sustained by the insured while helping to bring in a log to make a fire while on a hunting expedition.—*Wilkinson v. Travelers' Ins. Co.*, 72 S. W. 1016.

54. Where one at the time of taking accident insurance was a railroad employee and contracted to pay the higher premium demanded on account of the hazardous employment, he is entitled to the benefits of the exception in the policy allowing railroad employees to board a moving train, though before his accident he had ceased to be such an employee and was a farmer.—*Employers' Liability Assur. Corp. of London v. Rochelle*, 35 S. W. 869.

55. In an action on a policy of accident insurance, which provided for a reduction of the indemnity in case of any of the losses specified in certain parts of the policy, which included death where the "accidental injury" resulted from an intentional act, the word "injury" includes fatal injuries.—*Continental Casualty Co. v. Morris*, 102 S. W. 773. See 28 Cent. Dig. Insurance, §§ 1164-1187.

60. In an accident policy insuring against death through accidental means, which included death resulting from sunstroke independently of other causes "sunstroke" is to be deemed a form of personal injury rather than a disease.—*Bryant v. Continental Casualty Co.*, 182 S. W. 673.

ness contracted before the policy should have been in force thirty days.⁶¹ It is a good defense under a policy excepting injuries received while riding a motorcycle that the injuries were so received.⁶² A policy excepting liability for poisoning does not insure against death caused by the voluntary eating of spoiled oysters, whether the oysters were poisonous or not,⁶³ as the oysters were voluntarily taken into the stomach and death ensued therefrom.⁶⁴ In another case where the policy excepted injuries received from the "voluntary or involuntary" taking of poison, the term "involuntary" was held to include death from the accidental taking of an overdose of a poisonous medicine instead of a prescription left by insured's physician.⁶⁵ In a policy providing for non-liability of insurer for injuries received by insured while under the influence of intoxicating liquor, death of insured caused by the administration of morphine while suffering from delirium tremens will not make the insurer liable.⁶⁷

61. A health policy, dated September 19th, having excepted illness contracted before the policy should have been in force thirty days, held there could be no recovery for an illness contracted October 1st.—*American Nat. Ins. Co. v. Roberts*, 146 S. W. 326. See 28 Cent. Dig. Insurance, §§ 1171, 1172.

62. In an action on an accident policy which excepted injuries received while the insured was riding on a motorcycle, it is a good defense that the injuries were so received.—*International Travelers' Ass'n v. Peterson*, 183 S. W. 1196.

63. A policy insuring against bodily injuries sustained through external, violent and accidental means, but excepting from its operation, injuries resulting from poison or anything accidentally or otherwise taken, save by choking in swallowing, does not insure against death caused by the voluntary eating of spoiled oysters, whether the oysters were poisonous or not. Judgment 72 S. W. 1047, reversed.—*Maryland Casualty Co. v. Hudgins*, 76 S. W. 745, 97 Tex. 124.

64. In an action on an accident insurance policy, the petition alleged the cause of death to have been the accidental eating of spoiled oysters. The answer set up a stipulation in the policy excepting from its operation injuries resulting from poison or anything accidentally or otherwise taken and that if said oysters caused the death of insured it was because they contained ptomaine poison, "and therefore defendant is not liable." Held that the allegations of the petition, together with the answer, presented the defense that the oysters were voluntarily taken into the stomach, and that death ensued therefrom, though defendant did not specifically so plead, but alleged death caused by ptomaine poison.

Judgment 72 S. W. 1047, reversed.—*Maryland Casualty Co. v. Hudgins*, 76 S. W. 745, 97 Tex. 124.

65. Where an accident policy provided that the insurance did not cover an accident or death resulting wholly or partially from "voluntary or involuntary" taking of poison, the term "involuntary," as so used, was not limited to an act forced on insured, but included death from the accidental taking of an overdose of a poisonous medicine, instead of a prescription left by assured's physician.—*Kennedy v. Aetna Life Ins. Co.*, 72 S. W. 602.

66. An accident policy exempted the company from liability "for injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken." The death of the insured resulted from his eating unsound oysters, not knowing them to be unsound. They contained no poison whatever. Held, that the company was not exempted from liability.—*Maryland Casualty Co. v. Hudgins*, 72 S. W. 1047. Reversed, 76 S. W. 745.

67. An application for an accident policy provided that it should not cover any injury received while under the influence of intoxicating liquors or narcotics. The policy issued "in consideration of the warranties in the application" provided that it should not cover death resulting from medical treatment (except amputations necessitated by injuries), intoxication, or narcotics, or voluntary or involuntary taking of poison. The insured became intoxicated, and, when far towards delirium tremens, was taken for treatment to sanitarium, where a physician administered hypodermically several doses of morphine. From the immediate effect of the last dose insured died. Held, that the insurer was not liable.—*Flint v. Travelers' Ins. Co.*, 43 S. W. 1079.

What Constitutes An Accident.—Death from apoplexy resulting from over excitement is considered death by accident within the terms of a certificate, and not from disease.⁶⁸

External, Violent and Accidental Means of Death.—The Supreme Court has held that death by sunstroke to an insured while pursuing his ordinary vocation is within a policy insuring against sunstroke due to accidental means, reversing the Court of Civil Appeals.⁷¹ (For evidence supporting a finding that insured, who had symptoms of typhoid fever and who was injured in a railroad train, died through external and violent means, see Ann. 71a.)

External and Visible Signs of Injury.—It has been held that the "visible mark upon the body" required by an insurer need not be a bruise, contusion laceration, or broken limb, but may be any visible evidence of internal injury or any physical effect observable from an outward indication which reveals an injured condition of the internal organs.⁷²

Risks of Occupation.—The rule is that an insured, in changing from one occupation to one more hazardous carrying a higher premium rate, as provided in the policy, is entitled to recover only

449—What Constitutes Accident in General. (See 28 Cent. Dig. Insurance, § 1162.)

68. Death from apoplexy, resulting from excitement caused by witnessing a man being burned to death in an accidental fire, held death by accident, within the terms of an accident certificate, and not from disease.—International Travelers' Ass'n v. Branum, 169 S. W. 389.

455—External, Violent and Accidental Means of Death. (See 28 Cent. Dig. Insurance, §§ 1162-1169.)

69. An accident policy provided for indemnity in case of death sustained "through external violent, and accidental means." Insured ate two raw oysters before he discovered that they were unsound, and death resulted therefrom, though the oysters contained no poison of any description. Held, that his death was caused by accidental means.—Maryland Casualty Co. v. Hudgins, 72 S. W. 1047. Reversed 76 S. W. 745.

70. The death of a collector by sunstroke while pursuing his work on a hot day was not within an accident policy insuring against death by sunstroke due to external, violent, and accidental means.—Bryant v. Continental Casualty Co., 145 S. W. 636. Reversed 182 S. W. 673. See 28 Cent. Dig. Insurance, §§ 1166-1169.

71. Death of one by sunstroke, caused by exposure to the sun while pursuing his ordinary vocation, held due to accidental means, within a policy in-

suring against sunstroke due to accidental means.—Bryant v. Continental Casualty Co., 182 S. W. 673.

71a. In an action on an accident insurance policy, it appeared that the insured had been sick, with symptoms of typhoid fever; that, contrary to the advice of his physician, he took a railroad trip, and that, while at the water cooler, the car gave a sudden lurch, causing him to fall, and "hurt his back." The following day he suffered from internal troubles, which could only be accounted for by the presumption of a severe strain, his abdominal temperature became very high, he vomited blood, and on the second day died. Two physicians testified that there were no symptoms of typhoid fever subsequent to the accident, and that death was caused wholly by the injuries. Held sufficient to support a finding that death was caused through external and violent means, independent of insured's diseased condition.—Aetna Life Ins. Co. v. Hicks, 56 S. W. 87, 23 Tex. Civ. App. 74.

456—External and Visible Signs of Injury. (See 28 Cent. Dig. Insurance, § 1170.)

72. The "visible mark upon the body" required by a casualty insurance company need not be a bruise, contusion, laceration, or broken limb, but may be any visible evidence of internal injury or any physical effect observable from an outward indication which reveals an injured condition of the internal organs.—Royal Casualty Co. v. Nelson, 153 S. W. 674. 28 Cent. Dig. Insurance, § 1170.

the amount of insurance which the premiums paid will buy under the more hazardous classification.⁷³

Voluntary or Unnecessary Exposure to Danger.—It is a prerequisite that before recovery on a policy can be denied on the theory that deceased voluntarily exposed himself to unnecessary danger, it must be shown that he apprehended the danger and entered the position of peril with the intention of exposing himself.⁷⁴ Voluntary exposure to unnecessary danger or obvious risks within the meaning of a policy, has been defined as a conscious or intentional exposure to known risk, and not a mere inadvertent or accidental one.⁷⁵ Death of insured does not result as a matter of law, from voluntary exposure to unnecessary or obvious danger, so as to limit the insurer's liability, though an insured, whose business was repairing electric light wires, while "threshing" a pecan tree, fell to the ground and was killed.⁷⁵

Intentional Injuries.—An accident policy may stipulate for exemption from liability for intentional injuries and the loss of an eye resulting from a blow struck by another with intent to injure but not to put out the eye is within the meaning of such a clause.⁷⁷ In another case an insured who made an unjustifiable assault on another, was struck by the latter and severely injured, and the insurer was held not liable where the policy exempted it from liability for "injuries intentionally inflicted." Under a

Risks of Occupation.

73. An accident policy provided that, if insured was injured while engaged in any occupation classed as more hazardous than that stated in his application, the benefit should be such sum as the premiums paid would purchase at the rate fixed by the company for such increased hazard, and an application stated that insured was a blacksmith employed by a railroad company. It was shown that, at the date of the application, insured also acted as a switchman and car coupler which occupations were classed as more hazardous than blacksmithing, and that he was killed while attempting to uncouple cars. Held, that if deceased, at the time of the death, was working as a blacksmith and as a car coupler and switchman and was killed while acting as car coupler, the recovery should be limited according to the increased hazard.—*Standard Life & Accident Ins. Co. v. Taylor*, 34 S. W. 781, 12 Tex. Civ. App. 386.

461—**Voluntary or Unnecessary Exposure to Danger.** (See 28 Cent. Dig. Insurance, §§ 1180, 1181.)

74. Before recovery on an accident policy can be denied on the theory that deceased voluntarily exposed himself to unnecessary danger, he must have

apprehended the danger and entered the position of peril with the intention of exposing himself.—*Travelers Ins. Co. v. Harris*, 178 S. W. 816.

75. Death of insured does not result, as matter of law, from voluntary exposure to unnecessary and obvious danger, so as to limit the company's liability, though insured, whose business is the repairing of the wires of electric lines, is at the time of the accident out on a limb of a pecan tree 50 feet from the ground, knocking off nuts with a pole.—*Continental Casualty Co. v. Jennings*, 99 S. W. 423. See 28 Cent. Dig. Insurance, §§ 1180, 1181.

76. "Voluntary exposure" to unnecessary danger or obvious risks, within the meaning of an accident policy, is a conscious or intentional exposure to a known risk, and not a mere inadvertent or accidental one.—*Continental Casualty Co. v. Deeg*, 125 S. W. 353.

464—**Intentional Injuries.** (See 28 Cent. Dig. Insurance, § 1184.)

77. Loss of an eye from a blow struck by another, with intent to injure, but not with intent to put out an eye, is within the clause of an accident policy exempting the insurer from liability for intentional injuries.—*Travelers' Protective Association of America v. Weil*, 91 S. W. 886. See 28 Cent. Dig. Insurance, § 1184.

similar clause the insurer was not held liable where the insured was killed.⁷⁹

Proximate Cause of Injury or Death.—Ordinarily the accident must be the proximate cause of the injury or death. However, recovery was had where the accidental injury caused rheumatism and this produced death.⁸³ Other factors entering in oftentimes prevent recovery as where the diseases of insured caused the paralysis or concurred with the accidental injury in causing it and insurer was held not liable although if the accidental injury alone had caused the paralysis it would have been liable.⁸¹ The policy in the latter case provided that the paralysis should be the "direct, independent and exclusive" result of the injury.⁸⁰ Although the insured may be affected with disease, still if an accidental injury might have occurred and caused the death of a man in good health the company was liable, even though the policy stipulated for non-liability where insured was affected with disease.⁸²

EXTENT OF LOSS AND LIABILITY OF INSURER

Total Disability.—It has been held that total disability to perform the duties of insured's occupation does not necessarily mean physical inability to perform such duties.⁸⁵ However, a provision that prevents the insured from performing any and every kind of duty pertaining to his occupation requires only such disability as prevents the performance of any substantial part of his duties.⁸⁶

78. Plaintiff sued on an accident policy which provided that, "In case of injuries intentionally inflicted upon himself by the insured or by any other person, the measure of the company's liability shall be a sum equal to the premium paid." While plaintiff was making an unjustifiable assault, the assaulted person, to protect himself, struck and injured plaintiff so that he was disabled for several weeks. Held, that the injury was intentionally inflicted by another person within the meaning of the policy.—*Fidelity & Casualty Co. of New York v. Smith*, 71 S. W. 391.

79. Under a provision in an accident insurance policy that "this insurance does not cover death resulting from intentional injuries (inflicted by insured or any other person)," the company is not liable for death by murder.—*Johnson v. Travelers' Ins. Co.*, 39 S. W. 972.

466—**Proximate cause of injury or Death.** (See 28 Cent. Dig. Insurance, §§ 1178, 1186.)

80. Under provisions of accident insurance policy, the fact that insured was suffering from disease contributing to his paralysis would prevent the
35—Ins.

paralysis from being the "direct, independent" and exclusive result of the fall, though the fall hastened the paralysis.—*Western Indemnity Co. v. MacKechnie*, 185 S. W. 615.

81. Under accident policy, insurer held not liable where insured's diseases caused the paralysis or concurred with the insured's fall in causing it, but liable if the fall alone caused the paralysis.—*Id.*

82. A condition in an accident insurance policy preventing recovery for accident or death occurring while the insured was affected with disease or was engaged in voluntary over-exertion or voluntary exposure to unnecessary danger did not defeat the right of recovery for death occurring while insured was ill, and unnecessarily taking a trip by rail, contrary to the advice of his physician, but which was caused by an accident entirely independent of insured's weak condition, and which might have occurred to a man in good health.—*Aetna Life Ins. Co. v. Hicks*, 56 S. W. 87; 23 Tex. Civ. App. 74.

83. Recovery can be had on an accident policy for death where the accidental injury causes rheumatism, and this produces death.—*Travelers' Ins. Co. v. Hunter*, 70 S. W. 798.

A very late case holds that "one need not be absolutely disabled to do some acts usually done by him in carrying on his occupation to be totally disabled within an accident policy."⁸⁸ The "loss of one arm" is construed to cover a paralyzed arm.⁸⁴ It is reversible error to instruct the jury, in a case where the question of the total disability of the insured was contested, that if the injury continuously disabled and prevented plaintiff from performing any and every duty essential to his occupation in a manner "reasonably as effective" as he would otherwise have performed it, he was entitled to recover.⁸⁷ Where, under a certificate stipulating that the amount thereof should be paid to the member in the event of his "total and permanent disability and to the beneficiary in the event of his death," a member became sick while in good standing and died a few months later, being unable during his sickness to perform any of the duties of his occupation, it was held that he was totally disabled within the meaning of the certificate.⁸⁹ Even though the by-laws of an association provide for payment only when the insured should receive an accidental injury immediately and wholly disabling him from transacting any kind of business, the fact that the insured, a traveling salesman

EXTENT OF LOSS AND LIABILITY OF INSURER. (SEE 1 CYC. 269.)

524—Total Disability. (See 28 Cent Dig. Insurance, § 1310.)

84. "Loss of one arm" in an insurance policy covered total disability of an arm by an injury causing paralysis.—*Eminent Household of Columbian Woodmen v. Hancock*, 174 S. W. 657.

85. Total disability to perform the duties of insured's occupation, for which an accident policy provided certain indemnities, held not necessarily physical inability to perform the duties.—*Fidelity & Casualty Co. v. Joiner*, 178 S. W. 806.

86. A provision for indemnity for total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation requires only such disability as prevents the performance of any substantial part of his duties.—*Hefner v. Fidelity & Casualty Co. of New York*, 160 S. W. 330. 28 Cent. Dig. Insurance, § 1310.

87. In an action on an accident policy which provides for an indemnity for injuries which should, independently of other causes, immediately and wholly disable the assured from every duty pertaining to his occupation, the issue having been raised that for several weeks after injuries received the plaintiff was only partially disabled, it was reversible error to instruct that,

if the injury continuously disabled and prevented plaintiff from performing any and every duty essential to his occupation in a manner "reasonably as effective" as he would otherwise have performed it, he was entitled to recover.—(1899) *Fidelity & Casualty Co. of New York v. Getzendanner*, 53 S. W. 838, 22 Tex. Civ. App. 76, 23 Tex. Civ. App. 135, judgment affirmed on rehearing, 55 S. W. 179, 22 Tex. Civ. App. 76.

88. One need not be absolutely disabled to do some acts usually done by him in carrying on his occupation, to be totally disabled, within an accident policy.—*Commonwealth Bonding & Casualty Insurance Co. v. Bryant*, 185 S. W. 979.

89. A mutual benefit certificate stipulated that the amount thereof should be paid to the member in the event of his "total and permanent disability," and to the beneficiary in the event of his death." The member became sick while in good standing. He suffered from heart disease which resulted in his death a few months later. During his illness he was unable to perform the duties of his avocation, or do any other work. The physician who treated him stated that he considered his illness fatal from the beginning. Held, that the member was totally and permanently disabled within the meaning of the certificate.—*Brotherhood of Railway Trainmen v. Dee*, 108 S. W. 492, judgment reversed 111 S. W. 396, 101 Tex. 597. See 28 Cent. Dig. Insurance, §§ 1955, 1957-1959.

continued on his journey after his accident, will not bar recovery.⁹⁰

Particular Injuries Specified in Policy.—An insured is entitled to double indemnity under a policy allowing same if he is injured on a public conveyance or a common carrier, if he is injured while riding in an automobile which serves all members of the public.⁹¹ The loss of entire sight has been construed to mean not total blindness but it is sufficient if insured has practically lost the entire sight of the eye.⁹² Where, under a certificate entitling the member to one-fourth of his benefit if he should "lose a foot" does not mean a severance of the foot from the body but means the permanent loss of the use of the foot.⁹³ Where, under the constitution of a brotherhood, enumerating disabilities on which a member may recover and providing that claim for any other disability is addressed merely to the benevolence of the brotherhood, such other claim, being rejected, there is no right of recovery.⁹⁴

Continuous and Permanent Disability.—The Supreme Court has held that under a policy providing for a specified payment if insured should receive personal injury "at once resulting in continuous" total inability to engage in any business, the insurer was not liable where there was no continuous total inability to engage in business from the time of injury until insured's death, even though the disability occurred "at once" and the insured later died from the effects.⁹⁵

90. Where the by-laws of an accident insurance association provided for payment only where an insured should receive accidental injury immediately and wholly disabling him from transacting any kind of business, the fact that the insured, a traveling salesman, continued a journey after his accident will not bar recovery.—*International Travelers' Ass'n v. Bosworth*, 156 S. W. 346. 28 Cent. Dig. Insurance, §§ 1955, 1957-1959.

527—**Particular Injuries Specified in Policy.** See 28 Cent. Dig. Insurance, §§ 1312, 1313.)

91. An automobile of a liveryman who serves all members of the public is the vehicle of a common carrier, within an accident policy providing for a double indemnity to one injured in or on a public conveyance of a common carrier.—*Fidelity & Casualty Co. v. Joiner*, 178 S. W. 806.

92. In an accident policy providing that, for loss of entire sight of the eye, the insured shall receive not exceeding \$1,000, the word "entire" does not mean total blindness; but it is sufficient if the insured had practically lost the entire sight of the eye.—*International Travelers' Ass'n v. Rogers*, 163 S. W. 421. See 28 Cent. Dig. Insurance, §§ 1312, 1313.

93. A beneficial certificate entitling the member to one-fourth of his ben-

efit if he should "lose a foot," does not mean that there must be a severance of the foot from the body, but means a permanent loss of use of the foot; the language "loss of a foot" in common parlance meaning the loss of the use of that member.—*Modern Order of Praetorians v. Taylor*, 127 S. W. 260. 28 Cent. Dig. Insurance, §§ 1955, 1957.

94. Under the constitution of a brotherhood enumerating disabilities giving a member right of recovery on his beneficiary certificate, and providing that claim for any other disability is addressed merely to the benevolence of the brotherhood, such other claim, being rejected, gives no right of recovery.—*Rieden v. Brotherhood of Railroad Trainmen*, 184 S. W. 689.

528—**Continuous or Permanent Disability.**

95. Insured was injured January 31, 1903. He stopped work because of the injury for 15 minutes, and then continued to work until March 25, 1903, and died April 6th following from the injury. An accident policy provided for a specified payment if insured should receive personal injury "at once resulting in continuous" total inability to engage in any business, etc., necessarily resulting independently of all other causes in certain results including illness, loss of members and loss of life. Held, that while the disability

Limitation of Liability by Provisions of Policy.—The amount of recovery is often limited in a policy to provide for certain exigencies or exceptions. The insurer may limit its liability for recovery in cases where the injury is intentionally inflicted on insured by any other person, even though insured is paying a higher premium.⁹⁷ In another case of the same character the insurer limited its liability to one-fifth of the amount otherwise payable where the injury was inflicted by another and where the insured was assassinated this limitation prevailed.⁹⁸

Classification of Risk.—To provide for the particular hazards of different occupations insurers often stipulate that if an insured is killed or injured in an occupation more hazardous than the one under which they are insured the liability of the insurer should be for such part of the principal as the premium paid would purchase at the rates fixed for such more hazardous occupation, so that a sheep farmer who is killed while hunting will render the company liable only for the occupation of a hunter.⁹⁹

occurred "at once," to wit, at the time the accident happened, there was no continuous total inability to engage in business from the time of the injury to insured's death, and that the insurer was therefore not liable. Judgment 99 S. W. 877, reversed.—*Continental Casualty Co. v. Wade*, 105 S. W. 35. See 28 Cent. Dig. Insurance, § 1314.

96. Plaintiff's son was injured on January 31, 1903, but after a short time continued his work until March 25, 1903, when he died in consequence of the injury. An accident policy provided for a certain payment to plaintiff if the insured should receive personal injuries "at once resulting in continuous total inability to engage in any business," etc., and necessarily resulting independently of all other causes in certain results to the insured, one of which was the loss of his life from injury. Held, that the clause in the policy that the injury must result at once in a continuous total inability to engage in any business related to such injuries as resulted only in the loss of time by the insured where compensation was provided by the policy for such loss, and not injuries resulting in death, and that the fact that insured's injuries did not at once compel him to quit his work did not bar recovery on the policy in the event of his death.—*Continental Casualty Co. v. Wade*, 99 S. W. 877. Reversed, 105 S. W. 35. See 28 Cent. Dig. Insurance, § 1315.

530.—**Limitation of Liability by Provisions of Policy.** (See 28 Cent. Dig. Insurance, §§ 1309, 1316, 1317.)

97. Where an accident policy provided that, in case of injuries intentionally inflicted on assured by any other person, the measure of insurer's liability should be a sum equal to the

premium paid, which should be in full liquidation of all claims under the policy, the fact that deceased was a policeman, and paid a higher rate for insurance by reason of such fact, which was stated in the policy, did not, in the absence of fraud, prevent the insurer from insisting on the enforcement of such clause; deceased having been intentionally shot by a person whom he was attempting to arrest in the performance of his duty.—*Grimes v. Fidelity & Casualty Co.*, 76 S. W. 811, 33 Tex. Civ. App. 275. See Cent. Dig. vol. 28, cols. 2168, 2169, §§ 1316, 1317.

98. Accident insurance policy for \$400 providing that for injury intentionally inflicted by any person other than insured the liability was limited to one-fifth the amount otherwise payable construed, and held that, upon the assassination of assured, the beneficiary was entitled to recover only \$80.—*General Accident, Fire & Life Assur. Corporation v. Stedman*, 153 S. W. 692. 28 Cent. Dig. Insurance, §§ 1309, 1317.

531.—**Classification of Risk.** See 28 Cent. Dig. Insurance, § 1318.

99. Where one insured as a sheep farmer against accident by a policy classifying as more hazardous the occupation of a hunter, and stipulating that, where an injury occurred while doing any act pertaining to any occupation classified as more hazardous, the liability of insurer should be for such part of the principal as the premium paid would purchase at the rates fixed for such more hazardous occupation, was killed while hunting for recreation, insurer was liable only for the occupancy of a hunter.—*Lane v. General Accident Ins. Co.*, 113 S. W. 324. See 28 Cent. Dig. Insurance, § 1318.

NOTICE AND PROOF OF LOSS

Persons to Whom Notice or Proof of Loss May Be Given or Made.

—The statutes (Rev. St. 1914, Art. 5714) provide that notice of claim for damages required by contract may be given to the nearest or other convenient local agent of a company requiring same. Therefore, notice given to a local agent of a casualty company was sufficient.¹⁰⁰

Time for Notice and Proof.—The statutes make a stipulation fixing the time within which notice of a claim for damages shall be given at less than ninety days, void.¹⁰⁵ This has been made applicable to accident insurance companies (Rev. St. 1914, Art. 4733) and therefore a provision in a casualty policy requiring notice of injury within ten days is void.¹⁰¹ A delay of ten months in giving notice is unreasonable per se, under a clause in a policy requiring notice to be given as soon as may be reasonably possible.¹⁰² It is a condition precedent that notice shall be given as soon as may be reasonably possible under such a requirement.¹⁰³ Even though the physicians who attended insured attributed his condition to disease and not to accident, does not excuse his failure to give the insurer notice as soon as reasonably possible as required by the policy.¹⁰⁴ Under Article 5714 of the Revised Statutes of 1914, a stipulation requiring report from attending physician every thirty days is void.¹⁰⁶ A stipulation in a policy requiring "immediate

NOTICE AND PROOF OF LOSS. (SEE 1 CYC. 274.)

532—Persons to Whom Notice or Proof of Loss May Be Given or Made. (See 28 Cent. Dig. Insurance, § 1327.)

100. Under Rev. St. 1895, Art. 3379, as amended by Acts 1907, ch. 129, § 1, providing that a notice of claim for damages required by contract may be given to the nearest or other convenient local agent of the company requiring the same, notice of injury given to the local agent of a casualty company was sufficient.—*Royal Casualty Co. v. Nelson*, 153 S. W. 674. See 28 Cent. Dig. Insurance, § 1327.

533—Time for Notice and Proof. (See 28 Cent. Dig. Insurance, §§ 1328-1336.)

101. Under Rev. St. 1895, Art. 3379, as amended by Acts 1907, ch. 129, § 1, making a stipulation fixing the time within which notice of a claim for damages shall be given at less than 90 days void, made applicable to accident insurance companies by Rev. Civ. St. 1911, Art. 4733, a provision of a casualty policy requiring notice of injury within 10 days was void.—*Royal Casualty Co. v. Nelson*, 153 S. W. 674. See 28 Cent. Dig. Insurance, §§ 1328-1336.

102. A delay of 10 months in giving an accident insurance company notice of an accident is unreasonable per se, under a clause of the policy requiring notice to be given as soon as may be reasonably possible.—*Hefner v. Fidelity & Casualty Co. of New York*, 160 S. W. 330. See 28 Cent. Dig. Insurance, §§ 1328-1336.

103. Compliance with the requirement that notice be given as soon as may be reasonably possible is a condition precedent to recovery under the policy.—*Id.*

104. The fact that physicians who attended a person accidentally injured attributed his condition to disease, and not to the accident, does not excuse his failure to give the company notice of the accident as soon as reasonably possible, as required by the policy.—*Id.*

105. Under Vernon's Sayles' Ann. Civ. St. 1914, Art. 5714, a stipulation in a health insurance policy requiring notice within 90 days from the beginning of illness was void.—*First Texas State Ins. Co. v. Hare*, 180 S. W. 282.

106. Under Rev. St. 1911, Art. 5714, provision of policy, insuring against sickness, requiring report from attending physician every 30 days, held void.—*First Texas State Ins. v. Hernon*, 184 S. W. 283.

notice in writing" is in conflict with the statute and therefore void.^{107 108}

Inspection of Person of Insured After Injury or Death.—Before a body can be exhumed for examination the right must be clearly expressed in the policy.¹¹⁰ The right must be exercised at once and upon showing that fraud or mistake will be shown.¹¹² Where a policy gave the insurer the right to an autopsy but it was not demanded until six weeks after interment the insurer could not insist on the right, especially where the only dispute was whether the insured's neck was broken or dislocated.¹⁰⁹ Where the insurer pleaded that these two conditions were the same thing it could not base its right to an autopsy on such conflicting conditions.¹¹¹

Proofs of Death or Injury to Insured.—Where the proofs first furnished the insurer sufficiently showed his injury and disability, rendering the company liable on the policy, it was only necessary for insured in furnishing additional proof, to show the continuation of such total disability during the remaining life of the policy.¹¹³

Misrepresentations Shall Not Constitute Defense, Unless Shown—Statutory Provisions.—Any provision in a policy which provides that the same is void or voidable if any misrepresentations or false statements be made in proofs of loss or of death, shall be

107. An accident insurance policy provided that "immediate notice in writing of any accident and injury on account of which claim is to be made shall be given said company," with full particulars and name and address of insured. *Sayles' Ann. Civ. St. 1897, Art. 3379, amended by Gen. Laws 1907, p. 241, ch. 129*, provides that no stipulation in any contract requiring notice to be given in any claim for damages, as a condition precedent to a right to sue thereon, shall ever be valid unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than 90 days shall be void. Held, that the stipulation in the policy, if in conflict with the statute, is void. —*Aetna Life Ins. Co. of Hartford, Conn., v. Griffin*, 123 S. W. 432.

108. Rev. St. Art. 3379, reads: "No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon, shall ever be valid unless such stipulation is reasonable, and any stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void." Held, that a clause in an insurance policy requiring the insured to give immediate notice of accident or injury was of no force, and the policy must be construed as though no time was specified. —*Maryland Casualty Co. v. Hudgins*, 72 S. W. 1047. Reversed, 76 S. W.-745.

542—**Inspection of Person of Insured After Injury or Death.** (See 28 Cent. Dig. Insurance, § 1356.)

109. Where the policy gave the insurer the right to an autopsy, but it was not demanded at the time of death, the insurers could not six weeks after interment insist on such right, especially where the only dispute was whether his neck was broken or dislocated by the accident. —*American Nat. Ins. Co. v. Nuckols*, 187 S. W. 497.

110. To give the insurer the right of exhumation of the insured's body, such right must be clearly expressed in no uncertain words in the policy. —*Id.*

111. Where insurer pleaded that doctor's conflicting statements that insured died from broken neck, and from dislocated neck, meant the same thing, it could not base its right to an autopsy on such conflicting statements. —*Id.*

112. Insurer's right to exhume insured's body, if covered by right to autopsy, can be exercised only at once and upon showing that it will show fraud or mistake. —*American Nat. Ins. Co. v. Nuckols*, 187 S. W. 497.

543—**Proofs of Death or Injury to Insured.** (See 28 Cent. Dig. Insurance, § 1347.)

113. Where proofs first furnished by insured to an accident insurance company sufficiently showed his injury and disability, rendering the company

of no effect. Such provisions shall not constitute any defense unless it is shown upon the trial that the false statements made in such proofs of loss or death were fraudulently made and misrepresented a fact material to the question of the liability of the insurer upon the contract sued on and that such insurer was thereby misled and caused to waive or lose some valid defense to the policy. (Art. 4949, Rev. St. 1914.)

Misstatements in Notice and Proof.—Misstatements in notice and proof as to how the accident occurred will not relieve the company from liability where it is responsible under the true facts.¹¹⁴

Estoppel or Waiver as to Notice and Proofs.—An insurer may waive formal proofs of loss temporarily where it had stated that they were not necessary at that time as it was looking into the matter, but this waiver may be subsequently revoked.¹¹⁵

Denial of Liability.—The general rule is that proof of loss is waived when the insurer denies all liability under the policy.¹¹⁹ The insurer also waives all objections to the sufficiency of the proofs of loss presented when it refused payment on the sole ground that the insured was engaged in an occupation more hazardous than that in which he was insured.¹¹⁶ When a company refuses to pay benefits under a health policy because the final proof showed that insured had not been confined for the required period, it waives any objection to the sufficiency of the proofs although of course not admitting their truth.¹¹⁷ However, the general rule does not apply when the notice and proof of accident are made after the time prescribed in the policy.¹¹⁸

liable on its policy, it was only necessary for insured, in furnishing additional proof, to show the continuation of such total disability during the remaining life of the policy.—*Woodall v. Pacific Mut. Life Ins. Co.*, 79 S. W. 1090.

552—Misstatements or Omissions. (See 28 Cent. Dig. Insurance, §1358.)

114. Misstatements in the notice of injury and proof of death as to how the accident occurred do not relieve the company from liability where it is responsible under the true facts.—*Continental Casualty Co. v. Jennings*, 99 S. W. 423.

554—Estoppel or Waiver as to Notice and Proofs or Defects and Objections. (See 28 Cent. Dig. Insurance, §§ 1367-1409.)

115. Where defendant wrote to a beneficiary under one of its policies that it had received no formal notice of his claim beyond a request for a claim blank on which to make formal proofs of loss, and that it had replied that it was looking into the matter, and did not consider it necessary to have the formal proofs made, as it could do this in the course of the in-

vestigation, the waiver admitted operated simply as a temporary one, while the investigation was pending, and might subsequently be revoked.—*Allibone v. Fidelity & Casualty Co.*, 32 S. W. 569.

555—(A) Denial of Liability. (See 28 Cent. Dig. Insurance, §§ 1391, 1392.)

116. Where the company after receiving proofs of death, refused payment on the sole ground that insured was engaged in an occupation more hazardous than that in which he was insured, it thereby waived objections to sufficiency of the proofs.—*Standard Life & Accident Ins. Co. v. Koen*, 33 S. W. 133, 11 Tex. Civ. App. 273.

117. By refusing to pay benefits payable in cases of confining sickness because the final proof showed that assured had not been confined for the required period, insurer waived any objection to the sufficiency of the proofs as conforming to the requirements of the policy, but did not admit the truth of the statements in the proofs.—*General Accident Ins. Co. v. Hayes*, 113 S. W. 990. See 28 Cent. Dig. Insurance, §§ 1391, 1392.)

118. Denial of liability by an accident insurance company and refusal

Estoppel of Insurer to Deny Authority of Its Agent After Adjustment of Loss.—Where the agent of the company was notified of the death and viewed the body and said he was satisfied and that the loss would be paid, and the adjuster recognized his authority until suit was brought and then denied it, the company was estopped to deny the agency.¹²⁰

RIGHT TO PROCEEDS

Designation of Beneficiary.—Where the policy designates the beneficiary by name and states that she is the daughter of insured and it was shown that insured had a daughter bearing that name, parol evidence was not admissible to show that the wife of the insured was the beneficiary even though she bore the same name.¹²¹

May Change Name of Beneficiary.—Any member of a mutual assessment corporation shall have the right at any time with the consent of the company, to change the beneficiary in his policy or certificate without requiring the consent of the beneficiary. The corporation may give consent in accordance with the by-laws. (Art. 4806, Rev. St. 1914.)

Exemption of Proceeds.—The proceeds of a claim for loss of wages by the insured while he was incapacitated from illness were held not to be current wages and exempt from garnishment, even though the premiums on the policy were paid by exempt wages.¹²²

PAYMENT OR DISCHARGE, CONTRIBUTION AND SUBROGATION

Time of Payment.—The rule is that insured is not entitled to payment for a total disability claim until the period of disability

to pay its policy will not waive notice of the accident required to be given it, when made after the time within which the notice and proof of accident can be made.—*Employers Liability Assurance Corp. of London v. Rochelle*, 35 S. W. 369.

119. Proof of loss is waived when the insurer denies all liability under the policy.—*Commonwealth Bonding & Casualty Ins. Co. v. Knight*, 185 S. W. 1037.

561—(B) Adjustment of Loss and Negotiations for Settlement.

120. Where the company agent was notified of death and viewed the body and said he was satisfied and that loss would be paid, and the adjuster recognized his authority until suit was brought, and then denied it, the company was estopped to deny the agency.—*American Nat. Ins. Co. v. Nuckols*, 187 S. W. 497.

RIGHT TO PROCEEDS.

584—Designation of Beneficiary. (See 28 Cent. Dig. Insurance, §§ 1461-1474, 1479, 1482, 1485.)

121. Where an accident policy designates the beneficiary by name, and states that she is the daughter of insured, and it was shown that insured had a daughter bearing that name, parol evidence was inadmissible to show that the wife of insured, bearing the same name, was beneficiary.—*Standard Life & Accident Ins. Co. v. Taylor*, 34 S. W. 781, 12 Tex. Civ. App. 386.

122. Proceeds of a claim under an accident insurance policy for loss of wages by the insured while he was incapacitated from illness, held not "current wages," exempt from garnishment by Const. Art. 16, Par. 28 and Rev. Civ. St. 1911, Arts. 3785, 3788, though the premiums on the policy were paid by exempt wages.—*Mitchell v. Western Casualty & Guaranty Ins. Co.*, 163 S. W. 630.

has ceased.¹²³ If a policy does not specify when an accrued indemnity is payable, the liability accrues when the accident accrues and payment should be made when proof of this liability is made to the insurer.¹²⁴

Interest on Amount of Loss.—Although the liability accrues when the accident occurs payment should be made when proof of this liability is made to the insurer and interest should be allowed from the date such proof is furnished.¹²⁶ Under the statute (Rev. St. 1914, Art. 4977) six per cent is made the legal rate of interest on written contracts and this is recoverable on the amount contracted to be paid in an insurance policy.¹²⁵

Losses Shall Be Paid Promptly—Statutory Regulations.—In all cases where a loss occurs and the insurance company liable therefor shall fail to pay the same within thirty days after demand, such company shall be liable to pay the insured in addition to the amount of loss twelve per cent damages on the amount of such loss together with reasonable attorney's fees for the collection of such loss. (Art. 4746, Rev. St. 1914.)

Damages for Refusal of Payment.—A casualty insurance company carrying on business on the assessment or annual premium plan under Revised Statutes, Title 71, is subject to a penalty of twelve per cent damages on the amount of the loss together with reasonable attorney's fees when it shall fail to pay the holder of a policy the amount of same within thirty days after demand therefor.¹²⁷ However, the petition must allege specifically a demand and refusal to pay within the statutory time.¹²⁸ The Supreme Court

PAYMENT OR DISCHARGE, CONTENTION AND SUBROGATION.

597—Time of Payment. (See 28 Cent. Dig. Insurance, § 1493.)

123. Under an accident policy providing for payment for total disability due to bodily injuries, held, that insured was not entitled to payment until the period of disability had ceased.—Commonwealth Bonding & Casualty Co. v. Knight, 185 S. W. 1037.

124. Under an accident insurance policy not specifying when an accrued indemnity should be payable, the liability accrues when the accident occurs, and payment should be made when proof of this liability is made to the insurer.—American Nat'l Ins. Co. v. Fulghum, 177 S. W. 1008.

598—Interest on Amount of Loss. (See 28 Cent. Dig. Insurance, § 1494.)

125. Under Rev. St. 1911, Art. 4977, making 6 per cent, the legal interest on sums due and payable under written contracts, interest is recoverable upon the amount contracted to be paid in an insurance policy.—American Nat. Ins. v. Fulghum, 177 S. W. 1008.

126. Under an accident insurance policy not specifying when an accrued indemnity should be payable, the liability accrues when the accident occurs, and payment should be made when proof of this liability is made to the insurer, and interest should be allowed from the date such proof is furnished.—Id.

600—Damages for Refusal of Payment. (See 28 Cent. Dig. Insurance, § 1498.)

127. A casualty insurance company, carrying on business on the assessment or annual premium plan, under Rev. St. Tit. 71, is not exempt from penalties prescribed by Article 4746, which is a part of chapter 2, since Article 4957 only exempts it from the provisions of chapter 15.—International Travelers' Ass'n v. Branum, 169 S. W. 389.

128. Act 31st Leg. ch. 108, § 35, making an insurer failing to pay a loss liable for damages and attorneys fees, requires the petition to specifically allege a demand and refusal to pay within the statutory time.—General Accident, Fire & Life Assur. Corporation v. Lacy, 151 S. W. 1170. See 28 Cent. Dig. Insurance, § 1498.

held in the 105th S. W. that this provision for penalties in the statute (Rev. St. 1895, Art. 3071) did not apply to accident insurance companies.^{129 129a} However, the case first cited above is a later case, appearing in the 169th Southwestern.

Subrogation of Insurer.—It is held that an insurer is not entitled to subrogation to the rights of insured, who has been injured through the negligence of a third person, to recover from the latter for the injuries received.¹³⁰

Reduction of Loss by Insurance.—In a suit for damages against a railroad evidence that injured passenger held an accident insurance policy at the time of his injury introduced by the defendant in mitigation, was properly excluded.¹³¹

ACTIONS

Defenses in General.—"Legal defenses" as used in the Revised Statutes of 1914, Article 4807, providing that accident insurance companies shall be liable for the payment of the amount specified in their policies in full, subject to any legal defenses, mean those which defeat a recovery.¹³² Although an insurer interposed defenses to a policy, if it tenders into court the amount fixed in the policy for partial disability, it cannot question its liability on any ground for the amount so tendered.¹³³ It is no defense to a policy that an insured had settled with his employer for damages and released it from liability for his accident, on the theory that the in-

129. Rev. St. 1895, Art. 3071, provides for the imposing of a penalty of 12 per cent. and attorney's fees for failure to pay a life or health policy within the time specified. Held, that this does not include accident insurance policies.—Continental Casualty Co. v. Wade, 99 S. W. 877, reversed, 106 S. W. 35. See 28 Cent. Dig. Insurance, 1498.

129a. The statute authorizing a recovery of 12 per cent damages and attorneys fees where a "life or health insurance company" fails to pay the policy does not apply to accident insurance.—Lane v. General Accident Co., 113 S. W. 324. See 28 Cent. Dig. Insurance, §§ 1805, 1806.

605—Subrogation of Insurer. (See 28 Cent. Dig. Insurance, §§ 1504-1516.)

130. An insurer against accidents is not entitled to subrogation to the rights of assured, who has been injured through the negligence of a third person, to recover from the latter for the injuries so sustained.—Aetna Life Ins. Co. v. J. B. Parker & Co., 72 S. W. 168, 580.

Reduction of Loss by Insurance.

131. Evidence that injured passenger held an accident insurance pol-

icy at the time of his injury was properly excluded.—Texas Cent. R. Co. v. Cameron, 149 S. W. 709.

ACTIONS. (SEE 1 CYC. 279.)

615—Defenses in General. (See 28 Cent. Dig. Insurance, §§ 1530, 1532, 1534.)

132. Under Rev. St. Art. 4807, providing that accident insurance companies shall be liable for the payment of the amount specified in their policies in full, subject to any legal defenses, the term "legal defenses" means those which defeat a recovery.—International Travelers Assn v. Branum, 169 S. W. 339.

133. Where an insurer tendered to the insured and paid into court a sum in full of all claims under an accident policy, which sum was the amount fixed in the policy for a partial disability, it could not question its liability on any ground to the amount so tendered and paid, though it interposed defenses to the policy.—Wilkinson v. Travelers Ins. Co., 72 S. W. 1016.

surer was entitled to be subrogated to insured's action against the employer, identity of damage in the two causes of action being wanting.¹³⁴

Venue of Suits—Fire, Marine, Life and Accident Insurance Companies—Statutory Regulations.—Suits against fire, marine or inland insurance companies may be commenced in any county in which any part of the insured property was situated. Suits against life and accident insurance companies or associations may be commenced in the county in which the persons insured, or any of them, resided at the time of such death or injury. (Art. 1830 (29); also Art. 2308 (12), Rev. St. 1914.) A suit on a policy may be instituted in the county where the home office of the insurer is located, or in the county where loss has occurred or where the policy holder or beneficiary instituting such suit resides. (Art. 4744, Rev. St. 1914.)

Venue.—The right is given the insured to sue the insurer in the county in which he resided at the time of injury and this right cannot be withdrawn except by the legislature.¹³⁵ A suit on an accident certificate is maintainable in the county where the insured died, under the statute (Rev. St. 1914, Art. 4744) even though the certificate and the company's by-laws provided that all suits should be instituted in the county of the home office of the company.¹³⁷

Limitations by Provisions of Policy.—Notwithstanding stipulations in a certificate to the contrary the holder of such certificate has two full years in which to bring action thereon. (Rev. St. 1914, Art. 4830.)¹³⁸

Limitations By Provisions of Policy—Time Within Which Action Must Be Brought.—It has been held that an action on a policy is brought in time where petition is filed and a non-resident notice

134. The fact that insured, injured through the negligence of his employer, settled with the latter, and released it from liability, is not a defense to an action for his accident insurance on the theory that the insurer was entitled to be subrogated to insured's action against his employer, identity of damage in the two causes of action being wanting.—*Aetna Life Ins. Co. v. J. B. Parker & Co.*, 72 S. W. 621.

618—**Venue.** (See 28 Cent. Dig. Insurance, §§ 1536-1539.)

136. Right, given plaintiff to sue insurance company in the county in which he resided at the time of injury by Rev. St. 1895, Art. 1585, Subd. 12, cannot be withdrawn, except by the Legislature.—*Eaton v. International Travelers' Ass'n of Dallas*, 136 S. W. 817.

137. Under Rev. St. Art. 1830, Subd. 30, and article 4744, a suit on an acci-

dent certificate held maintainable in the county where the insured died, though the certificate and the company's by-laws provided that all suits should be instituted in Dallas county, Texas.—*International Travelers' Ass'n v. Brannum*, 169 S. W. 389.

620—**Limitations by Provisions of Policy.** (See 28 Cent. Dig. Insurance, §§ 1540, 1542-1553.)

138. Under Rev. Civ. St. 1911, Art. 4830, exempting fraternal benefit associations from the insurance law and Rev. St. 1895, Art. 3378, prohibiting any person from fixing a shorter time than two years in which to bring action upon any contract, the holder of a certificate of such an association has two full years in which to bring action thereon, notwithstanding a stipulation in the certificate fixing a less time.—*International Travelers' Ass'n v. Bosworth*, 156 S. W. 346. See 28 Cent. Dig. Insurance, § 1993.

is served on defendant within the time limited by the policy for bringing action, even though citation is not served on defendant's agent till after the lapse of such time.¹³⁹ The year allowed by insurer in which to file suit was held to begin upon the expiration of the three months after furnishing proofs of death.¹⁴⁰

Service of Process—Statutory Regulations.—Process against any domestic insurance company may be served only on the president, or any active vice-president, or secretary, or general counsel residing at the city of the home office of the company, or by leaving a copy of same at the home office of such company during business hours. (Art. 4745, Rev. St. 1914.)

Jurisdiction as Dependent on the Amount in Controversy.—Where a petition demanded judgment for \$500, 12 per cent damages and attorney's fees, there being no exception attaching the jurisdiction of the court, the amount asked was in excess of \$500 and the court had jurisdiction though the damages and attorney's fees were not proper claims.¹⁴¹

Joinder of Causes of Action.—A holder of a policy providing for monthly indemnity in case of disability, has a distinct and separate right of action for each monthly installment,¹⁴⁵ and in the absence of any alleged defense avoiding the policy equity will not

622—(A) Time Within Which Action Must Be Brought. (See 28 Cent. Dig. Insurance, §§ 1540, 1544-1550.)

139. An action on an accident policy is brought in time where petition is filed and a nonresident notice is served on defendant within the time limited by the policy for bringing action, though citation is not served on defendant's agent till after the lapse of such time.—Standard Life & Accident Ins. Co. v. Askew, 32 S. W. 31. 11 Tex. Civ. App. 59.

140. An accident policy provided for immediate written notice of an injury, and proof of the accident within seven months, no action under the policy to be begun within one year from the time of the accident, and no legal proceeding for recovery thereunder to be brought within three months after the receipt by the company of proof of the injury. Held, that the year in which suit was required to be commenced began, not at the date of the death of the insured, but upon the expiration of the three months after furnishing proofs of death, during which legal proceedings were prohibited.—Allibone v. Fidelity & Casualty Co., 32 S. W. 569.

Jurisdiction as Dependent on the Amount in Controversy.

141. Where, in an action in the district court on an insurance policy, the petition demanded judgment of \$500 and attorney's fees and 12 per cent

damages, and there was no plea or exception attacking the jurisdiction of the court or suggesting that a judgment could not be rendered for the attorney's fees and the damages, the amount in controversy exceeded \$500, so that the court had jurisdiction, though attorney's fees and damages were not proper claims.—Lane v. General Accident Ins. Co., 113 S. W. 324.

142. Under Vernon's Sayles' Ann. Civ. St. 1914, Art. 4977, touching allowance of interest on written contracts ascertaining the sum payable when no rate is agreed, the Court of Civil Appeals had no jurisdiction of an appeal from the judgment of a county court in an action for a disability indemnity of \$100, on which plaintiff prayed interest.—Great Eastern Casualty Co. v. Anderson, 183 S. W. 802.

143. A judgment of the county court on appeal from a justice court's judgment, adding a penalty and items in excess of the amount within the jurisdiction of the justice court, was invalid; but it could be reformed and affirmed on appeal to the Court of Civil Appeals.—North American Ins. Co. v. Jenkins, 184 S. W. 307.

Joinder of Causes of Action.

144. An action for personal injuries to an employee cannot be joined with an action on a contract of insurance against accidents.—G. A. Duerler Mfg. Co. v. Dullnig, 83 S. W. 889, judgment affirmed, Dullnig v. G. A. Duerler Mfg. Co., 87 S. W. 332.

enjoin the insured from bringing suits for each part of the indemnity as it becomes due.¹⁴⁰ It has been held that an action for personal injuries to an employee cannot be joined with an action on a contract of insurance against accidents.¹⁴⁴

Abatement of Cause of Action.—A cause of action which has not matured will be abated as being premature.¹⁴⁷

Waiver of Limitation in Policy.—Absolute denial of liability on a policy is sufficient to authorize suit being begun at once notwithstanding any provisions in the policy to the contrary.¹⁴⁸

Petition—(A) Form and Requisites in General.—Under certain circumstances it is not necessary that the petition allege the occupation of insured at the time of his injury, as where the defendant had possession of the application for a policy and the petition stated the cause of death.^{149 151} Neither is it necessary under the same circumstances to aver that the injuries resulting in death left physical marks on the insured's body.¹⁵⁰

(B) Loss and Cause Thereof.—A petition was held sufficient where it alleged the loss and cause thereof as the result of the

145. A holder of an accident and health insurance policy, providing for a monthly indemnity in case of disability, has a distinct and separate right of action for each monthly installment.—*Rau v. American Nat. Ins. Co.*, 154 S. W. 645.

146. In the absence of any alleged defense avoiding the policy, or any denial of liability thereon, equity will not enjoin insured, under a health and accident policy providing monthly indemnity for disability, from bringing suits for each part of the indemnity as it became due.—*Rau v. American Nat. Ins. Co.*, 154 S. W. 645.

Abatement and Revival.

147. Where the cause of action on an accident insurance policy has not matured the action is premature, and will be abated for that reason.—*Commonwealth Bonding & Casualty Ins. Co. v. Knight*, 185 S. W. 1037.

623.—**Limitations by Provisions of Policy—Waiver of Limitation.** (See 28 Cent. Dig. Insurance, §§ 1551-1553.)

148. Where an insurer absolutely denied its liability on an accident policy the beginning of an action without regard to the provisions of the policy relating to the time in which suit might be brought thereon was authorized.—*Western Indemnity Co. v. MacKechnie*, 185 S. W. 615.

623.—**Petition. (A) Form and Requisites in General.** (See 28 Cent. Dig. Insurance, §§ 1575, 1576, 1579, 1580, 1584-1586, 1592, 1593.)

149. Where the petition in an action on an accident policy alleged that insured, a railroad man, was killed by a cyclone while at supper in a restaurant, and averred that defendant had sole possession of the application for insurance, it was not necessary that the petition should negative the violation of a condition in the application against engaging in a more hazardous occupation.—*Standard Life & Accident Ins. Co. v. Koen*, 33 S. W. 133. 11 Tex. Civ. App. 273.

150. Where the petition in an action on an accident policy alleged that insured, while at supper at a restaurant, received injuries from a falling house and flying timbers, produced by a cyclone then raging, from which, on that day, he died, it was not necessary to allege in what occupation insured was engaged at the time of his death, nor to aver that the injuries resulting in his death left physical marks upon his body.—*Standard Life & Accident Ins. Co. v. Koen*, 33 S. W. 133. 11 Tex. Civ. App. 273.

151. Where the petition in an action on a policy showed that the occupation in which insured was engaged when the policy was issued was stated in his application for insurance, and that the application was in defendant's sole possession, it was not necessary to aver insured's occupation at that time.—*Standard Life & Accident Ins. Co. v. Koen*, 33 S. W. 133. 11 Tex. Civ. App. 273.

accident, showing that the insured lost his sight through external, violent and accidental means.¹⁵²

(C) **Anticipating Defenses.**—A petition need not set forth clauses of a policy, which if breached, would limit or exempt defendant from liability as this would be a matter of defense.¹⁵³ The exceptions of a policy are regarded as a matter of defense.¹⁵⁴

Issues, Proof and Variance.—An insured cannot show that his illness did not come within an exception in a policy without pleading same.¹⁵⁵ The non-payment of the premium must be alleged by insurer, otherwise a peremptory instruction for defendant cannot be predicated on that ground.¹⁵⁶ It has been held that there

635—Petition. (B) Loss and Cause Thereof. (See 28 Cent. Dig. Insurance, §§ 1599-1608.)

152. In an action in an accident insurance policy plaintiff alleged: That in unloading rails, a piece of iron or other hard substance was caused to fly and strike plaintiff in his right eye; that by reason of such accident plaintiff lost the entire sight of both eyes; that immediately after said injury his right eye became inflamed and sore, and continued in that condition for about two weeks, at which time the inflammation and soreness was communicated to his left eye, from which time both eyes continued sore and inflamed until a date specified, at which time, from said causes, he entirely and irrevocably lost the sight of both eyes. Held that, as against the general demurrer, the petition sufficiently alleged that plaintiff lost the sight of both his eyes through external, violent, and accidental means, independently of all other causes.—*Aetna Life Ins. Co. of Hartford, Conn., v. Griffin*, 123 S. W. 432. See 28 Cent. Dig. Insurance, §§ 1599, 1602.

639—Petition. (C) Anticipating Defenses. (See 28 Cent. Dig. Insurance, §§ 1554, 1593, 1598.)

153. It is enough for the petition, in an action on an accident policy for death of insured, to allege the contract with sufficient particularity to show liability for death, without setting forth clauses which, if breached, would limit defendant's liability, or exempt it from any liability; these being matters of defenses to be pleaded by defendant.—*Continental Casualty Co. v. Jennings*, 99 S. W. 423.

154. A complaint on an accident policy need not deny that insured came to his death by any of the means which, by the policy, would relieve defendant from liability; the exceptions in the policy being matter of defense.—*Employers' Liability Assur. Corp. of London v. Rochelle*, 35 S. W. 869.

645—Issues, Proof and Variance. (See 28 Cent. Dig. Insurance, §§ 1554, 1632-1644.)

155. In an action on a health policy, specifying an indemnity for confining illness, excepting disabilities resulting from paralysis, etc., in which case one-fifth of the amount is payable, insured cannot show that it was paralysis which confined insured without pleading that fact.—*General Accident Ins. Co. v. Hayes*, 113 S. W. 990. See 28 Cent. Dig. Insurance, §§ 1554, 1632-1644.

156. In an action on a policy, where the defense that the premium on the policy has not been paid was not pleaded, there was no issue as to its payment, and it was not error to refuse a peremptory instruction for the defendant upon the ground that there was no evidence that payment of the premium had been made.—*Continental Casualty Co. v. Wade*, 99 S. W. 877, reversed, 105 S. W. 35.

157. The petition, in an action on an accident insurance policy, alleged that the insured's death was caused from his having wrenched and hurt his back, ruptured his stomach, and dislocated his kidneys. The testimony showed that death was caused either by injury to the stomach proper, or to the pyloric orifice connecting the stomach with the intestines, which, though not designated a rupture, produced the same effects as must have resulted from a rupture of the membrane. Held, that an objection to the testimony on the ground of variance would not be sustained.—*Aetna Life Ins. Co. v. Hicks*, 56 S. W. 87, 23 Tex. Civ. App. 74.

158. An accident policy exempted the company from liability "for injuries fatal or otherwise, resulting from poison or anything accidentally or otherwise taken." Held that, the company having merely pleaded that death resulted from eating oysters containing ptomaine poison, it would not be heard on the contention that death resulted from something else other than poison taken.—*Maryland Casualty Co. v. Hudgins*, 72 S. W. 1047. Reversed, 76 S. W. 745.

is no substantial variance between the petition and the policy which was an exhibit and introduced in evidence where the former alleged the terms of the policy at so many weeks and the latter at so many months in periods aggregating the same as the former.¹⁶⁰ The fact that the insured pleaded that he had been informed by defendant that further proofs of loss were unnecessary was sufficient to introduce conversations showing such waiver.¹⁶⁵ A variance between the petition and testimony was not sustained where the effect on the body of the insured as shown in the testimony was the same as set forth in the pleading.¹⁵⁷ Where a policy is identified properly a slight variance in the name of the insured is immaterial.^{160a}

Presumption and Burden of Proof.—The general rule is that the burden is upon the insurer to prove that the accident came within the exceptions of the policy.^{161 163} The burden is on the insurer to prove that an action was not brought within the time required by a policy.¹⁶² However, the burden is on the plaintiff, in alleging the cause of the insured's death, to prove that such was the proximate and sole cause of his death.¹⁶⁴

Admissibility of Evidence—(A) In General.—It is a general rule that parol negotiations and agreement for insurance preceding execution of the policy are not admissible to vary or con-

159. The pleading by plaintiff, suing on an accident policy, that he was informed by defendant that further proofs of loss were unnecessary, held sufficient to authorize a showing of waiver by conversation with defendant's agents.—*Commonwealth Bonding & Casualty Ins. Co. v. Bryant*, 185 S. W. 979.

160. In an action on an accident policy, the policy was made an exhibit to the complaint, and the complaint alleged that the term of the insurance was 52 weeks, while the policy provided for such a term, under independent contracts, for 2, 2, 3, and 5 months. Held, that there was no substantial variance.—*Standard Life & Accident Ins. Co. v. Koen*, 33 S. W. 133, 11 Tex. Civ. App. 273.

160a. A petition on an accident insurance policy described it as No. 188,695, issued to William Shelby, and alleged an assignment of policy No. 188,695, issued to William Shelby, to plaintiff. The policy introduced in evidence was No. 138,695, issued to William Selvey, and the assignment introduced in evidence was of policy No. 138,695, by William Selvey to plaintiff. Insured testified that his name was William Selvey, and identified the policy as the one delivered to him by the company's agent, and one which he had paid premiums, and which he had assigned. The judgment correctly described the policy. Held, that the variance was

immaterial.—*Aetna Life Ins. Co. v. J. B. Parker & Co.*, 72 S. W. 621.

646.—**Presumption and Burden of Proof.** (See 28 Cent. Dig. Insurance, §§ 1555, 1645-1668.)

161. Where an accident policy excepting certain causes, the insurer has the burden of proving that an accident came within the exceptions.—*Travelers Ins. Co. v. Harris*, 178 S. W. 816.

162. Where an insurance company defends an action on a policy on the ground that the suit was not brought within the time required by the policy, it has the burden of proof to show that defense.—*Allibone v. Fidelity & Casualty Co.*, 32 S. W. 569.

163. In an action on a health policy specifying an indemnity for confining illness, but providing in a subsequent clause for one-fifth of the amount for a disability from specified diseases, the burden was on insured to show that insured's illness was one embraced by the latter clause.—*General Accident Ins. Co. v. Hayes*, 113 S. W. 990. See 28 Cent. Dig. Insurance, § 1555, 1645-1668.

164. In an action on an accident insurance policy for death from an anaesthetic administered by a physician, plaintiff had the burden of proving that the anaesthetic was proximately the sole cause of the death of the insured.—*Maryland Casualty Co. v. Glass*, 67 S. W. 1062.

tradict its terms.¹⁶⁵ Neither are declarations of an agent as to occupation of insured and the policy conflicting therewith, made at the time of issuance binding on the company after the death of such insured, it not appearing that the agent was authorized to make them.¹⁷² Acts and declarations of the insured at the time of accident are admissible as *res gestae*.¹⁶⁷ It has been held that preliminary reports of a physician are not admissible to show the nature of a disease which confined insured.¹⁶⁸

It is not proper to permit a physician to state that in his opinion the insured had not lost the entire sight of the eye.¹⁷⁴ In questioning a witness the rule is that counsel may embody in their hypothetical questions the facts which in their judgment the evidence proved, and are not compelled to embrace therein facts which the opposing litigant contends to be established.¹⁷⁵ It is not error to ask a question assuming certain facts which facts are understood by the jury to be intended merely to identify the matter inquired about.¹⁷³ Under Article 3690 of the Revised Statutes of

648—Admissibility of Evidence. (A) In General. (See 28 Cent. Dig. Insurance, §§ 1669, 1676.)

165. Parol negotiations and agreement for insurance preceding execution of the policy, cannot be shown to vary or contradict its terms.—*Great Eastern Casualty Co. v. Thomas*, 178 S. W. 603.

167. In an action on an accident policy for death of insured, alleged to have resulted from a fall on the ice of a skating pond, his declaration to witness a very few moments after the fall that he hurt his head, and at the same time raising his hand near or to his head, when properly qualified, was admissible as *res gestae*.—*Order of United Commercial Travelers of America v. Roth*, 159 S. W. 176.

168. In an action on a health policy, preliminary reports furnished insurer by a physician are not admissible to show the nature of the disease which confined insured.—*General Accident Ins. Co. v. Hayes*, 113 S. W. 990. See 28 Cent. Dig. Insurance, §§ 1669, 1676.

169. In action on accident policy to recover death claim, admission of draft or voucher for the amount of a disability claim, sent after the insurer knew that plaintiff was making claim for the death, held not to violate the rule against evidence as to offer to compromise.—*Commonwealth Bonding & Casualty Co. v. Hendricks*, 163 S. W. 1007.

170. In action on accident policy, letters written insurer by plaintiff's attorney, held admissible as a basis for the recovery of attorney's fees and the statutory damages for failure to pay.—*Commonwealth Bonding & Casualty Co. v. Hendricks*, 163 S. W. 1007.

171. Admission of evidence of an of-

fer to and refusal by insured of a draft held harmless, as it could not be an admission by defendant of plaintiff's total disability, the real issue.—*Commonwealth Bonding & Casualty Ins. Co. v. Bryant*, 185 S. W. 979.

172. Declarations by the local soliciting agent of an accident insurance company, as to the occupation of insured at the time the policy was applied for, that his duties as specified in the policy "would not conflict with the conditions in the policy," and that insured "wanted a \$5000 policy, and he selected it for him," cannot be treated as admissions binding upon the company, where made after the death of the insured, and it not appearing that he had been expressly authorized to make them, or that in making them he was acting within the scope of his authority.—*North American Acc. Ins. Co. v. Frazer*, 112 S. W. 312.

173. Interrogatory to a witness in an action on an accident policy insuring J. being whether he had known H., who was agent of a certain company, who met with an accident and injury at a certain time and place, and, if so, how long, overruling exceptions thereto that it assumed the happening of an accidental injury to H. is not error, as the reference to this must have been understood by the jury to be intended merely to identify it.—*Travelers' Ins. Co. v. Hunter*, 70 S. W. 798.

174. In an action upon an accident policy, the court properly refused to allow a physician to state that, in his opinion, the insured had not lost the entire sight of his eye.—*International Travelers' Ass'n v. Rogers*, 163 S. W. 421.

175. Counsel may embody in their hypothetical questions the facts which, in their judgment, the evidence proved.

1914, a wife may not testify as to statements by her husband before his death in regard to his having received a check in settlement of his claim.¹⁷⁶ It has been held that the admission of a draft or voucher for the amount of a disability claim, sent by the insurer, after it knew the plaintiff was making claim for death of the insured, did not violate the rule against evidence as to offer to compromise.¹⁶⁹ In another case the admission in evidence of an offer to and refusal by insured of a draft was held harmless as it could not be an admission by defendant of plaintiff's total disability, the real issue. Letters which were written insurer by plaintiff's attorney were held admissible as a basis for the recovery of attorney's fees and the statutory damages for failure to pay.¹⁷⁰

(B) Death of or Injury to Person Insured and Cause Thereof.

—It is held that the failure of insured to inform his attending physician that an accident had happened will not prevent his beneficiary from showing on his death that it was the result of an accident.¹⁷⁷ A physician's certificate was admitted in evidence to show compliance with the requirements of the policy as to furnishing notice of the accident.¹⁷⁸ The conduct of insured after the event bringing about his death was relevant.¹⁷⁹ As a general rule, the admission of minor evidence, such as letters containing expressions as to cause of death and a draft in full for all claims, is not sufficiently prejudicial as to be cause for granting a new trial.¹⁸⁰

(C) Refusal to Pay Claim.—The sending of a draft for disability

and are not compelled to embrace therein facts which the opposing litigant contends to be established.—*Order of United Commercial Travelers of America v. Roth*, 159 S. W. 176.

176. In an action on a benefit certificate, where it was claimed by the company that a check of \$5.20, which it had sent decedent in full of his claim for sickness, was never returned, the wife may not, under Rev. St. 1895, Art. 2302, testify as to statement by husband on receiving the check.—*Royal Fraternal Union v. Stahl*, 126 S. W. 920.

659—**(B) Death of or Injury to Person Insured and Cause Thereof.** (See 28 Cent. Dig. Insurance, § 1691-1693.)

177. Failure of one insured against accident to make known to his attending physician that an accident had occurred will not prevent his beneficiary from showing on his death that it was the result of an accidental injury.—*Travelers' Ins. Co. v. Hunter*, 70 S. W. 798.

178. In action on accident policy, physicians certificate that death was
36—Ins.

caused by paralysis of the heart due to tetanus, held admissible to show compliance with requirement of policy as to furnishing notice of the accident, with full particulars thereof.—*Commonwealth Bonding & Casualty Co. v. Hendricks*, 168 S. W. 1007.

179. In an action on an accident certificate for death due to apoplexy claimed to have been caused by excitement, evidence that decedent suffered great pain in his head, and that he talked about the exciting cause, would get very much excited, would gesticulate with his arms, and on one occasion tried to get out of bed, held relevant.—*International Travelers' Ass'n v. Branum*, 169 S. W. 389.

180. In an action on an accident policy, where evidence as to cause of death was conflicting though letters in evidence contained expressions as to cause of death, and as to sending a small draft in full for all claims which were not strictly admissible, held, that such expressions were not sufficiently prejudicial to require a new trial.—*Commonwealth Bonding & Casualty Co. v. Hendricks*, 168 S. W. 1007.

claim has been held admissible to show a refusal to pay a death claim.¹⁸¹

Weight and Sufficiency of Evidence.—Plaintiff is not required to make out his case by evidence establishing his right to a recovery beyond a reasonable doubt, but it is sufficient that he brings his case within the purview of the policy by a fair preponderance of evidence, and the same rule applies to affirmative defenses, which when established by a fair preponderance of evidence, are sufficient to defeat recovery. (C. J. Par. 334.) The sufficiency of evidence in the following matters has been passed on: Total disability, Ann. 182; injury caused wholly by external violence, Ann. 183; total but not immediate disability, Ann. 185, 196; attorney's fees, Ann. 186; accidents while attempting to enter train, Ann. 184, 187; waiver of forfeiture for non-payment of premiums, Ann. 188; death by accident within contemplation of policy, Ann. 189; truth of representation as to use of intoxicating liquor, Ann. 190; as to losing classification by reason of duties per-

662—(C) Notice and Proof and Adjustment of Loss. (See 28 Cent. Dig. Insurance, §§ 1697, 1698, 1700-1706.)

181. In action on accident policy to recover stipulated amount in case of death, evidence as to sending of draft for disability claim held admissible as tending to show a refusal to pay the death claim.—Commonwealth Bonding & Casualty Co. v. Hendricks, 168 S. W. 1007.

665—Weight and Sufficiency of Evidence. (See 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.)

182. In an action on an accident policy, evidence held to warrant a finding that insured, from the time of injury till his death, was totally disabled from performing his customary duties.—Fidelity & Casualty Co. v. Joiner, 178 S. W. 806.

183. In an action on an accident policy answers to special questions, held a sufficient finding that the injury was caused wholly by external violence to support a judgment against the insurer, which was liable only for such injuries.—International Travelers' Ass'n v. Bosworth, 156 S. W. 346.

184. In an action on an accident policy evidence held not to show that insured was killed while attempting to enter a moving train, injures from which cause were excepted.—Travelers' Ins. Co. v. Harris, 178 S. W. 816.

185. Evidence held to show that the disability of the insured resulting from the accident, while total within the meaning of the policy, was not immediate.—Hefner v. Fidelity & Casualty Co. of New York, 160 S. W. 330. See 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.

186. In action on health and accident insurance policy, evidence held to support a verdict for \$100 as attorney's fees under Vernon's Sayles' Ann. Civ. St. 1914, Art. 4746.—Commonwealth Bonding & Casualty Ins. Co. v. Wright, 171 S. W. 1043.

187. In an action on an accident policy excepting accidents while trying to enter a conveyance using steam as a motive power, evidence held not to sustain a verdict for plaintiff.—American Nat. Ins. Co. v. Fulghum, 177 S. W. 1008.

188. An accident policy stipulated for the payment of premiums in four equal installments. Notes were given for the premiums, payable in one, two, three, and four months. The insured testified that, when the note for the first installment became due, the agent granted an extension of time for the payment thereof, and that later the agent gave an extension of time for the payment of the notes for other installments. Held sufficient to authorize a finding that the insurer elected to waive the forfeiture of the policy by reason of the non-payment of the notes, providing the act of the agent was binding on it.—North American Acc. Ins. Co. v. Bowen, 102 S. W. 163. See 28 Cent. Dig. Insurance, §§ 1707-1728.

189. In an action on an accident policy, evidence held to warrant a finding that deceased met his death through an accident contemplated by the terms of the policy.—Order of United Commercial Travelers v. Simpson, 177 S. W. 169.

190. In a suit on an accident policy, evidence held to warrant a finding that insured's statement that he did not use intoxicating liquors was not a misrepresentation.—Id.

formed, Ann. 191; death not resulting from anaesthetic alone, Ann. 192; loss of eyesight by external, violent and accidental means, Ann. 193; full recovery for loss of eye, Ann. 194; death due solely from injury received and not from other causes, Ann. 195; total blindness, Ann. 198; blindness as result of injury to one eye and not from any other cause, Ann. 199; establishing waiver as to furnishing proofs of continuance of disability, Ann. 197. As to the sufficiency of circumstantial evidence it has been held that it is not required that the evidence be of such a nature and so related as not to fairly and reasonably permit any other conclusion than that the death was caused in a certain way, but a preponderance of the evidence that the death was so caused is sufficient.²⁰¹ As a general rule it is held that where the evidence is undisputed the court should decide it as a matter of law.²⁰⁰

191. Where the application stated that decedent was employed as an extra conductor, testimony of a witness, for years engaged in the railway service, that an extra conductor, when not engaged in running trains, may perform any other service required of him, warranted a finding that an extra conductor could brake a train without losing his classification as such.—*Standard Life & Accident Ins. Co. v. Koen*, 33 S. W. 133. 11 Tex. Civ. App. 273.

192. In an action on an accident policy for death from an anaesthetic, it appeared that the insured died during an operation for appendicitis. A witness for plaintiff testified that chloroform was the immediate and determining cause; that insured was suffering from blood poison, which was a contributory cause, and would be a dangerous present agent, and liable to produce death under the operation. A witness for defendant testified that at the time of the operation the insured was suffering from the absorption of septic material into the circulation; that his extremities were cold, his respiration difficult, his pulse from 140 to 150; that witness stated at the time that insured would probably die under the operation, and would surely die without it. Held, that the evidence showed that death did not result from chloroform alone, and plaintiff could not recover.—*Maryland Casualty Co. v. Glass*, 67 S. W. 1062.

193. Evidence held to warrant the finding by the jury that plaintiff's eye was injured by external, violent, and accidental means.—*International Travelers' Ass'n v. Rogers*, 163 S. W. 421. See 28 Cent. Dig. Insurance, §§ 1555, 1707.

194. Evidence held to entitle insured to recover as for loss of the entire sight of an eye within the provision for a certain indemnity.—*Id.*

195. Evidence in an action on a casualty insurance policy held to sustain

a finding that decedent died solely as a result of injury received and not from other causes.—*Royal Casualty Co. v. Nelson*, 153 S. W. 674.

196. In an action by an attorney upon an accident insurance policy for the indemnity provided therein for immediate, continuous, and total disability, evidence held to show that the disability of the insured resulting from the accident, while total within the meaning of the policy, was not immediate.—*Hefner v. Fidelity & Casualty Co. of New York*, 150 S. W. 330.

197. Evidence, in an action on an accident policy, held sufficient to establish waiver as to furnishing proofs of continuance of disability.—*Commonwealth Bonding & Casualty Ins. Co. v. Bryant*, 155 S. W. 979.

198. Evidence, in an action on an accident insurance policy, held sufficient to support a finding that plaintiff was irrevocably blind.—*Aetna Life Ins. Co. of Hartford, Conn., v. Griffin*, 123 S. W. 432. See 28 Cent. Dig. Insurance, §§ 1555, 1707.

199. Evidence, in an action on an accident insurance policy, held sufficient to support a finding that plaintiff lost the sight of both his eyes as the result alone of the injury to his right eye, and not as the result of any kind of a disease.—*Id.*

200. Where the evidence on an issue was undisputed, the court should decide it as a matter of law.—*Hackler v. International Travelers' Ass'n*, 165 S. W. 44.

201. That the evidence relied on by the beneficiary of a member of an accident insurance association to prove that the member died as a result of an injury to his head caused by a fall is circumstantial does not require that it be of such a nature and so related as not to fairly and reasonably permit any other conclusion than that his death was so caused; but a preponderance of the evidence that his death was so caused is sufficient.—*Travelers'*

Amount of Recovery.—A plaintiff is not entitled to interest on a petition claiming indemnity specified in the policy, attorneys fee and damages allowed by the statute (Rev. St. 1914, Art. 4746).²⁰² It has been held that where, under the laws of an association providing that if the beneficiary should become disabled totally he should receive annually one-tenth part of the sum for which his certificate calls until the total has been paid, he is entitled to judgment only for the sum of the annual installments due at the time of the trial.²⁰³

Questions for the Jury.—It is for the jury to pass upon all questions of fact about which there has been conflicting evidence, such as whether or not the injury was caused by external, violent or accidental means;²⁰⁴ ²¹⁴ as to statements in application;²¹³ increase of risk;²⁰⁸ ²¹² voluntary exposure to danger;²⁰⁷ ²⁰⁸ immediate cause;²⁰⁵ ²¹⁰ total disability;²⁰⁹ cause of death.²¹¹

Protective Ass'n of America v. Roth, 108 S. W. 1039, affirmed Roth v. Travelers' Protective Ass'n of America (1909), 115 S. W. 31, 102 Tex. 241. See 28 Cent. Dig. Insurance, §§ 2006, 2007.

686—Amount of Recovery. (See 28 Cent. Dig. Insurance, § 1791.)

202. On a petition claiming indemnity specified in a policy, and an attorney's fee, and the 12 per cent. damages allowed by Rev. St. 1911, Art. 4746, recovery of interest held properly denied.—American Nat. Ins. Co. v. Fulghum, 177 S. W. 1008.

203. Under laws of a beneficial association, providing that, if the beneficiary should become disabled to perform any or all kinds of labor, he should receive annually one-tenth part of the sum for which his certificate was issued, until the aggregate received should equal the sum specified in such certificate, a beneficiary of a \$3,000 certificate, disabled to perform any or all kinds of labor, could recover only the sum of the annual installments due at the time of the trial, and hence a judgment entered for the entire sum of the certificate was erroneous.—Supreme Tent of Knights of Maccabees of the World v. Cox, 60 S. W. 971.

688—Questions for the Jury. (See 28 Cent. Dig. Insurance, §§ 1556, 1732, 1770.)

204. In an action upon an accident certificate, evidence held sufficient to go to the jury on the question whether insured's injury was caused by external violence.—International Traveler's Ass'n v. Bosworth, 156 S. W. 346. See 28 Cent. Dig. Insurance, § 2009.

205. In an action on an accident policy, defendant held entitled to have the issue as to whether insured's disease caused him to be stricken with

paralysis submitted to the jury.—Western Indemnity Co. v. MacKechnie, 185 S. W. 615.

206. Where an insurer so construed its policy as only to require a disclosure of such injuries as insured had suffered which increased the risk whether certain injuries which insured had sustained and did not disclose did increase the risk, was for the jury.—North American Acc. Ins. Co. v. Trenton, 99 S. W. 740. See Cent. Dig. Insurance, §§ 1732-1770.

207. In an action on an accident policy, evidence as to plaintiff's voluntary exposure to unnecessary danger or obvious risks held to require a submission to the jury.—Continental Casualty Co. v. Deeg, 125 S. W. 353. See 28 Cent. Dig. Insurance, §§ 1556, 1732-1770.

208. The fact that a railroad employee, traveling as a passenger, alights from a slowly moving train is not, as a matter of law a voluntary exposure to danger within an accident policy, since the danger must have been one so logically attending the act that he must have been conscious of it.—Id.

209. Evidence held sufficient to take to the jury the question whether an attorney was so disabled by an accident as to be entitled to total disability indemnity.—Hefner v. Fidelity & Casualty Co. of New York, 160 S. W. 330. See 28 Cent. Dig. Insurance, §§ 1556, 1732.

210. In an action upon an accident policy, evidence held to make it a question for the jury whether a loss to the insured was the result of sickness or of an accident within the policy.—First Texas State Ins. Co. v. Jones, 167 S. W. 9.

211. In an action on an accident policy, the question of cause of death is for the jury, where no one witnessed it.—Order of United Commercial Travelers v. Simpson, 177 S. W. 169.

Instructions.—It is the duty of the court to explain to the jury the issues involved in the case and present for their determination the matters proper to be considered by them and the legal principles by which the rights of the parties are governed. (C. J. Accident Insurance Par. 342.) An instruction is bad if it ignores the issues presented.²¹⁵ Instructions on the following matters have been passed on and held proper: Consideration of physician's certificate as establishing cause of death;²¹⁷ ²¹⁸ compliance with agree-

212. An accident insurance application warranted that the applicant had never had certain diseases, "injuries or wounds" or suffered the loss of a limb or an eye except as stated, and that he had never been ruptured or "otherwise injured." In an action on the policy there was evidence that insured's agent, who solicited the policy, was told by insured that his foot had been mashed at one time, and that he had sustained certain slight injuries to his fingers, but was informed that these were of no consequence. Held, that insurer construed the application only to require disclosure of such injuries as increased the risk, and hence it was not error for the court to submit the issue whether the injuries so sustained in fact increased the risk under the policy.—*North American Acc. Ins. Co. v. Trenton*, 99 S. W. 740. See 28 Cent. Dig. Insurance, §§ 1785-1787.

213. Where insured, in an application for accident insurance, stated that he had not had any bodily or mental infirmity, injuries, or wounds, or been otherwise injured, in addition to several diseases and injuries specified, whether a mashed foot or injured finger, not disclosed, were such injuries as increased the risk, and were within the contemplation of the parties, was for the jury.—*Trenton v. North American Acc. Ins. Co.*, 89 S. W. 276.

214. In an action on an accident policy for death, evidence held to require submission to the jury of the question whether insured's death resulted from external, violent, or accidental means, or from prior disease.—*Order of United Commercial Travelers of America v. Roth* 159 S. W. 176. See 28 Cent. Dig. Insurance, §2009.

669—Instructions. (See 28 Cent. Dig. Insurance, §§ 1556, 1771-1784.)

215. In an action on an accident policy, providing for a reduced recovery in case of voluntary exposure to unnecessary or obvious risks of danger, in which it was shown that the accident happened while insured, a passenger on a train, was attempting to alight from a passenger coach, an instruction that if the jury believed such acts to be an unnecessary exposure to danger, or that the risk of danger was obvious, then there could

be no recovery for the full amount of the policy, was properly refused as ignoring the element of voluntary exposure.—*Continental Casualty Co. v. Deeg*, 125 S. W. 353.

216. Where an answer to a suit on an accident policy insuring plaintiff's decedent as a roundhouseman alleged that the policy provided that, if assured was injured in any occupation classed by the company as more hazardous than a roundhouseman, the company's liability should be for such principal sum or weekly indemnity as the premium paid by defendant would purchase at the rate fixed for such increase hazard, and averred that the premium per \$1,000 for roundhousemen was \$15, and that for firemen, the duties of which deceased was exercising when injured, was double that charged for roundhousemen, and that no part of decedent's duties as a roundhouseman required him to act as a fireman, such plea sufficiently pleaded that defendant classed the occupation of fireman as more hazardous than that of roundhouseman; and hence it was error for the court to charge that the question of diminution in the amount of plaintiff's recovery depended on whether or not the occupation of fireman was more hazardous than that of roundhouseman in fact, and not on whether it had been so classed by defendant.—*Fidelity & Casualty Co. of New York v. Jones*, 62 S. W. 927, 28 Tex. Civ. App. 38.

217. In an action on an accident policy, an instruction that a physician's certificate as to the cause of death, showing compliance with a provision of the policy requiring notice of the accident, with full particulars, could not be considered as establishing the cause of the death, should have been given.—*Commonwealth Bonding & Casualty Co. v. Hendricks*, 168 S. W. 1007.

218. Where evidence as to cause of death was conflicting, and doctor's certificate was received without limiting its use to the question of compliance with a provision of the policy requiring notice of the accident, refusal of instruction that such certificate could not be considered as establishing the cause of insured's death held not harmless under rule 62a (149 S. W. x).—*Commonwealth Bonding & Casualty Co. v. Hendricks*, 168 S. W. 1007.

ments and conditions of policy;^{220 221} total disability;²²² accident caused solely through external, violent and accidental means.²²⁷ In general the refusal of a requested charge is not error where the instructions given fully and fairly present the case.²¹⁹ Again, it has been held that where evidence raising an issue was received without objection, though the issue was not presented by the pleadings, instructions submitting the issue were proper.²²⁴ Questions of fact may only be withdrawn from the jury when reasonable men fairly exercising their judgment would arrive at the same conclusion.²²⁵ Charges on the following issues have been passed on and held erroneous: Amount of recovery depending on the question of increased hazard by reason of change of employment;²¹⁶ total disability;²²² indebtedness of defendant to plaintiff on the question of non-payment of premium,²²⁶ and failure to charge

219. Refusal of requested charge is not error, where the instructions given fully and fairly present the case.—Order of United Commercial Travelers of America v. Roth, 159 S. W. 176.

220. In an action on an accident insurance policy, a charge to find for plaintiff if he had complied with all the "agreements and conditions" of the policy, whereas the policy stipulated for the payment of the insurance on compliance by the insured with the "agreements as conditions," was not misleading, where all the agreements expressed in the policy were made conditions precedent to the insured's right of indemnity.—Woodall v. Pacific Mut. Life Ins. Co., 79 S. W. 1090.

221. Where the only provision in an accident policy about which there was any evidence of plaintiff's failure to comply with was the stipulation in regard to furnishing notice and proofs of accident and injury, it was unnecessary to submit to the jury plaintiff's compliance with any other agreements of the policy.—Woodall v. Pacific Mut. Life Ins. Co., 79 S. W. 1090.

222. In an action on an accident policy indemnifying assured against accidents immediately, continuously, and wholly disabling and preventing him from performing any and every kind of duty pertaining to his occupation, an instruction to find for plaintiff if the injury disabled and prevented him from performing any and every kind of duty essential to his occupation in a manner "reasonably as effective" as he could have performed it if not injured, was erroneous.—Fidelity & Casualty Co. of New York v. Getzendanner, 56 S. W. 326, 93 Tex. 487.

223. Where, in an action on an accident policy, providing for indemnity against such injuries as, independently of other causes, should wholly disable assured from performing any and ev-

ery kind of duty pertaining to his occupation, there is evidence to sustain a finding either that the disability caused by the accident was immediate and total, or that it was not, an instruction that the insured is entitled to recover if the injury immediately and continuously disabled him from performing any and every kind of duty materially essential to his occupation in a manner reasonably as effective as it would have been performed if the injury had not been sustained, correctly submits the question of total disability to the jury. Judgment (1899) 53 S. W. 838, 22 Tex. Civ. App. 76, 23 Tex. Civ. App. 135, affirmed on rehearing.—Fidelity & Casualty Co. of New York v. Getzendanner, 56 S. W. 179, 22 Tex. Civ. App. 76.

224. Where evidence raising an issue was received without objection, though the issue was not presented by the pleadings, instructions submitting the issue were proper.—McKee v. Garner, 168 S. W. 1031.

225. The court may withdraw a question of fact from the jury only when reasonable men fairly exercising their judgment would arrive at the same conclusion.—Royal Casualty Co. v. Nelson, 153 S. W. 674.

226. Where, in an action on a benefit certificate, the jury was instructed that if on the 31st day of December, 1907, defendant was indebted to plaintiff for sick benefits due, the policy could not then be forfeited for non-payment of dues, a further instruction for defendant that "if you fail to find that the defendant was indebted to * * * (plaintiff) on December 31, 1907, and that the policy was thereby continued in force, you will return a verdict for defendant," is reversible error; since the jury could not find that such indebtedness existed, and not find, because thereof, the policy was continued in force.—Royal Fraternal Union v. Stahl, 126 S. W. 920.

on the question of a physician's certificate not being considered as establishing the cause of insured's death.²¹⁸

Verdict and Findings.—A verdict which included twelve per cent "interest" was held to justify a judgment for twelve per cent damages for delay (Rev. St. 1914, Art. 4746).²²⁸

Judgment.—It was immaterial that a judgment authorizing payment in installments was conditional on defendant's failure to appeal.²²⁹

Appeal and Error.—In general the giving of a peremptory charge does not present fundametal error or one apparent on the face of the record, which can be reviewed without a sufficient bill of exceptions.²³⁰ The court above will presume that the court below, in an action on a health policy providing for indemnity only for illness beginning after sixty days after the policy issued, found that the sickness sued on began after that period where there was evidence to that effect.²³¹ The damages for delay provided for in the statutes (Rev. St. 1914, Art. 1629) will not be allowed on appeal

227. In action on accident policy, the issue being whether nail in insured's foot caused death, held proper to refuse an issue whether deceased's sticking a nail in his foot was the sole cause of death, and to submit issue whether death was "caused solely through external, violent and accidental means."—Commonwealth Bonding & Casualty Ins. Co. v. Hendricks, 187 S. W. 698.

670—Verdict and Findings. (See 23 Cent. Dig. Insurance, §§ 1785-1787.)

228. In action on insurance policy verdict for specified amount, "with 12 per cent interest," held to justify judgment for 12 per cent damages for delay, under Vernon's Sayles' Ann. Civ. St. 1914, Art. 4746.—Commonwealth Bonding & Casualty Ins. Co. v. Wright, 171 S. W. 1043.

672—Judgment. (See 23 Cent. Dig. Insurance, §§ 1789-1794.)

229. Where an insurance association's by-law provided for payment of death losses in installments at the association's option, the first payable 90 days after proof of loss, and more than 90 days had expired pending appeal from a judgment, it was not material that the judgment authorizing payment in installments was conditional on defendant's failure to appeal.—International Travelers' Ass'n v. Barnum, 169 S. W. 389.

Appeal and Error.

230. The giving of a peremptory charge does not present a fundamental error or one apparent on the face of

the record, which can be reviewed without a sufficient bill of exception.—Commonwealth Bonding & Casualty Co. v. Bryant, 185 S. W. 979.

231. On appeal from a judgment for plaintiff in an action on a health policy providing for indemnity only for illness beginning after 60 days after the policy issued, it must be presumed that the court found that the sickness sued on began after that period, where there was evidence to that effect.—General Accident Ins. Co. v. Hayes, 113 S. W. 990.

232. Defendant may not assign error on the admission of testimony, the substance of which was otherwise given by another witness without objection.—International Travelers' Ass'n v. Branum, 169 S. W. 389.

233. A bill of exceptions to the giving of a charge, to authorize review, must, under Acts 33d Leg. c. 59, affirmatively show that the objections were presented before the charge was read to the jury.—Commonwealth Bonding & Casualty Ins. Co. v. Bryant, 185 S. W. 979.

234. The court on appeal cannot say that the conclusion reached by the trial judge was erroneous in the absence of a statement of facts.—North American Ins. Co. v. Jenkins, 184 S. W. 307.

235. An instrument called a "statement of facts," not signed by counsel for plaintiff or approved by the court, cannot be regarded.—North American Ins. Co. v. Jenkins, 184 S. W. 307.

236. Where a party desires review of the judge's conclusion, he should call attention to alleged insufficiency of evidence in a motion for new trial.—North American Ins. Co. v. Jenkins, 184 S. W. 307.

unless the grounds of alleged error are so frivolous that there could be no reasonable expectation that the judgment would be reversed.²³⁷

Costs.—It has been held that an insurer is entitled to recover the costs in the court below where on appeal the judgment in favor of the beneficiary was reduced.²³⁸

237. Under Vernon's Sayles' Ann. Civ. St. 1914, Art. 1629, allowing appellee 10 per cent additional on the amount in dispute as damages upon affirmance, where appeal is taken for delay by defendant, damages will not be allowed unless it appears that the grounds of alleged error are so frivolous that there could have been no reasonable expectation that the judgment would be reversed.—Commonwealth Bonding & Casualty Ins. Co. v. Hendricks, 187 S. W. 698.

675—Costs and Attorney's Fees. (See **28 Cent. Dig. Insurance, §§ 1805, 1806.**)

238. An insurer defending a suit on an accident policy by an administrator, and impleading the beneficiary, for whom judgment was rendered for the full amount of the policy, and on appeal having judgment reduced, held entitled to recover the costs in the court below.—General Accident, Fire & Life Assur. Corporation v. Stedman, 153 S. W. 692.

FRATERNAL BENEFIT INSURANCE

Definition 529

Elements 529

Statutory Provisions 529 (See pages 1, 276, 483)

(a) *Exemptions* 529

(b) *Provisions Not to Apply to Local Mutual Aid Associations* 529

(c) *Chapter 15 of Revised Statutes of 1914 Does Not Apply to Fraternal Beneficiary Companies* 529

(d) *Failure to Pay Insurance Within Time Specified Does Not Apply to Mutual Benefit Associations* 529

I. Corporations and Associations 530 (See pages 8, 276, 483)

Nature and Status in General 530

Organization—Statutory Regulations 531

Admission of Foreign Fraternal Societies—Statutory Regulations 532

Power of Attorney and Service of Process—Statutory Regulations 532

Place of Meeting of Domestic Society—Location of Principal Office—Statutory Regulations 532

No Personal Liability of Officers and Members—Statutory Regulations 532

Waiver of Provisions of Laws—Separate Jurisdiction—Statutory Regulations 532

Authority or License to Do Business 533

Constitution and By-Laws 533

Membership—Qualifications for Membership 535

(a) *Statutory Provisions* 535

(d) *Whole Family Protection for Members* 535

(b) *Case Law* 535

Officers and Agents 536 (See pages 12, 283, 488)

Person soliciting Insurance Unlawfully Guilty of Misdemeanor—Statutory Provisions 537

Agents' Certificates Issued, Where—Statutory Provisions 538

Powers and Liabilities of Association in General 538

Superior, Subordinate and Affiliated Bodies 539

Special Funds—Statutory Provisions 540

Reinsurance—What Is a Contributing Member in Good Standing 541

Insolvency and Dissolution—When an Association Is Not Insolvent 541

Reorganization—Rights of Members 542

ii (528) **FRATERNAL BENEFIT INSURANCE**

Consolidation—Statutory Provisions 542

- (a) *Estoppel to Deny Liability of Members 542*
- (b) *Rights of Members Where Consolidation Had Failed 542*
- (c) *Attempt to Enforce Rights Through Receiver After Consolidation Had Failed 543*

II. The Contract in General 543 (See pages 21, 296, 489)

(a) *Benefits—Statutory Provisions 543*

(b) *Certificate—Statutory Provisions 543*

Nature of the Contract—A Life Insurance Policy and a Chose in Action 543

Application as Part of Contract 543

- (a) *Application Must Be Properly Executed 543*
- (b) *Application for Reinstatement Must Be Authoritative 544*

Constitution, By-Laws or Rules as Part of Contract—What Constitutes Contract 544

What Is Regarded as a By-Law 544

Members Presumed to Know Constitution and By-Laws 544

Subsequent Provisions or Amendments 544

- (a) *Effect of Amendments—Statutory Provisions 544*
- (b) *Notice to Commissioner Necessary—Evidence of Adoption of Amendments—Statutory Provisions 545*
- (c) *Agreement to Be Bound by Subsequent Amendments 545*
- (d) *Reduction of Amount of Certificate and Limitation as to Payment of Benefits 545*
- (e) *Effect in General on Existing Members 546*
- (f) *Effect Where a New Charter Is Obtained 546*
- (g) *Where Amendment Is Not Valid 547*
- (h) *Where By-Law Should Be Inserted in Certificate 547*
- (i) *Increase in Rate of Assessment 547*

Validity of Certificate in General 548

Delivery and Acceptance of Certificate—General Rule 549

Delivery Where Applicant Is Sick or Dead 549

Delivery must Be Made to Applicant 549

Delayed Delivery 550

Written Acceptance Not Necessary to Validity 550

Payment of Dues 550

- (a) *Acceptance by Association 550*
- (b) *Order Given on Another for "Advance Premium" 550*

Misrepresentation, Fraud or Breach of Warranty—In General 551

Where Misstatement is Unintentional—Good Faith 551

Misstatement as to Beneficiary 553

Misrepresentation as to Good Health 553

FRATERNAL BENEFIT INSURANCE (528) iii

Breach of Warranty Before Delivery of Certificate—As to Good Health 553

Fraud of Physician 553

Breach of Warranty in General 554

Misrepresentations "Material to the Risk" 555

Persons Making False Representations Guilty of Misdemeanor 556

Estoppel or Waiver as to Defects of Objections 556

(a) *Waiver of Requirement as to Good Health of Applicant 556*

(b) *Waiver of Payment of First Premium 557*

Estoppel Where False Answers Have Been Inserted by Medical Examiner 558

What Will Not Operate as a Waiver 558

Estoppel by Payment of Premiums 558

Who May Not Waive 558

Construction and Operation in General—What Constitutes the Contract of Insurance 558

General Rules of Construction 558

Exchange of Certificate for a New One 559

Assignment or Other Transfer—Assignment as Collateral Security 560

Effect of Will Disposing of Proceeds After Assignment by Beneficiary to Testator 561

Where Fraud Is Alleged 561

Cancellation, Surrender, Abandonment or Rescission—In General 562

Restraining Cancellation of Certificate 562

Remedies for Wrongful Cancellations 562

Measure of Damages 563

Present Value of a Life Policy 563

III. Dues and Assessments 564 (See pages 37, 306, 492)

Unequal Assessments Sometimes Permissible 564

Where Constitution Provides for Re-Rating 564

Validity of Assessments 564

Mode and Sufficiency of Payment 565

(a) *Where Camp Is Suspended and Member Is Entitled to Benefits 565*

(b) *By Officer of Camp 565*

Effect of Payment—Question of Estoppel 565

As to When Receipt May Be Given 565

Refunding or Recovery of Dues and Assessments Paid 565

(a) *Recovery After Void Expulsion of Member 565*

(b) *Credits 566*

(c) *Limitations 566*

Re-Rating Without Authority 566

iv (528) **FRATERNAL BENEFIT INSURANCE**

Exchange of Certificates 566

Voluntary Payment of Premiums 567

Measure of Damages on Void Policy 567

IV. Forfeiture or Suspension 567 (See pages 60, 332, 496)

Grounds in General—Suspension of Lodge 567

Forfeiture for Failure to Pay All Assessments 567

Forfeiture Under Obligation 567

Effect of Expulsion or Suspension of Member 567

Violation of Terms or Conditions of Contract 568

(a) *Conviction of a Felony* 568

(b) *Use of Narcotics or Intoxicants* 568

(c) *Sale of Intoxicants* 568

Non-payment of Dues or Assessments in General 568

Notice of Time of Payment 569

What Is Sufficient Notice 569

Sufficiency of Payment or Tender of Payment—Payment Through Third Party 570

Default as a Ground of Forfeiture in General 570

Where Vote of Association Is Required After Default 570

Provisions Prohibiting Forfeiture During Sickness 571

Funeral Benefits Not Forfeited, When 571

Excuses for Non-Payment of Dues or Assessments 572

(a) *Custom of Secretary to Collect* 572

(b) *Custom of Paying Dues and Not Suspending at Once* 572

(c) *Agreement of Clerk to Pay Dues* 573

(d) *Insanity of Member* 573

(e) *Suspension of Local Camp* 573

Estoppel or Waiver Affecting Right of Forfeiture 574

(a) *Acceptance of Dues and Assessments* 574

(b) *Failure of Insurer to Send Notices or Drafts as Per Custom* 574

(c) *Use of Intoxicating Liquor* 574

(d) *Knowledge of Habits of Insured* 575

(e) *False Statements as to Age in Application* 575

(f) *Estoppel by Acts of Insurer* 576

Authority to Waive Suspension 576

As to Enforcing Suspension 576

As to Reinstatement 576

Notice and Proceedings to Give Effect to Forfeiture 577

Effect of Suspension 578

Reinstatement 578

(a) *Right in General* 578

(1) *Damages for Failure to Reinstall* 578

FRATERNAL BENEFIT INSURANCE (528) v

- (b) *Payment of Arrears as a Preliminary to Reinstatement* 579
- (c) *Certificate of Health as a Preliminary to Reinstatement* 580

V. Beneficiaries and Benefits 580 (See pages 133, 359, 512)

- Insurable Interest of Beneficiary* 580
- Recovery of Dues Paid by Beneficiary Without Insurable Interest* 581
- Persons Who May Be Beneficiaries* 581
 - (a) *Statutory Provisions* 581
 - (b) *In General* 581
- Provisions of Charter or By-Laws* 582
- Designation of Beneficiary* 584
- Revocation* 584
- Invalid or Ineffective Designation* 585
- Failure to Make Designation* 585
- Rights of Beneficiary Previously Designated* 585
- The Vested Interest of the Beneficiary* 586
- Mode of Changing Beneficiary* 587
- Beneficiary May Be Changed by Will* 588
- Death of Beneficiary Before Insured* 588
- Simultaneous Death of Member and Beneficiary* 589
- Contingency on Which Benefits Become Payable* 589
 - (a) *Suicide* 589
 - (b) *Violation of Law* 590
- Notice and Proof of Death* 590
- False Statement to Force Payment—Statutory Penalties* 590
- Amount of Benefits* 591
- Value of Paid-up Policy* 591
- Rights of Beneficiaries to Proceeds* 591
- Proceeds as Community Property* 592
- Rights of Representatives of Insured* 592
- Rights of Representatives of Beneficiary* 593
- Rights of Creditors—General Rule* 593
- Rights of Creditors—in General* 593
- Rights Where Certificate Is Assigned* 594
- Voluntary Payment of Dues* 595
- Renewal for Benefit of Creditor* 595
- Benefits Not Attachable—Statutory Provisions* 595
- Damages for Refusal of Payment* 595
- Discharge from Liability* 596

VI. Actions 596 (See pages 143, 371, 514)

- Resort to Courts for Settlement of Disputes* 596
- Limitations* 597

Parties 597

Venue—Statutory Regulations 597

Defenses 597

Process and Appearance 598

Pleading of Insured 599

Pleading of Insurer 599

Interpleader 600

Issues, Proof and Variance 600

Presumption and Burden of Proof—In General 601

- (a) *As to Insurer Being a Fraternal Benefit Association* 601
- (b) *As to forfeiture* 601
- (c) *As to Suicide* 601
- (d) *As to Violation of Law* 601
- (e) *As to Validity of Change of Beneficiary* 602
- (f) *As to Delay in Delivery of Certificate* 602
- (g) *As to Survivorship* 602
- (h) *As to Presumption of Death* 602

INDEX

Admissibility of Evidence 603

- (a) *As to Payment of Dues* 603
- (b) *As to Health of Applicant or Member* 605
- (c) *As to Representations of Agent* 606
- (d) *As to Misstatements of Examiner* 606
- (e) *As to Expulsion* 607
- (f) *Res Gestae* 607
- (g) *Report of Death* 607
- (h) *As to Condition of Association* 607
- (i) *As to Pleading* 607

Weight and Sufficiency of Evidence 607

- (a) *To Show Suicide* 607
- (b) *To Show Violation of Law* 608
- (c) *To Show Knowledge of Insurer as to Habits of Insured* 608
- (d) *To Show Death of Insured* 609
- (e) *To Show Non-Payment of Dues* 609
- (f) *Miscellaneous* 610

Trial—Questions for the Jury 610

- (a) *Payment of Dues* 610
- (b) *Misrepresentations* 611
- (c) *Violation of Law* 612
- (d) *Good Health of Insured at Time of Delivery of Policy* 612
- (e) *Total Disability* 612
- (f) *Certainty as to Policy* 612
- (g) *As to Reinstatement* 612

Instructions 612

- (a) *In General* 612
- (b) *As to Burden of Proof* 612
- (c) *As to Rules and By-Laws* 612 •
- (d) *As to Estoppel and Waiver* 613
- (e) *As to Forgery of Signatures* 613
- (f) *As to Payment of Dues* 613
- (g) *As to Violation of Law* 614
- (h) *As to Good Health of Insured at the Time of Delivery of Policy* 615
- (i) *As to a Diseased Condition of a Member* 616

Verdict and Findings 617

Judgment 618

Appeal and Error 619

- (a) *New Trial* 619
- (b) *Action of Jury* 619
- (c) *The Certificate* 619
- (d) *Insufficiency of Evidence* 619
- (e) *Tender in Lower Court* 620
- (f) *Request for Filing of Conclusions of Law and Fact* 620
- (g) *Judgment on a Severable Contract* 620

Cross References

Fire Insurance—Index vii

Life Insurance—Index 275-i

Accident and Health Insurance—Index 482-i

Industrial Accident Insurance—Index 479

Livestock Insurance—Index 676

Burglary Insurance—Index 674

Fidelity Guaranty and Surety Insurance—Index 656

Casualty Insurance—Index 670

FRATERNAL BENEFIT INSURANCE

Definition.—"Any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with Article 4832 of the Revised Statutes (1914), is hereby declared to be a fraternal benefit society." (Art. 4827, Rev. St. 1914.)

A mutual life insurance company is one in which the life of every member is insured by reason of his membership and compliance with the requirements of its constitution and by-laws. It contemplates a benefit fund raised by means of payments made by members joining the order and assessments levied upon them when a member dies, if necessary. *Splawn v. Chew*, 60 Tex. 532.

Elements.—The elements of a fraternal benefit society are: A supreme governing or legislative body, elected by the members or by delegates; subordinate lodges or branches into which members shall be elected, initiated and admitted according to the rules and rituals, holding meetings at least once a month, and payment of benefits. (Arts. 4828, 4829, Rev. St. 1914.)

Statutory Provisions—(A) Exemptions.—Fraternal benefit societies are governed by Chapter VII of the Vernon's Sayles' Texas Civil Statutes, 1914, alone and are exempt from all provisions of the insurance laws of the state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein. (Art. 4830, Rev. St. 1914.)

(B) Provisions Not to Apply to Local Mutual Aid Associations.—The provisions of this act shall not apply to mutual relief or benefit or burial associations operating upon the assessment plan whose business is confined to one county or within a radius of not more than twenty-five miles surrounding the town where the principal office is located. (Art. 4859, Rev. St. 1914.)

(C) Chapter 15 of the Revised Statutes of 1914 Does Not Apply to Fraternal Beneficiary Companies.—The chapter entitled "General Provisions" (Chapter 15) does not apply to fraternal beneficiary associations nor does it apply to companies carrying on the business of life or casualty insurance on the assessment or annual premium plan. (Art. 4957, Rev. St. 1914.)

(D) Failure to Pay Insurance Within Time Specified Does Not Apply to Mutual Benefit Associations.—It has been held that Article 4746 of the Revised Statutes of 1914 (Rev. St. 1895, Art. 3071)

providing for twelve per cent damages and reasonable attorney's fees for failure to pay insurance within the time specified in the policy does not apply to mutual benefit associations.⁷

CORPORATIONS AND ASSOCIATIONS

Nature and Status in General.—In general, a mutual relief association organized under the laws of another state, having no capital stock, the purpose of which is to provide a fund from which a certain sum shall be paid on the death of its members, is an insurance company.⁸

It has been held that the legislature has the power to divide the different associations and orders into classes and to exempt certain orders (such as the Brotherhood of Locomotive Firemen, Brotherhood of Locomotive Engineers, etc.) from the general operation of the fraternal beneficiary association laws of the state.^{1 2 3 4 5}

CORPORATIONS AND ASSOCIATIONS. (SEE 29 CYC. 7.)

687—Nature and Status in General. (See 28 Cent. Dig. Insurance, § 1824.)

1. Act May 12, 1899 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a) imposing certain restrictions on and granting certain privileges to fraternal benefit orders generally, from which, by section 16, designated orders are excluded, must be regarded as an entirety, and section 16 cannot be expunged, but all must fall as repugnant to U. S. Const. Amend. 14, and Const. Tex. Art. 1, Par. 3, guarantying equal protection of the laws.—Supreme Lodge United Benev. Ass'n v. Johnson, 77 S. W. 661, Judgment reversed, 81 S. W. 18, 98 Tex. 1.

2. Act May 12, 1899 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a), relative to fraternal benefit associations, section 16 of which excludes from its provisions certain orders which issue policies of insurance or benefit certificates to their members, and are, as to their insurance provisions, substantially fraternal benefit orders, is repugnant to Const. Art. 1, Par. 3, imposing on fraternal benefit associations generally certain conditions for the transaction of business, and granting certain privileges, such as exemption from garnishment, from both of which the designated orders are excluded.—Supreme Lodge United Benev. Ass'n v. Johnson, 77 S. W., 661, Judgment reversed, 81 S. W. 18, 98 Tex. 1.

3. Act May 12, 1899 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a) Par. 11, which exempts benefits to be paid by fraternal beneficiary associations from garnishment or other process, is not repugnant to Const. Tex. Par. 3, Art. 1, prohibiting exclusive privileges, on

the ground that such special benefits are not conferred on other insurance companies, which are separately classified in the statutes; such classification not being an arbitrary one, but based on sufficient reason.—Supreme Lodge United Benev. Ass'n v. Johnson, 77 S. W. 661, judgment reversed, 81 S. W. 18, 98 Tex. 1.

4. Act May 12, 1899, p. 195, c. 115 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a), relative to fraternal beneficiary associations, section 16 of which excludes from its provisions certain designated orders which issue policies of insurance or benefit certificates to their members, representing particular classes of the general class of laborers, does not violate Const. Tex. Art. 1, Par. 3, prohibiting special privileges. Judgment, 77 S. W. 661, reversed.—Supreme Lodge United Benev. Ass'n v. Johnson, 81 S. W. 18, 98 Tex. 1.

5. Act May 12, 1899, p. 195, c. 115 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a) relative to fraternal beneficiary associations, section 16 (page 200) of which excludes from its provisions certain designated orders which issue policies of insurance or benefit certificates to their members, representing particular classes of the general class of laborers, does not violate Const. U. S. Amend. 14, Par. 1, guarantying the equal protection of the laws. Judgment, 77 S. W. 661, reversed.—Supreme Lodge United Benev. Ass'n v. Johnson, 81 S. W. 18, 98 Tex. 1.

6. A mutual relief association, organized under the laws of Massachusetts, and having no capital stock, the purpose of which is to provide a fund from which a certain sum shall be paid on the death of its members, is an insurance company.—Supreme Council of American Legion of Honor v. Larmour, 16 S. W. 633.

Fraternal Benefit Societies—Organizations—Statutory Regulations.—Seven or more citizens of the United States, a majority of whom are citizens of this state, desiring to form a fraternal benefit society, may execute articles of incorporation stating, the proposed name, the purpose for which it is formed, the names, residences and official titles of all the officers, trustees, directors or other persons, who are to have general management and control; such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, copies of all proposed forms of benefit certificates, applications therefor, circulars to be issued and a bond in the sum of \$5000 conditioned upon the return of the advance payments to applicants if the organization is not completed within one year, to be filed with the Commissioner of Insurance and Banking. Upon this being furnished, the commissioner of insurance, being satisfied with the same, shall issue a preliminary certificate authorizing the society to solicit members. It shall collect from each applicant an amount of not less than one regular monthly payment. However, no society shall become liable for or promise to pay any claim of any kind whatsoever until the actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, nor until there has been established ten subordinate lodges or branches into which the five hundred applicants have been initiated, nor until the commissioner of insurance and banking has been furnished with the names and the full required information as to the five hundred applicants, nor until the treasurer shall have submitted to the commissioner a sworn statement showing that the five hundred applicants have each paid in one regular monthly payment per each one thousand dollars, payments in the aggregate to amount to at least \$2500. Upon being satisfied that the law has been fully complied with the commissioner shall issue a certificate to that effect. If after one year from date the society has not completed its organization the preliminary certificate becomes void. (Art. 4839, Rev. St. 1914.)

Every such society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs and the fixing and readjusting of the rates of contribution of its members. It also has the power to change, alter, add to or amend its constitution and by-laws and shall have such other powers as are necessary and inci-

682—**Exemption from General Laws Regulating Insurance.** (See 29 Cent. Dig. Insurance, §§ 1825, 1826.)

7. Under Rev. St. 1895, Art. 3092, providing that the provisions of this chapter relating to insurance shall not apply to mutual benefit organizations

doing business through lodges or councils, article 3071, in the same chapter, providing a penalty for failure to pay insurance within the time specified in a policy, does not apply to mutual benefit associations.—*Sovereign Camp, W. O. W. v. Carrington*, 90 S. W. 921.

dental to carrying into effect the object and purposes of the society. (Art. 4839, Rev. St. 1914.)

Admission of Foreign Fraternal Societies—Statutory Regulations.

—All foreign societies must have a license to do business in this state and in order to secure one must file with the commissioner of insurance and banking the following: A certified copy of its charter or articles of association; a copy of its constitution and laws; a power of attorney to the commissioner; a sworn statement of its business; a certificate from the proper official of its home state that the society is legally organized; a copy of its contract, which must show that its benefits are provided for by periodical or other payments by persons holding similar contracts; such other information as the commissioner may require as to its business and plan of working, and finally, a showing that the assets are properly invested according to the laws of this state. All of this being satisfactory the commissioner shall issue a license for the company to do business until the first day of the succeeding April, the license then being renewable annually. (Art. 4843, Rev. St. 1914.)

Power of Attorney and Service of Process—Statutory Regulations.—Both domestic and foreign societies now doing business in this state must file a power of attorney appointing the commissioner of insurance and banking its true and lawful attorney upon whom all process may be served. However, such service shall not be binding against any society when it is required thereunder to file its answer or defense in less than thirty days from the date of mailing of such service to such society. When legal process against any society is served upon the commissioner he must immediately forward it by registered mail to its secretary or corresponding officer. Legal process must be served on any society in this way only. (Art. 4844, Rev. St. 1914.)

Place of Meeting of Domestic Society—Location of Principal Office—Statutory Regulations.—A domestic society may meet anywhere in or out of the state where it has subordinate branches and all business transacted there is valid, but the principal office must be in this state. (Art. 4845, Rev. St. 1914.)

No Personal Liability of Officers and Members—Statutory Regulations.—The officers and members of any such incorporated society are not individually liable for the payment of any claim for benefits, but the same shall be payable out of the funds of the society. (Art. 4846, Rev. St. 1914.)

Waiver of Provisions of Laws—Separate Jurisdiction—Statutory Regulations.—The constitution and laws of the society may provide that no subordinate body, officers or members shall have power to waive any of the provisions of the laws and constitution of the society and the same shall be binding. All grand lodges holding charters from any supreme governing body which were doing business at the time of the passage of this law as a fraternal beneficiary association, upon what is known as the separate jurisdiction plan, are to

be treated as single state organizations. (Art. 4847, Rev. St. 1914.)

Authority or License to Do Business.—The attorney general may enjoin an association from doing business on its failure to make required reports, but upon its compliance with the law the commissioner of insurance must issue to its agents certificates of authority.⁸ However, the commissioner is not required to issue a certificate allowing the association to do the business "for which it was organized and chartered."⁸

Constitutions and By-Laws.—The rule is that a by-law or amendment to the by-laws or constitution must be reasonable,¹⁰ and it must not contravene the laws of the state,⁹ and it must in no event oust or attempt to oust a proper tribunal of its jurisdiction over the subject matter.¹¹ A by-law was declared invalid which stated that a member's disappearance from his last place of residence should not be an evidence of his death as it contravened the statute relating to the presumption of death.^{9 14} Not only this but it was an attempt to oust the court of jurisdiction in declaring what evidence should be allowed, thus defeating the ends to be subserved by litigation.¹¹ Where an amendment to the constitution provides that it shall be made a part of every certificate but such amendment is not in the nature of a general by-law declaring all certificates void if the contingency happens, but declares such certificates void only of which it shall be made a part, then a certificate of which it is not made a part is not void upon the occurrence

690—Authority or License to Do Business.

8. Under sections 6-8, enacted in 1899 (Laws 1899, p. 195, c. 115) authorizing a suit by the Attorney General to enjoin a fraternal benefit association from doing business on its failure to make required reports, or pay any judgment against it, requiring every association within the act to pay specified fees in connection with its entrance into the state, and prohibiting any person from soliciting for such association, without first obtaining from the commissioner of insurance a certificate of authority showing that the association has complied with the act, a fraternal benefit association, which has filed with the Secretary of State its charter as required by section 14, may begin and continue to do business until enjoined in the suit of the Attorney General, and the Commissioner of Insurance, on an association complying with the act, must issue to an agent thereof a certificate of authority; but the commissioner is not required to issue a certificate allowing the association to do the business "for which it was organized and chartered."—*Trinity Life & Annuity Society v. Love*, 116 S. W. 1139, 102 Tex. 277. See 28 Cent. Dig. Insurance, § 1828.

693—Constitutions and By-Laws. (See 28 Cent. Dig. Insurance, § 1833.)

9. By-law of a fraternal beneficiary society declaring that members disappearance should not be an evidence of his death, contravened Rev. St. 1911, Art. 5707, relating to the presumption of death, and was invalid.—*Sovereign Camp of Woodmen of World v. Robinson*, 187 S. W. 215. See 28 Cent. Dig. Insurance, § 1833.

10. A by-law of a fraternal beneficiary association, to be valid, must be reasonable.—*Id.*

11. A by-law which declares that the disappearance of insured from his last place of residence shall not be any evidence of his death could not be allowed to control the action of the court as a court will not permit the course of justice to be affected by stipulations such as would defeat the ends to be subserved by such litigation or allow the parties to a contract to agree to oust the court's jurisdiction over such contracts.—*Id.*

12. Where the executive committee of a mutual benefit society was expressly authorized to re-rate members by the society's constitution, it was not material that the by-law providing for such re-rating was not passed by the supreme legislative authority of the organization.—*Supreme Ruling*

of the contingency provided for.¹³ In a case where the charter empowered a society to make its own constitution, exercise general legislative authority and authorized delegates to the "Sovereign Camp" at certain intervals, such camp constituting the supreme legislative department of the order with authority to make its laws, it is held that such "Sovereign Camp" has power to adopt an amendment changing the conditions of the benefit certificate, rendering it null if the insured committed suicide while either sane or insane, instead of only while sane as before prescribed.¹⁷ But this act is a corporate act and cannot be exercised outside of the state in which the society was organized even though it had power to establish subordinate orders in the United States and Canada.¹⁸ Where the by-laws provide for publication in the official organ of any notice of amendments to be sufficient notice and where it is the duty of a certain official to compile and arrange for publication all such amendments, it is not necessary that, after adoption of an amendment it should be published as provided.¹⁶ If the evidence shows that certain contested provisions of the constitution were not in force when the policy was issued a verdict for defendant for want of proof of compliance must be refused.¹⁵

of *Fraternal Mystic Circle v. Ericson*, 131 S. W. 92. See 28 Cent. Dig. Insurance, § 1833. Reversed, 146 S. W. 160.

13. An amendment to the constitution of a mutual benefit society was adopted, changing the conditions of the benefit certificate so as to provide that, if insured committed suicide either while sane or insane, it should be void, which conditions should be made a part of every certificate and to be binding on both member and order, and which no officer or agent could waive. After its adoption, insured made application for insurance, which stipulated that it was made subject to all the provisions of the constitution and by-laws, and received one of the old certificates because the new form had not been issued, which was signed by the proper officers, providing that the policy should be void if he committed suicide, unless he was insane at the time. He committed suicide while insane. Held, in an action on the certificate, that the order was liable on the certificate since the amendment was not a general by-law declaring all certificates void if the insured committed suicide, but it declares void only certificates of which it shall be made a part. Judgment 59 S. W. 905, affirmed.—*Sovereign Camp W. O. W. v. Fraley*, 59 S. W. 879.

14. By-law that absence or disappearance of member should not be evidence of his death held void under Rev. St. 1911, Art. 5707, creating a presumption of death from absence

for seven years.—*Supreme Ruling of Fraternal Mystic Circle v. Hoskins*, 171 S. W. 812.

15. Where plaintiff's evidence showed that certain provisions of the society's constitution, relied on as a defense to a policy, were not in force when the policy was issued, the direction of a verdict for defendant for want of proof of compliance with such provisions was properly refused.—*International Order of Twelve of the Knights and Daughters of Tabor v. Boswell*, 43 S. W. 1108.

16. Where the by-laws of a mutual benefit insurance association provide that publication in the official organ of any notice required to be given the members shall be sufficient notice, and make it the duty of a certain official "to compile and arrange for publication all amendments to the by-laws," it is not necessary that an amendment, after adoption, should be published in the official organ.—*Eversberg v. Supreme Tent Knights of Macabees of the World*, 77 S. W. 246, 33 Tex. Civ. App. 549.

17. The charter of a mutual benefit society empowered it to make its own constitution and exercise general legislative authority, and required authorized delegates from the head camps to meet every two years, which, when assembled, were called the "Sovereign Camp," and constituted the supreme legislative department of the order, with authority to make its laws. Held, that such delegates, when assembled at the sovereign camp, had power to adopt, in the manner re-

Membership—Qualifications for Membership—(A) Statutory Provisions.—A society may admit any person to membership who is not less than sixteen and not more than sixty years of age, and who has passed the proper medical examination in accordance with the laws of the society. A beneficiary member applying for disability benefits is not required to pass an additional medical examination. General and social members may be admitted to membership also. (Art. 4833, Rev. St. 1914.)

(a) Whole Family Protection for Members.—Under an act passed by the 35th legislature, death and annuity benefits upon the lives of children between the ages of two and eighteen years, for whose support and maintenance a member of a society is responsible, are provided for. (Chap. 192, p. 430, General Laws 35th Leg.)

(B) Case Law.—Where the laws of an order required initiation as an essential to membership and a benefit certificate could be issued only on application from the subordinate lodge after the applicant had received his degree a man was held not a member even though he had complied with all other preliminaries.²⁰ Neither is a party a member where the certificate has not been delivered to him and he has never been adopted in accordance with the by-laws.¹⁹ Although the ceremony of initiation is secret yet the provisions of the constitution and by-laws requiring an applicant to

quired by the by-laws, an amendment to the constitution changing the conditions of the benefit certificate, rendering it null if the insured committed suicide while either sane or insane, instead of only while sane, as before prescribed. Judgment 59 S. W. 905, affirmed.—Sovereign Camp, Woodmen of the World v. Fraley, 59 S. W. 879.

18. A beneficial society, though organized with power to establish subordinate orders in the United States and Canada under a charter empowering it to make its own constitution and exercise general legislative authority, at a meeting outside the state of its incorporation cannot amend its beneficiary certificates, which were declared to be a part of its constitution, by changing their conditions so as to render them void if the insured committed suicide while either sane or insane, instead of only while sane as previously prescribed, since such an amendment is a corporate act, which cannot be exercised outside the state in which the society was incorporated.—Sovereign Camp, Woodmen of the World v. Fraley, 59 S. W. 905, Judgment affirmed 59 S. W. 879.

694—Membership. (See 28 Cent. Dig. Insurance, §§ 1824, 1835.)

19. Where a certificate of membership in a mutual benefit society was never delivered to decedent, and he

was never adopted as a member in accordance with the by-laws, he was not a member, and there could be no recovery of benefits in case of his death.—McWilliams v. Modern Woodmen of America, 142 S. W. 641.

20. Deceased applied for membership in a subordinate lodge of the Knights of Honor, his proposition fee being paid. The medical examiner recommended him for membership. All forms were complied with, and he was elected a member by the lodge, but died two days later, without having been initiated. The laws of the order required an applicant, within a certain time after his election, to present himself for initiation, or forfeit his election, and the benefit certificate from the supreme lodge was to be issued only on application from the subordinate lodge, after the applicant had received his degree. The application contained an agreement that the payment of the proposition fee or the entertaining of the application, unless the applicant should be duly elected "and initiated," should not constitute membership, or give any rights of a member. It was only on the death of a "member who has obtained the degree of the subordinate lodge" that the supreme lodge could order payment to the beneficiary. Held, that deceased was not a member of the lodge.—Matkin v. Supreme Lodge Knights of Honor, 18 S. W. 306.

be initiated as a condition precedent to membership are reasonable and not contrary to law.²¹ However, the rule is that after an order receives the assessment and delivers a benefit certificate it cannot question a membership even though the party was not initiated.²⁸ When a member ceases to be such he parts with his interest in the property of his lodge, as the lodge is not a business enterprise but an organization for benevolent and fraternal purposes.²²

Officers and Agents.—Where the by-laws provided that among other duties of a secretary should be those of collecting and receipting for the dues of the subordinate and supreme lodges it is held that such a secretary in performing these duties acted as the agent of the society and not of the member,³⁰ and this seems to be the general rule. However, it is also held that while the camp officers of an organization are agents of the Sovereign Camp for certain purposes, they cannot bind the camp in dealing with local members by acting merely within the apparent scope of their authority, that rule having no application where the member knows or is presumed to know the extent of the agent's powers.²⁶ Such powers are prescribed in the constitution, accessible to every member and a part of every insurance contract and therefore a member will be presumed to know them and in his dealings with the general officers he must take cognizance of the limitations placed upon their powers.²⁷ It is held that the officers and members of a

21. The constitution and by-laws of the Knights of Honor, requiring an applicant for membership to be initiated in addition to paying his proposition fee and being elected, before acquiring any rights as a member, are reasonable, and not contrary to law, notwithstanding the ceremony of initiation is secret.—*Matkin v. Supreme Lodge Knights of Honor*, 18 S. W. 306.

22. Where land was conveyed to trustees for the benefit of a lodge of Masons, a member, on ceasing to be such, parts with his interest in the property; the lodge not being a business enterprise, but an organization for benevolent and fraternal purposes. *Minor v. St. John's Union Grand Lodge of Free and Accepted Ancient York Masons*, 130 S. W. 893. See 6 Cent. Dig. Ben. Assoc., §§ 38-40.

23. A fraternal order, after receipt of assessments from a person and delivery to him of a benefit certificate, cannot question his membership, though he were not initiated.—*Supreme Ruling of the Fraternal Mystic Circle v. Crawford*, 75 S. W. 844.

695—**Officers and Agents.** (See 28 Cent. Dig. Insurance, § 1836.)

24. Where an applicant for membership in a fraternal order is examined by a physician having authority from the state deputy to examine his

own applicants for membership and has physicians of his own selection to sign the reports, and such examination is signed by an approved examiner of the order, it is sufficient, though the laws of the order declare that no examination shall be legal unless made by an examiner approved by the supreme medical director.—*Supreme Ruling of the Fraternal Mystic Circle v. Crawford*, 75 S. W. 844.

25. Directors in a voluntary insurance association held personally liable for the amount which a beneficiary should have received, where they wrongfully withheld payment on the member's death and paid it on account of a member subsequently deceased.—*Home Benefit Ass'n No. 3 of Coleman County v. Wester*, 146 S. W. 1022. See 28 Cent. Dig. Insurance, § 1836.

26. While camp officers in the Woodmen of the World are agents of the Sovereign Camp for certain purposes, they cannot bind the camp in dealing with local members by acting merely within the apparent scope of their authority; that rule having no application where the member knows, or is presumed to know, the extent of the agent's powers.—*Bennett v. Sovereign Camp, Woodmen of the World*, 168 S. W. 1023.

27. In a mutual benefit association, such as the Woodmen of the World, in

local lodge, when acting within the scope of the order, are agents of the order.²⁹ Therefore knowledge on their part of facts which would render an applicant ineligible is notice to the supreme lodge where no collusion is shown.²⁹ The officers of a local lodge are so far the agents of the order that they are liable to a member negligently injured by such officers when initiating him in the active discharge of their duties.³¹ Further, the directors of a voluntary insurance association were held personally liable for the amount a beneficiary should have received where they wrongfully withheld payment on the member's death and paid it on account of a member who subsequently died.²⁵ A private physician is not regarded as the agent of the insurer who is procured by a friend of the applicant.³² An examination made by a physician having authority from the state deputy, countersigned by an approved examiner of the order, is sufficient even though the laws of the order declare that no examination is legal unless made by an examiner approved by the supreme medical director.²⁴

Person Soliciting Insurance Unlawfully Guilty of Misdemeanor—Statutory Provisions.—Any person who solicits membership for any fraternal benefit society not licensed to do business in this state is guilty of misdemeanor and subject to fine. Also any person who solicits for or organizes lodges as described in this law without

which the powers of the Sovereign Camp officers are prescribed by the constitution, accessible to any member, and a part of every insurance contract, a member will be presumed to know them, and in his dealings with the general officers must take cognizance of the limitations placed upon their powers.—Id.

28. In the absence of a limitation on the authority of the medical examiner or worthy recorder of an insurance society expressed in the contract of insurance, each of such persons would be the agent of the insurer while performing the duties of his position.—*Modern Order of Praetorians v. Hollmig*, 103 S. W. 474. Judgment reversed on rehearing 105 S. W. 846. See 28 Cent. Dig. Insurance, § 1836.

29. The officers and members of a local lodge of an insurance order which is organized under warrant from the supreme lodge, with power to admit members in accordance with the laws of the order, when acting within the scope of their authority, are agents of the order, and knowledge on their part of facts which would render an applicant ineligible is notice to the supreme lodge where no collusion is shown.—*Knights of Pythias of the World v. Bridges*, 39 S. W. 333.

30. Where the by-laws of an insurance society provided that the duties of the secretary of a subordinate lodge should be to collect and receipt for all

dues of the subordinate and supreme lodges, and keep a correct list of all members, remit all supreme lodge funds to the supreme secretary, promptly deliver all benefit certificates, and immediately on the death of any member to notify the supreme secretary, and, on receiving blank proofs, to have them properly filled, and to do and perform such other duties as usually devolve on secretaries of deliberative bodies, such secretary in receiving and collecting assessments and dues acted as the agent of the society, and not of the member.—*Supreme Lodge United Benevolent Ass'n v. Lawson*, 133 S. W. 907. See 28 Cent. Dig. Insurance, § 1836.

31. The officers of a local lodge of a fraternal beneficial insurance association are, when in the discharge of their duties, agents of the order, and it is liable to a member negligently injured by the officers of a local lodge when initiating him.—*Grand Temple and Tabernacle in the State of Texas of the Knights and Daughters of Tabor of the International Order of Twelve v. Johnson*, 171 S. W. 490.

32. A private physician who, in the absence of the regular examiner, examined the applicant for a policy to be issued by a fraternal insurer, is not the agent of the insurer, where he was procured by a friend of the applicant.—*Sovereign Camp Woodmen of the World v. Lillard*, 174 S. W. 619.

first obtaining a certificate of authority from the commissioner of insurance and banking showing that the association has complied with the provisions of this law and is entitled to do business in this state is guilty of a misdemeanor and subject to fine or imprisonment. Of course, this does not prohibit members of a local lodge from soliciting members for a lodge already in existence and neither does it apply to members of any local lodge who participate in the establishment of any local lodge within the limits of the county of his residence. (Art. 4859a, Rev. St. 1914.)

Agents' Certificates Issued Where—Statutory Provisions.—All certificates of authority issued to agents are issued annually by the commissioner upon application. (Art. 4859a, Rev. St. 1914.)

Powers and Liabilities of Associations in General.—It will be presumed that a foreign beneficial association is carried on for the sole benefit of its members and beneficiaries and not for profit, as are domestic associations of the same kind, in the absence of proof to the contrary, and therefore a contract to divert such foreign company's benefit fund to the payment of certificates issued by another corporation, with which it has no power to consolidate, is *ultra vires* and void.³³ In contradistinction to a fraternal benefit association as defined in the statute, an unincorporated voluntary association organized for charitable and not for business purposes, can neither be sued nor sue except where it is a joint stock association or where the individuals are held liable either in person or as agents for debts incurred by the association or where the plaintiffs have shown themselves entitled to subject the property of the association to their claims by virtue of an equitable lien or some species of trust.³⁴ However, the court says that an unincorporated voluntary association organized for the purpose of insuring its members, and not for charitable purposes, might be sued though not possessed of any property.³⁵ It is held also that the unauthorized false repre-

696—Power of Association in General.

33. Acts 1899, p. 195, c. 115, § 1. provides that a fraternal beneficial association is a corporation formed and carried on for the sole benefit of its members and beneficiaries, and not for profit, and sections 2 and 3 authorize similar associations organized under the laws of other states to do business in Texas on complying with certain statutory requirements. Held, in the absence of proof to the contrary, it will be presumed that a foreign beneficial association doing business in Texas was created for the same purpose as that described in section 1, and hence a contract to divert its benefit fund to the payment of certificates issued by another corporation, with which it had no power to consolidate, is *ultra vires* and void.—*Whaley v. Bankers' Union of the World*, 88 S. W. 259.

34. An unincorporated, voluntary association organized for charitable, and not for business purposes, can neither sue nor be sued, except where it be a joint stock association, or where individuals are held liable either in person or as agents for debts incurred for the benefit of the association, or where the plaintiffs have shown themselves entitled to subject the general, or some particular, property of the association to their claims by virtue of an equitable lien or some species of trust.—*Home Benefit Ass'n No. 3 of Coleman County v. Wester*, 146 S. W. 1022.

35. Unincorporated voluntary associations organized for the purpose of insuring its members, and not for charitable purposes, might be sued though not possessed of any property.—*Id.*

sentations of a member of a building committee of such an association are not binding upon the lodge or upon an individual jointly interested with the lodge.³⁶ A fraternal benefit association is not liable in an action against it for injuries received from a fall caused by tripping while being initiated, where the tripping is shown not to be a part of the ceremony.³⁷

Superior, Subordinate and Affiliated Bodies.—With reference to the relations between an association and a local body, it is held, under Revised Statutes of 1914, Article 4847, declaring that a local branch cannot waive any provisions of the laws and constitutions of the society, that the society cannot be estopped by the conduct of the local body.⁴⁷ Further, a subordinate temple, in inflicting an injury while acting outside of its authority and not in furtherance of its business, sustains neither the relation of master and servant nor of principal and agent towards the grand body.⁴⁸ In general, the constitution and laws of a fraternal insurance order, consisting of a supreme lodge and of subordinate lodges are a part of the contract entered into by each member of the order when he becomes a member and therefore the property owned by a subordinate lodge is subject to the constitution and laws.⁴¹ Where the constitution so provides, on the suspension of a local lodge its officers must deliver up its charter and property to the supreme officer and the fight of the local members to the property of the subordinate lodge is simply an incident to their ownership and the fight is merely to use the property during the meetings of the lodge.⁴² When it is provided in the constitution that a lodge may be suspended for improper conduct and it is shown to be divided into irreconcilable factions and that at stated meetings much disorder occurs resulting in personal collisions and a display of force, the suspension of the lodge is justified.⁴³ A court will not interfere with the action of a supreme lodge in suspending a local lodge under authority alleged to be conferred by the constitution of the order where the certificates of the members were contracts between the supreme lodge and the individual members and no property rights were affected.⁴⁴ Neither in such cases can appeals be made to the courts where the constitution of such an order provides for an appeal from the decision of any officer within the organization itself.⁴⁵

It has been held that the conveyance of land to a Masonic organization deriving its authority from a larger organization known as the Grand Lodge does not convey it for the individual members

36. Unauthorized false representations of one member of building committee of a lodge to a materialman held not binding upon the lodge or upon an individual jointly interested with the lodge.—*Kuteman v. Lacy*, 144 S. W. 1184.

37. In an action against a beneficial association for injuries from a fall

caused by tripping while being initiated, where all the testimony showed that the tripping was not a part of the ceremony, but an independent act of some one in the temple, the association was not liable.—*Grand Temple and Tabernacle of Knights and Daughters of Tabor v. Johnson*, 135 S. W. 173. See 6 Cent. Dig. Ben. Association, § 8, 11.

but for the benefit of the lodge itself as an existing entity.³⁸ Neither, under such circumstances could a majority of the members dissolve such a lodge and form themselves into a different association, thus devoting the property to business purposes, nor could they dissolve the local lodge so long as there remained a sufficient number of loyal members to constitute a lodge under the laws of the Grand Lodge.³⁹ Those who remained were held to have the right to hold and use the property of the lodge.⁴⁰

Special Funds—Statutory Provisions.—Any society may create, maintain, invest, disburse and apply an emergency surplus or other

697—*Superior, subordinate and Affiliated Bodies.* (See 28 Cent. Dig. Insurance, § 1838.)

38. Where a lodge of Masons was a part of a larger organization known as the Grand Lodge, organized for specific purposes to be accomplished through local lodges, and such local lodge came into being by virtue of power conferred on its members to so organize themselves, a conveyance of land to trustees of such lodge placed the legal title in them and their successors, for the benefit, not of the individual members, but for the lodge itself as an existing entity.—*Minor v. St. John's Union Grand Lodge of Free and Accepted Ancient York Masons*, 130 S. W. 893. See 6 Cent. Dig. Ben. Assoc., §§ 32-35.

39. Where a local lodge derived its warrant of existence from a Grand Lodge to which it owed allegiance, a majority of its members could not dissolve such lodge and form themselves into a different association, thus devoting the property to business purposes; nor could they dissolve the local lodge, especially so long as there remained a sufficient number of loyal members to constitute a lodge under the laws of the Grand Lodge.—*Id.*

40. Where a majority of the members of a lodge, owing its existence and allegiance to a Grand Lodge, attempted to dissolve its organization and organize a new lodge with different purposes, but sufficient members loyal to the old lodge remained to constitute a lodge under the laws of the Grand Lodge, those who thus remained were entitled to hold and use the property of the lodge.—*Id.*

41. The constitution and laws of a fraternal insurance order, consisting of a supreme lodge and of subordinate lodges, are a part of the contract entered into by each member of the order when he becomes a member, and property owned by a subordinate lodge is subject to the constitution and laws.—*Lone Star Lodge No. 1935, Knights and Ladies of Honor v. Cole*, 131 S. W. 1180.

42. Under the constitution of a fraternal insurance order, consisting

of a supreme lodge and of subordinate lodges, authorizing the Supreme Protector to appoint deputies and providing that on the suspension of a subordinate lodge, its officers must deliver up its charter and property to the Supreme Protector or deputy, etc., the right of the members of a subordinate lodge to its property is simply an incident to their membership, and the right is merely the right to use the property during the meetings of the lodge.—*Id.*

43. Where the membership of a subordinate lodge of a fraternal insurance order, consisting of a supreme lodge and of subordinate lodges, and governed by a constitution providing for the suspension of any subordinate lodge for improper conduct, was divided into irreconcilable factions so that at stated meetings much disorder occurred, resulting in personal collisions and a display of force, the suspension of the lodge was justified.—*Id.*

44. Where the benefit certificates of members of a fraternal insurance order, consisting of a supreme lodge and of subordinate lodges, were contracts between the Supreme Lodge and the individual members, so that the suspension of a subordinate lodge did not affect such certificates, and where the suspension did not affect any rights of the members of the lodge in sick benefits, and where the rights resulting from the privileges possessed by the members of the lodge, together with the right to participate in the control of the affairs of the Supreme Lodge, were not property, the court, at the suit of the members of the suspended lodge, will not interfere with the action of the Supreme Lodge in ordering a suspension under authority alleged to have been conferred by the constitution of the order.—*Id.*

45. Members of a fraternal insurance order, consisting of a supreme lodge and of subordinate lodges, and governed by a constitution authorizing members to appeal from any decision of any officer in the manner prescribed by the constitution, must pursue the remedy provided for, and where they do not do so, they cannot appeal to the courts.—*Id.*

similar fund in accordance with its laws. The statute provides that the funds from which benefits shall be paid and the funds from which the expenses of the society are defrayed shall be derived from periodical or other payments by the members of the society and accretions of such funds. All fraternal societies must provide for stated periodical contributions sufficient for meeting the mortuary obligations, using as a basis the National Fraternal Congress Table of Mortality. (Art. 4835, Rev. St. 1914.)

Deferred payments or installments of claims are considered as fixed liabilities and every society must maintain a fund to meet them. (Art. 4835, Rev. St. 1914.)

Reinsurance—What Is a Contributing Member in Good Standing.—A member of a society who disappeared before the assumption of the society's debts by the defendant, but whose dues were paid was held a "contributing member in good standing" and a finding that he was a "living member" was warranted, notwithstanding Article 5707 of the Revised Statutes of 1914.⁴⁸

Insolvency and Dissolution—When an Association is Not Insolvent.—An association is not insolvent when it has power to levy extra assessments, has a large number of members, has paid all its obligations as they matured and had not suspended business but was a going concern with available assets of three or four thousand dollars on hand.⁴⁹ It is held that the power to levy additional assessments is an important factor in determining a corporation's solvency where the limited or term payments may not be sufficient to meet the liabilities of the association.⁵⁰

46.—Where a subordinate temple of a beneficial association has been fully organized and received its charter, the relation neither of master and servant nor principal and agent existed between the grand body and members of the subordinate temple inflicting an injury while acting outside of its authority, and not in furtherance of its business. —Grand Temple and Tabernacle of Knights and Daughters of Tabor v. Johnson, 135 S. W. 173.

47. Under Rev. St. 1911, Art. 4847, declaring that a local branch of a fraternal association cannot waive any provisions of the laws and constitution of the association, the association cannot be estopped by the conduct of a local body.—Grayson v. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of the International Order of Twelve, 171 S. W. 489.

699—Reinsurance.

48. Members of society who disappeared before assumption of society contracts by defendant, but whose dues were paid, held a "contributing member in good standing" and a finding that he was a "living member" was

warranted, notwithstanding Rev. St. 1911, § 5707.—Supreme Ruling of Fraternal Mystic Circle v. Hopkins, 171 S. W. 812.

701—Insolvency and Dissolution. (A) Insolvency and Its Effect in General. (See 28 Cent. Dig. Insurance, §§ 1840-1847.)

49. Where a fraternal beneficiary association, obtaining its funds from assessments on members, had power to levy extra assessments whenever there was insufficient money in the benefit fund to meet the claims of the beneficiaries of the fraternity, and when proceedings were instituted by the state to wind it up it had 279 members, and had paid all its obligations as they matured and had not suspended business, but was a going concern, with available assets of \$3,500, it was not insolvent, though its unmatured liabilities greatly exceeded that sum.—State v. Trinity Life & Annuity Society, 127 S. W. 1174.

50. Under Acts 31st Leg. 1st Ex. Sess. c. 36, providing that any insurance association doing business under the act might issue term certificates on the death of members within the

Reorganization—Rights of Members.—A corporation organized to receive the membership and assets of another fraternal insurance corporation and to assume its liabilities was held not authorized to re-rate a member of the latter, pursuant to a constitution adopted by the former as a member of the latter became a member of the former and was not received into it by the former.⁵¹

Consolidation—Statutory Provisions.—A domestic society must not merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, filed with the commissioner of insurance and banking and approved by him. The merger or transfer must be approved by a vote of two-thirds of the members of the supreme legislative or governing body of each society also. (Art. 4841, Rev. St. 1914.)

(A) **Estoppel to Deny Liability of Members.**—Where a mutual benefit society was formed by the consolidation of two societies created by laws of different states, it was held to be not estopped from denying liability to a member of one of the societies.⁵² In another case a society was held answerable for a breach of certificate issued by a prior corporation and society which it had absorbed.⁵³

(B) **Rights of Members Where Consolidation Had Failed.**—Where one society attempted to take over all the assets and certificates of another but received nothing of value belonging to plaintiff and made no promise or agreement with him based on any consideration the plaintiff could not recover on the ground of equitable estoppel.⁵³

(C) **Attempt to Enforce Rights Through Receiver After Con-**

term for which payments were limited, or limited payment, full life certificates payable at death, provided that the contract should provide that, if such limited or term payments were not sufficient to meet the liabilities of the association for death benefits as they should accrue, additional assessments may be made for that purpose, the power to levy additional assessments is an important factor in determining the corporation's insolvency.—Id.

704—(B) Reorganization. (See 28 Cent. Dig. Insurance, §§ 1840-1847.)

51. A fraternal insurance corporation organized to receive the membership and assets of another fraternal insurance corporation and to assume its liabilities held not authorized to re-rate a member of the latter organization, pursuant to a constitution adopted by the former.—*Ericson v. Supreme Ruling of Fraternal Mystic Circle*, 146 S. W. 160, reversed judgment Supreme Ruling of Fraternal Mystic Circle v. *Ericson*, 131 S. W. 92. See 28 Cent. Dig. Insurance, § 1840.

705—(C) Consolidation. (See 28 Cent. Dig. Insurance, § 1840.)

52. A mutual benefit society formed by the consolidation of two societies created by laws of different states held not estopped from denying a liability to a member of one of the societies.—*Gordon v. American Patriots of Springfield, Ill.*, 141 S. W. 331. See 28 Cent. Dig. Insurance, § 1840.

53. Where a mutual benefit society by which plaintiff's wife was insured for plaintiff's benefit made an ineffectual attempt to consolidate with defendant association, and the latter attempted to take over all of the assets and certificates of the former, but received nothing of value belonging to plaintiff or his wife, and made no promise or agreement with them based on any consideration, plaintiff could not recover from defendant, on his wife's certificate, after her death, on the ground of equitable estoppel.—*Whaley v. Bankers' Union of the World*, 88 S. W. 259. See Cent. Dig. vol. 28, cols. 2984, 2985, § 1840.

solidation Had Failed.—A holder of a certificate against an insolvent association could only enforce his rights through its receiver after the receiver had recovered the assets of the society erroneously paid over.⁵⁴

THE CONTRACT IN GENERAL

(A) Benefits—Statutory Provisions.—All such societies must provide for the payment of death benefits and may provide for the payment of benefits in case of temporary or permanent physical disability, either as a result of disease, accident or old age. In the latter case benefits shall not commence under seventy years and may provide for tombstones and the payment of funeral benefits. Fraternal benefit societies have the power to give a member when permanently disabled or on attaining the age of seventy all or such portion of the value of his certificate as the laws of the society may provide. Benefit certificates may be issued for a term of years less than the whole of life, payable upon the death or disability of the member occurring with the term stated. Provision is also made for partial cash payments of dues and the right to charge the balance against the certificate. Under certain circumstances a society may grant its members extended and paid-up protection and withdrawal equities. (Art. 4831, Rev. St. 1914.)

(B) Certificate—Statutory Provisions.—Every certificate shall specify the amount of the benefit provided and shall specify that the certificate, charter or articles of incorporation (or, if a voluntary association, the articles of association) the constitution and laws of the society, the application for membership and medical examination, signed by applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member. Copies of the same shall be received in evidence of the terms and conditions thereof. (Art. 4834, Rev. St. 1914.)

Nature of the Contract—A Life Insurance Policy and a Chose in Action.—A benefit certificate issued by a fraternal benefit order, which is in effect a policy of life insurance, is, even before the death of the insured, a chose in action.⁵⁵

Application as Part of Contract—(A) Application Must Be Properly Executed.—The application forms the basis of the contract and unless it is properly executed the party seeking mem-

54. Where defendant, a mutual benefit society, made an ineffectual attempt to consolidate with an insolvent association and take over its assets and certificates, a holder of a certificate against such insolvent association could only enforce his rights through its receiver after the receiver had recovered the assets of the society so erroneously paid over.—*Whaley*

v. Bankers' Union of the World, 88 S. W. 259.

55. Defendant mutual benefit society, having absorbed the membership and entire insurance business of a prior corporation and of an unincorporated society which succeeded it, held answerable for a breach of certificate issued by such prior corporation and society.—*Supreme Lodge K. P. v. Mims*, 167 S. W. 835.

bership can take no benefits as the minds of the parties contracting did not so meet as to give the contract binding force.⁵⁸

(B) Application for Reinstatement Must Be Authoritative.—Unless the application for reinstatement was with authority the statements and promises therein are nudum pactum and not binding on the applicant.⁵⁷

Constitution, By-Laws or Rules as Part of Contract—What Constitutes Contract.—In general the rule is that the constitution, by-laws and the policy of a fraternal benefit association constitute the contract between the member and the association, so far as the insurance is concerned.⁶⁰ In another case the court says the constitution and by-laws are a part of the benefit contracts made with the members of a mutual benefit society, who are charged with notice thereof.^{61a}

What Is Regarded as a By-Law.—An unrecorded proceeding fixing the monthly dues could not be regarded as a by-law under the constitution of a subordinate lodge.⁶¹

Members Presumed to Know Constitution and By-Laws.—The members are charged with notice of the constitution and by-laws of the society.^{59 61a}

Subsequent Provisions or Amendments—(A) Effect of Amendments—Statutory Provisions.—Any changes, additions or amendments to the charter or articles of incorporation or association, a constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the member and his bene-

THE CONTRACT IN GENERAL.
(SEE 29 CYC. 62.)

711—Nature of the Contract. (See 28 Cent. Dig. Insurance, § 1848.)

56. A benefit certificate issued by a fraternal benefit order, which is in effect a policy of life insurance, is, even before the death of the insured, a chose in action.—*Coleman v. Anderson*, 82 S. W. 1057, judgment affirmed (1905) 86 S. W. 730, 98 Tex. 570.

715—Application as Part of Contract. (See 28 Cent. Dig. Insurance, § 1853.)

57. Where an application for reinstatement by a member of a benevolent association, as required by the association, was without authority, statements or promises in such application are nudum pactum, and hence not binding on the applicant.—*Supreme Lodge Nat. Reserve Ass'n v. Turner*, 47 S. W. 44, 19 Tex. Civ. App. 346.

58. Unless the agreement and warranty prescribed as preliminary to the issuance of a benefit certificate and which forms the basis of the contract, is properly executed the party seeking membership can take no benefits, since the minds of the parties con-

tracting did not so meet as to give the contract binding force.—*Supreme Lodge P. K. and L. of H. v. Grace et al.*, 60 Tex. 569.

717—Constitution, By-Laws or Rules as Part of Contract. (See 28 Cent. Dig. Insurance, §§ 1854, 1855.)

59. A member of a fraternal insurance organization is presumed to know its by-laws.—*Modern Woodmen of America v. Owens*, 130 S. W. 858. See 28 Cent. Dig. Insurance, § 1854.

60. The constitution and by-laws and the policy of a fraternal benefit association constitute the contract between a member and the association, so far as the insurance is concerned.—*Haywood v. Grand Lodge of Texas, K. P.*, 138 S. W. 1194.

61. Under constitution of a subordinate lodge held that an unrecorded proceeding fixing the monthly dues could not be regarded as a by-law.—*Id.* See 28 Cent. Dig. Insurance, § 1854.

61a. The constitution and by-laws of a mutual benefit society are a part of the benefit contracts made with its members, who are charged with notice thereof.—*United Moderns v. Colligan*, 77 S. W. 1032, 34 Tex. Civ. App. 173.

ficiaries and shall govern and control the agreement in all respects the same as though such changes or amendments had been made prior to and were in force at the time of the application for membership. (Art. 4834, Rev. St. 1914.)

(B) Notice to Commissioner Necessary—Evidence of Adoption of Amendments—Statutory Provisions.—Every society shall certify to the commissioner of insurance and banking all amendments or additions to the constitution and laws within ninety days after enactment and printed copies of the constitution and laws as amended, certified by the secretary or corresponding officer of the society shall be prima facie evidence of the legal adoption. (Art. 4849, Rev. St. 1914.)

(C) Agreement to Be Bound by Subsequent Amendments.—It is customary for associations to require in their applications and certificates that members agree that the laws then in force and that may thereafter be adopted shall form the basis of the contract.⁷⁵ Also the insured must agree that his benefit shall not be payable unless he shall have complied with the laws then in force or that may thereafter be adopted.⁷⁶ Therefore the insured is bound under such circumstances by a subsequent amendment of the by-laws amplifying the defense of suicide.⁷⁶

(D) Reduction of Amount of Certificate and Limitation as to Payment of Benefits.—Where the amount of a certificate was materially reduced by a by-law and provided that the face value should be paid as long as the emergency fund had not been exhausted, the by-law was void and the beneficiary could recover under the original contract, the member during her life time having a right to regard the by-law as a repudiation of the contract

719—Provisions or Amendments. (A) Subsequents. (See 28 Cent. Dig. Insurance, § 1855.)

62. Where notice of a condition of a benefit certificate, which was part of the constitution was intended to be given by inserting it in the certificate, which was not done, the insured is not chargeable with knowledge on the ground that it was a by-law of the insurer, though his application was made subject to the constitution and by-laws, since the insurer had assumed the duty of notifying the insured of the existence of such provision. Judgment, 59 S. W. 905, affirmed.—Sovereign Camp, Woodmen of the World, v. Fraley, 59 S. W. 879.

63. Where a beneficial society amends its beneficiary certificates by changing their conditions so as to render them void if insured committed suicide while either sane or insane instead of only while sane, as previously prescribed, which amendment was void because made outside the state of incorporation, a member accepting a certificate before the amendment was enforced, subject to all laws then in force or

that might thereafter be adopted, was not precluded from questioning the validity of such amendment, as he was not bound by a law that was not valid.—Sovereign Camp, Woodmen of the World, v. Fraley, 59 S. W. 905, judgment affirmed, 59 S. W. 879.

64. Insured, in his application for membership in a mutual benefit life insurance society, agreed to conform to the laws, rules, and usages of the order then in force, or which might thereafter be adopted. The by-laws were thereafter amended so as to decrease the amount his beneficiary would receive, and also to decrease the amount of the dues, but provided that members admitted before a certain date, to which class insured belonged, might, by a declaration in writing of such election, remain under the former plan. Insured did not make such declaration. Held, that he was bound by the change, and that his beneficiary had no such vested right in the certificate that it could not be affected by the change.—Duer v. Supreme Council, Order of Chosen Friends, 52 S. W. 109, 21 Tex. Civ. App. 493.

and treat it as ended, recovering the amount of premiums paid.⁷⁷

(E) Effect in General on Existing Members.—Where a by-law is passed requiring the members to surrender their certificates and receive new ones, payable to such beneficiary as may be designated from certain specified classes, the fact that the insurer receives the premiums on the unsundered policy afterwards, waives nothing more than the return of the certificate and designation of the beneficiary.⁸⁰ Further, if there should be no beneficiary within the classes specified the insurance will on the death of the insured revert to the association when so provided in the by-laws.⁸⁰ A finding that a member had not elected to accept the society's action where the latter had made a new by-law reducing the value of her certificate even though she had made payments was justified where it was shown that she had made them with the expectation that such by-law might be repealed.⁷⁸ Where after a new by-law is made, members are given the opportunity by acting before a certain time, to continue under the old system, one who does not so act within the time specified is bound by the change and his beneficiary had no such vested right in the certificate that it could be affected by the change.⁶⁴

(F) Effect Where a New Charter Is Obtained.—It has been held that where a society obtains a new charter after a member has joined the rights under his certificate will be governed by the later charter.⁶⁵ The later charter would be in the nature of an amendment to the first and as the member in his application agreed to comply with future regulations, the change in the rule for determining beneficiaries under the new charter was binding on him and his beneficiary.⁶⁶

65. A beneficial association first incorporated in Kentucky, but later abandoned its charter and obtained a charter in Missouri, and for many years, with the knowledge and recognition of the subordinate lodges and of deceased, continued to act under the later charter. Held, that the Missouri charter, and the constitution and by-laws enacted thereunder, controlled in determining the rights under deceased's certificate, though he had joined before the new charter was obtained.—*Bollman v. Supreme Lodge Knights of Honor*, 53 S. W. 722.

66. Conceding that the Kentucky charter and the laws enacted thereunder should control, the second amendment to the first; and as the first provided for amendment, and deceased, in his application, agreed to comply with future regulations, a change in the rule for determining beneficiaries was binding on him and on the beneficiaries.—*Bollman v. Supreme Lodge Knights of Honor*, 53 S. W. 722.

67. Where the constitution of a mutual benefit society provided that

whenever members taken over from another society were permitted to retain their benefit certificates, or if the rate of assessment paid by any member was lower than the rate charged by the corresponding benefit plan of the receiving society, the members might be rerated by the supreme executive committee, such provision authorized the executive committee to re-rate the assessments of existing members, and was not limited to persons who should thereafter become members.—*Supreme Ruling of Fraternal Mystic Circle v. Ericson*, 131 S. W. 92. Reversed, 146 S. W. 160.

68. A mutual benefit society insuring members on the monthly assessment plan in 1907 had an insurance liability of \$39,937,000. It had in its treasury \$225,000 applicable to the payment of death losses, but up to 1907 its membership had incurred losses exceeding contributions by \$68,651.23, and its excess of liabilities for death and benefit claims over assessments paid, for the year 1907, amounted to \$33,156.27, notwithstanding the assessments of plaintiff and others in

(G) **Where Amendment Is Not Valid.**—A member is not bound by an amendment which is void, because made out of the state of incorporation, even though he had agreed to comply with all future regulations.⁶¹

(H) **Where By-Law Should Be Inserted in Certificate.**—Neither is a member bound by a by-law which should have been inserted in his certificate, where the insurer had assumed the duty of notifying him of its existence by so doing.⁶²

(I) **Increase in Rate of Assessment.**—The fact that a society has the right to amend its constitution and by-laws at will and that the certificate holder is obligated to pay monthly assessments as levied does not authorize the society to change the terms of a member's insurance contract by increasing the assessment rate.⁷⁵

his class had been increased from \$3.30 a month in 1893 to \$4.92 in 1895, and to \$7.35 in 1903, all of which had been paid up to and including 1907. Held, that the \$225,000 in the treasury could not be regarded as a surplus so as to show that the society was in such a condition as to render a further increase in rates unnecessary and unreasonable.—*Id.*

69. Where a mutual benefit certificate was issued on condition that the insured would comply in the future with the rules and regulations then governing the society and its fund, or that might thereafter be enacted by the supreme body for that purpose, such body, both under such provision and independent thereof, was entitled as against existing members to adopt a new by-law providing for the re-rating of members and the increasing of the amount of assessments in order to enable it to perform its certificate obligations.—*Id.*

70. "Business methods" of a mutual benefit society, as to which it is authorized to adopt new by-laws binding on existing members, includes the fixing of proper assessment rates to enable it to meet its obligations.—*Id.*

71. The vested rights of a member of a mutual benefit society are not impaired by a by-law raising the assessment rates he is required to pay in the future to enable the society to meet its obligations to himself and his fellow members.—*Id.*

72. Where a change of rates of a mutual benefit society imposed an equal burden on all members of plaintiff's class, the change was not arbitrary.—*Id.*

73. Facts held not to show that an increase in the rates of a mutual benefit society by which a member, 63 years of age, was charged \$23.16 a month for a policy of \$3,000 under which he was entitled to mortuary, sick, and old age benefits was unreasonable.—*Id.*

74. A mutual benefit association

certificate and application for membership provided that a member should be bound by the laws and regulations of the Supreme Lodge, and those thereafter adopted by it. Insured's assessment when he entered was \$3.65, but subsequently the Supreme Lodge raised its rates; insured's rate being fixed at \$4.25. He paid a few of the increased assessments, and then defaulted, was suspended, and paid no subsequent assessments, and died five years afterwards. Held, that insured was bound by the increased rate, and, not having paid it, or even the original rate, his certificate became void.—*United Benevolent Ass'n v. Cass*, 119 S. W. 123. See 28 Cent. Dig. Insurance, § 1855.

75. Right of mutual benefit society to amend its constitution and by-laws at will and the obligation of a certificate holder to pay monthly assessments as levied held not to authorize it to change the terms of a member's insurance contract by an increase in the assessment rate.—*Supreme Lodge K. P. v. Mims*, 167 S. W. 835.

76. Where a member of a mutual benefit insurance association agrees in his application and certificate that the laws then in force or that may thereafter be adopted shall form the basis of his contract, and that his benefit shall not be payable unless he shall have complied with the laws then in force or that may thereafter be adopted, he is bound by a subsequent amendment of the by-laws amplifying the defense of suicide.—*Eversberg v. Supreme Tent Knights of Maccabees of the World*, 77 S. W. 246, 33 Tex. Civ. App. 549.

77. Where a beneficial association issued a certificate for \$5,000 to a member, and later adopted a by-law providing that \$2,000 should be the highest amount paid by the order under any benefit certificate theretofore or thereafter issued, provided that the face value of the certificate should be paid as long as the emergency fund

Where a constitution provides that if the assessment provided is not adequate then such a "further assessment" should be made as might be necessary to fully meet the benefits due, the association may require the payment of such increased rate of assessment as might be necessary to meet the benefits due, as by requiring an increased rate per month by each member.⁷⁹ In a case where the insured's rate was raised, as the laws of the lodge provided it might be, and he paid a few of the assessments, then defaulted, was suspended and died a number of years later it was held that the insured was bound by the increased rate and not having paid either it or the original rate his certificate was void.⁷⁴

Validity of Certificate in General.—It is the duty of the applicant to read over the answers in the application before signing.^{82a}

In case of failure to read over such application he is bound by the answers as written.^{82a}

A benefit certificate issued by a mutual relief association, promising to pay from a fund raised for that purpose a certain sum to the husband of the assured on her death, in consideration of her paying regularly monthly installments, is a valid insurance policy.⁸²

had not been exhausted, such by-law was void, and the beneficiary could, after the death of the member, recover under the original contract, as the member during her lifetime had the right to regard the by-law as a repudiation of the contract, and treat it as needed, and recover the amount of premiums paid by her.—Supreme Council A. L. H. v. Batte, 79 S. W. 629, 34 Tex. Civ. App. 456.

78. Where payments made by a member of a beneficial association, after a virtual reduction in the value of her certificate by a by-law of the association, were made with the expectation that the by-law might be repealed, a finding was justified that the member had not elected to accept the association's action and treat the contract as still in force.—Supreme Council A. L. H. v. Batte, 79 S. W. 629, 34 Tex. Civ. App. 456.

79. Under the constitution of a fraternal benefit association providing that if the assessment provided for is inadequate, then "further assessment" should be made as might be necessary to fully meet the benefits due, the association may require payment of such increased rate of assessment as might be necessary to meet the benefits due, as by requiring an increased rate payable per month by each member.—Supreme Lodge of Fraternal Union of America v. Ray, 166 S. W. 46.

80. Where a member of a voluntary benevolent association holds a certificate payable to his order, and by laws subsequently passed require him to surrender the certificate, and receive a new one, payable to such

beneficiary as he may designate from certain specified classes, the receiving of the premiums on the unsundered policy afterwards is not a waiver of anything more than the return of the certificate, and a designation of the beneficiary; and, if there be no beneficiary within the classes specified, the amount of the insurance reverts to the association at the death of the assured when so provided by the by-laws.—West v. Grand Lodge of the A. O. U. W. of Texas, 37 S. W. 966.

722.—Validity in General.

81. Insured, while in good health, applied for insurance in a benefit association, and paid the requisite amounts therefor. The application was approved, a certificate issued, and sent to the local agent, who delivered it while insured was very ill with malarial fever, of which she died the next day. The agent acted with full knowledge of all the facts, and there was no fraud on the part of the insured or the beneficiary. Held, that the association was liable on the certificate, though the delivery to the insured while sick was contrary to its by-laws.—Home Forum Ben. Order v. Varnado, 55 S. W. 364.

82. A benefit certificate issued by a mutual relief association, promising to pay from a fund raised for that purpose a certain sum to the husband of the assured on her death, in consideration of her paying regular monthly installments, is a valid insurance policy.—Supreme Council of American Legion of Honor v. Larmour, 16 S. W. 633.

Delivery and Acceptance of Certificate—General Rule.—Ordinarily a certificate must be delivered to the insured before it is binding and most constitutions and by-laws contain this provision.⁸³

Delivery Where Applicant is Sick or Dead.—Where an applicant has complied with all the preliminaries, had tendered the dues and demanded his certificate but was taken sick before delivery and it was refused, it was held that the beneficiary could recover.⁸⁴ It has been held that delivery to a beneficiary after the death of insured does not amount to a delivery to the insured such that it will bind the association.⁸⁵ The clerk of a local camp has no authority to deliver a certificate to an applicant who is sick and such delivery would not be binding on the society where the application and by-laws provide that a certificate should not take effect until it was delivered to the applicant while in good health.⁸⁷ In general, an association is liable on a certificate where its agent, acting with full knowledge of all the facts, delivers the certificate to the insured while sick although the same was contrary to the by-laws of the society.⁸¹

Delivery Must Be Made to Applicant.—Delivery to the clerk of a local camp is held not delivery to the member.^{86 90} The clerk is regarded as the agent of the association and not of the insured.⁸⁶

82a. It is the duty of one applying for a policy, to be issued by a fraternal insurer, to read over the answers written in the application before signing, and, in case of failure to read over such application, the applicant is bound by the answers as written.—*Sovereign Camp W. O. W. v. Lillard*, 174 S. W. 619.

720—Delivery and Acceptance of Certificate. (See 28 Cent. Dig. Insurance, § 1856.)

83. The constitution and by-laws provided that liability to pay on the death of a member should not arise unless the association had delivered to him his beneficiary certificate. An applicant had fulfilled all requirements entitling him to a certificate, but the association had failed to deliver it. The applicant was taken sick and before he was in default as to any assessment, tendered it to the association, and demanded his certificate. He was sick at the time and delivery of the certificate was refused. Held that his beneficiary could recover after his death.—*Pledger v. Sovereign Camp W. O. W.*, 42 S. W. 653, 17 Tex. Civ. App. 18.

84. Where the by-laws of a mutual benefit society provided that the first assessment and dues must be paid by the applicant, and forwarded, together with the acceptance of the certificate, to the sovereign clerk, immediately after the delivery of the certificate, it was not necessary to the validity of

the certificate that the member should have executed a written acceptance.—*Sovereign Camp Woodmen of the World v. Brown*, 88 S. W. 372. See Cent. Dig. vol. 28, cols. 3005, 3006, § 1856.

85. Where delivery of a mutual benefit certificate is essential to completion of the contract, no delay caused by acts of the insurer can take the place of delivery.—*Modern Woodmen of America v. Owens*, 130 S. W. 858. See 28 Cent. Dig. Insurance, § 1856.

86. The receipt of a benefit certificate by the clerk of the local camp of a beneficiary association was not a delivery to insured; the clerk being an agent of the association, not of insured.—*Id.*

87. Where an application for a benefit certificate, and the by-laws of the beneficiary association, provided that it should not take effect till it was delivered to the applicant while in good health, and the clerk of the local camp of the association was expressly prohibited from waiving any requirements of the by-laws, he was not only justified in not delivering the certificate, but had no authority to deliver it when the applicant was sick with typhoid fever, and such a delivery would not have been binding.—*Id.*

88. The delivery of a benefit certificate to the beneficiary after the death of the applicant did not amount to a delivery to him so as to bind the association.—*Id.*

Delayed Delivery.—In a case where the certificate was sent to the wrong camp, and the applicant, after having complied with all the requirements, suddenly died before receiving it, it was held that his beneficiary could recover even though the laws of the order provided for personal delivery before liability should accrue.⁸⁹ In another case it was held that no delay caused by the acts of the insurer can take the place of delivery where delivery is essential to completion of the contract.⁹⁰

Written Acceptance Not Necessary to Validity.—Even though the by-laws provided that a written acceptance must be forwarded with the first assessment upon delivery of the certificate, it was not necessary to the validity of the certificate that the member should have executed a written acceptance.⁹¹

Payment of Dues—(A) Acceptance by Association.—Where an association accepts the premium or dues, with knowledge that the insured has died, the liability of the insurer is established, even though the certificate has not been delivered.⁹²

(B) Order Given on Another for "Advance Premium."—Under the terms of the policy which provided that the consideration was the receipt of the "advance premium" and payment of all bi-monthly premiums, the "advance premium" was held to be in the nature of a membership fee.⁹³ Where the premium is to be paid

89. Deceased made application to join the Woodmen, complied with all the requirements, and a certificate was issued by the sovereign camp, but through mistake was sent to the wrong local camp, and before the mistake was corrected, and the certificate sent to the right camp for delivery, insured was killed. He had offered to pay the first assessment, which was due when the certificate was delivered. The application for membership and the constitution and laws of the order provided that no liability for benefits should accrue until the certificate was personally delivered to him and he had paid one assessment. Held, that the beneficiary could recover.—*Sovereign Camp, Woodmen of the World, v. Dees*, 100 S. W. 366. See 28 Cent. Dig. Insurance, § 1856.

90. Delivery of a benefit certificate by the head officers of the order to the clerk of the local camp held not a delivery to the member.—*McWilliams v. Modern Woodmen of America*, 142 S. W. 641.

721.—**Payment of Dues.** (See 28 Cent. Dig. Insurance, § 1857.)

91. The consideration for dues as expressed in the policy was "the receipt of the advance premium, the payment of all bi-monthly premiums,"

etc. The policy and regulations provided for payment of bi-monthly premiums, graded according to the age of applicant. The policy and application provided that no liability should be incurred until payment of the advance premium, the approval of the application, and the delivery of the policy. The regulations provided that an "advance premium" of the same amount for all ages should be collected with each application, and that no bi-monthly call should be made on any member until after the expiration of at least 105 days from date of policy. Held, that the "advance premium" is of the nature of a membership fee, and not a payment in advance to meet the bi-monthly calls made after expiration of 105 days.—*Smith v. Covenant Mut. Ben. Ass'n*, 43 S. W. 819, 16 Tex. Civ. App. 593.

92. Where the policy and by-laws of a mutual insurance company provide for payment of an advance premium as membership fee, which was given to the soliciting agent as his commission, an order given on the company by an applicant for membership for the payment of such premium to the agent out of money due the applicant from the company cannot be countermanded without withdrawing the application.—*Smith v. Covenant Mut. Ben. Ass'n*, 43 S. W. 819, 16 Tex. Civ. App. 593.

by an order on the insurer for money due insured the withdrawal of the order will withdraw the application.⁹²

Misrepresentation, Fraud or Breach of Warranty—In General.—The usual statutory provisions in regard to misrepresentations do not apply to fraternal benefit companies (Art. 4957, Rev. St. 1914),⁹³ ¹¹⁰ ¹¹² but instead penalties are provided making it a misdemeanor for an applicant or member to make false statements in the application (Art. 4859a, Rev. St. 1914) willfully and knowingly.

Where Misstatement is Unintentional—Good Faith.—Where the certificate provided that the answers in the application and the medical examiner's report were made a part of the certificate and the applicant agreed that the answers in the examiner's report were warranted to be true and should with the application form the basis of the contract and constitute a warranty, a misstatement in the examiner's report, although unintentional, made the certificate invalid.⁹⁴ Under such conditions and circumstances more than good faith was required on the applicant's part in answering the medical examiner's questions.⁹⁷ In another case an applicant stated that he had never been intoxicated and that his deceased

⁹². A wife made application for membership in a benefit association, and for insurance, payable to her husband, and paid the requisite amounts therefor, to be returned if the application was rejected. The application was approved, a benefit certificate was issued and forwarded, to be delivered on payment of some additional dues. After the certificate was issued, but before delivery, insured died. The husband thereupon tendered the dues to a local agent, who forwarded them to the association, which accepted and retained them knowing the facts. Held sufficient to establish the liability of the association.—*Home Forum Ben. Order of Illinois v. Jones*, 48 S. W. 219, 20 Tex. Civ. App. 68.

722—Misrepresentation, Fraud, or Breach of Warranty. (See 28 Cent. Dig. Insurance, §§ 1859-1865.)

⁹⁴. A mutual benefit certificate provided that the answers in the application and the medical examiner's report were made a part of the certificate. At the foot of the examiners report insured declared that the answers as written were given by herself to the medical examiner, and in the body of the report she declared that she agreed with the foregoing answers and statements, and the answers to questions propounded to her by the medical examiner were warranted to be true, and that such answers and statements, together with her application for membership, should form the basis of her agreement with the order, and constitute a warranty.

Held that, where insured misstated that she was not then pregnant in the examiner's report, the certificate was invalid, though there was no intentional misstatement, and both the insured and the examining physician were deceived as to her condition, and though she died from other causes.—*Supreme Lodge Knights and Ladies of Honor v. Payne*, 108 S. W. 1160, 101 Tex. 449, 15 L. R. A. (N. S.) 1277.

⁹⁵. The constitution of a fraternal beneficiary association designated a wife, children, adopted children, parents, brothers, sisters, or other blood relations or persons dependent on the member as those who might be named as beneficiaries in certificates. Acts 26 Leg. (Sess. Acts 1899, p. 195, c. 115) designates the family, heirs, blood relatives, affianced husband or wife, or persons dependent on the member at his death. The constitution and by-laws further provided, and the benefit certificate itself recited that the same was issued subject to all the laws, rules, etc., and in consideration of the representations and warranties in the application and that, if any of the statements were untrue, the certificate should be void. The application stated that applicant warranted all the statements therein as true, and that any untrue statement should avoid the certificate. Held, that the representation that the beneficiary named was a cousin of applicant, whereas she was no blood relative, rendered the certificate void.—*Gray v. Sovereign Camp W. O. W.*, 106 S. W. 176, 47 Tex. Civ. App. 609. See 28 Cent. Dig. Insurance, §§ 1859-1865.

maternal grandmother was never insane. These were held to be statements of opinion and where he in fact believed them in good faith their falsity would not vitiate the certificate warranting the truth of the answers and stipulating that the literal truth of each shall be a condition precedent to any contract issued on the faith of the answers.⁹⁶ The word "faith" was held to mean a firm conviction of the truth of what is declared by another by way of testimony without other evidence.⁹⁶ In still another case, it was held that express warranties must be literally complied with and good faith in making the answers is immaterial.⁹⁸ Where an applicant stated in good faith that he was free of disease and never had had a certain disease, his statements were true in the sense intended by the parties, though he died shortly thereafter and may at the time of his application have had the germs of the disease in him.¹⁰⁰ In a case where the policy contained the usual warranty that the answers in the application should be construed as warranties and the policy should be void if any of the statements "upon the faith of which it was issued" should be found untrue, it was held that such policy was not rendered void where the insured died subsequently of small pox, by reason of the fact that he had falsely stated that he had not been successfully vaccinated and agreed to waive all claims under the policy until after he had been successfully vaccinated.¹²⁴

^{96.} Statements of the applicant for insurance that he had never been intoxicated and that his deceased maternal grandmother was never insane are statements of opinion, and, where the applicant in good faith believes them, their falsity will not vitiate the certificate warranting the truth of the answers, and stipulating that he agrees that the literal truth of each shall be a condition precedent to any contract issued on the faith of the answers; the word "faith" meaning a firm conviction of the truth of what is declared by another by way of testimony without other evidence.—*Daniel v. Modern Woodmen of America*, 118 S. W. 211.

^{97.} A life policy containing a declaration of insured that the foregoing answers and statements and the answers to questions propounded to her by the medical examiner were warranted to be true, and contained a declaration of insured to the medical examiner that answers as written in the medical examiner's certificate were as given by her, followed by the words "and that I have not made any misstatements or concealed any facts in relation to my past or present condition, family history, or age." Held, that the quoted language did not qualify the language preceding it so as to require only good faith on insured's part in answering the medical exam-

iner's questions.—*Supreme Lodge Knights and Ladies of Honor v. Payne*, 110 S. W. 523. See 28 Cent. Dig. Insurance, §§ 558-559-562-566.

^{98.} Where answers in an application were expressly made a part of a benefit certificate and were expressly made warranties, the question of good faith in making the answers, if they were false, is immaterial, since express warranties must be literally complied with.—*Modern Woodmen of America v. Owens*, 130 S. W. 858. See 28 Cent. Dig. Insurance, §§ 1859-1865.

^{99.} Acts 1903, c. 69 (Rev. St. 1895, Art. 3096aa), providing that misrepresentations shall not be a defense to an action on an insurance policy unless they are material to the risk, or actually contributed to the contingency or event on which the policy became due, does not apply to fraternal beneficiary societies.—*Id.*

^{100.} Where an applicant for fraternal benefit insurance in the evening after the application had a headache, and two days later was in bed sick, and his sickness was afterwards diagnosed as typhoid fever, of which he died, his statements in his application, made in good faith, that he was free of disease and never had typhoid fever, were true in the sense intended by the parties, though the germs of the disease may then have been in his system in the process of development.—*Id.*

Misrepresentation as to Beneficiary.—Where the constitution provided that among other persons blood relatives could be beneficiaries, the statute making the same provision, and the constitution, by-laws and the policy recited that the certificate was issued subject to all the laws and rules of the society and in consideration of the warranties and representations in the application, that the insured warranted the statements therein as true and any untrue statement should avoid the contract, it was held that the representation that the beneficiary named was a cousin of applicant, whereas she was no blood relative, rendered the certificate void.⁹⁵

Misrepresentation as to Good Health.—In a case where the applicant warranted that she was in good health, such statements upon being found to be false, precluded recovery by the beneficiary.¹¹⁴ An applicant's answer that he had never had any serious illness would be considered as a mere expression of opinion, which will not avoid the policy, though untrue, unless he knew of its falsity.¹¹⁶ Where the insured did not make the statement as to her good health personally but it was inserted by her father who was the beneficiary and the agent of insurer and it was not shown that the insured knew that such a statement was in the application, it was, as to insured, but the expression of an opinion and its falsity would not necessarily defeat recovery on the certificate.¹⁰⁴

Breach of Warranty Before Delivery of Certificate—As to Good Health.—A good health warranty is a continuing one up to the time of the consummation of the contract and one who became sick and died before the delivery of the certificate breached the warranty so that the contract never took effect.^{101 102}

Fraud of Physician.—A physician who corrected an application

101. Where an applicant for a benefit certificate within the time when the contract would have been consummated had the matter been handled with the utmost dispatch became sick with typhoid fever, of which he died, his contract never took effect, his warranty that he was in good health being a continuing one up to the time of consummation of the contract, or at least to the time when it could have been consummated.—Id.

102. Where an application for a benefit certificate was made a part of the certificate, and the answers of the applicant and the by-laws of the association were made warranties, a statement that the applicant did not have typhoid fever was a continuing warranty up to the consummation of the contract, which in no event could be regarded as taking place before the approval of the application, at which time, without the knowledge of the association, he was sick with typhoid fever, of which he died in a few days.—Id.

103. Where an application for a

benefit certificate was returned for correction as to a matter of family history, and the applicant was then sick with typhoid fever to the knowledge of the examining physician, if the date of the correction be regarded as the date of the policy, an answer that the applicant was not sick, the certificate of the physician that the answers were true, and his approval of the application were a fraud on the association, not within the actual or apparent authority of the physician.—Id.

104. When a daughter did not personally make the statement as to good health in an application for a certificate of life insurance which was issued on her life, but it was printed in an application prepared by her father, who was the beneficiary, and the agent of the insurance order, and it was not shown that the daughter knew that such statement was in the application, it was, as to plaintiff, but the expression of an opinion, and its falsity would not necessarily defeat recovery on the certificate.—Home Circle Soc., No. 2, v. Shelton, 85 S. W. 320.

at a time when the applicant was sick with typhoid fever, stating that the applicant was not sick, adding to such application his certificate that the answers therein were true, commits a fraud on the association not within the actual or apparent authority of a physician.¹⁰⁵

Breach of Warranty in General.—Answers are regarded as warranties of an insured where in his medical examination, which is a part of his application, he warrants and guarantees them to be true and agrees that if they are untrue the policy will be avoided.¹⁰⁶ The following additional kinds of misrepresentation and breach of warranty have been passed on: As to being under the care of a physician;¹⁰⁷ as to the use of intoxicating liquors;¹⁰⁸ hospital surg-

105. Where insured in her medical examination stated that she had had two miscarriages, proof that she had had two abortions did not show a breach of warranty.—*Royal Neighbors of America v. Bratcher*, 151 S. W. 885. See 28 Cent. Dig. Insurance, §§ 1859-1865.

106. Proof that insured had been treated for headache three years prior to the issuance of her policy, she having stated that she had had no illness for seven years, was not necessarily a defense; the jury being authorized to find that it was not material to the risk under Acts 31st Leg. (2d Extra Sess.) ch. 22.—*Id.*

107. Where insured, in his medical examination accompanying an application for a policy of insurance, warranted that he had not been under the care of a physician within five years, and it appeared that within that time he had visited a physician nearly every day for two months for granulated eyelids, the policy was void.—*Brock v. United Moderns*, 81 S. W. 340, 36 Tex. Civ. App. 12.

108. Where insured warranted and guaranteed his answers to questions in his medical examination, which was a part of his application for an insurance policy, to be true, and agreed that if they were untrue the same should avoid the policy, his answers to such questions were warranties.—*Brock v. United Moderns*, 81 S. W. 340, 36 Tex. Civ. App. 12.

109. Deceased, in an application for a benefit certificate, warranted that all questions were truthfully and completely answered. He was asked to what extent he used intoxicating liquors, and to state the kind and average quantity, etc., to which he answered, "Don't use them." He was also asked whether he had always been temperate in their use, and, if not, to explain the duration and extent of excess, and when last, which he answered "Yes," and stated that he was not engaged in any manner in the sale or manufacture of intoxicating liquors. Held, that the purpose of such questions

was to ascertain, not whether insured used intoxicating liquors at all, but the extent to which he used them, and that the insurer was not misled by such answers, though insured was not a total abstainer.—*Endowment Rank Supreme Lodge K. P. v. Townsend*, 83 S. W. 220, 36 Tex. Civ. App. 651.

110. Acts 1903, p. 94, ch. 69 (Rev. St. 1895, Art. 3096aa), declares that any provision in an insurance policy contracted for in Texas that the answers or statements in the application, if false, shall render the policy void or voidable, shall not constitute a defense unless shown to have been material to the risk. Such provision was an amendment to Rev. St. 1895, tit. 58, embodying the law of insurance, and was added to chapter 4, which treats of life and accident insurance companies, their contracts, and policies. Held, that such provision was an "insurance law," within Laws 1899, p. 195, ch. 115, § 1, relating to fraternal associations, and providing that they shall not be subject to the insurance laws of the state unless expressly designated therein.—*Modern Order of Praetorians v. Hollmig*, 103 S. W. 476. See 28 Cent. Dig. Insurance, §§ 1859-1865.

111. Acts 1903, p. 94, ch. 69 (Rev. St. 1895, Art. 3096aa), declaring that any provision in an insurance policy contracted for in Texas that the answers or statements in the application, if false, shall render the policy void or voidable, shall not constitute a defense unless shown to be material to the risk, is applicable to fraternal societies, as well as associations conducting an ordinary life insurance business.—*Modern Order of Praetorians v. Hollmig*, 103 S. W. 474, judgment reversed on rehearing, 105 S. W. 846.

112. Where a member of a beneficiary association falsely warranted in his application for membership that he had not consulted with or been treated by a physician, there can be no recovery against the association, since Acts 1903, p. 94, ch. 69 (Rev. St. 1895, Art. 3096aa), providing that any pro-

ical operations;¹¹⁷ hereditary disease;¹¹⁷ rejection by another order;^{119 120} as to having had the piles;¹²¹ and as to having had an abortion.¹⁰⁵

Misrepresentations "Material to the Risk."—Under the law as it now exists, the old provision that a misrepresentation shall not constitute a defense unless material to the risk, does not apply and the following cases will be valuable only in a general way: As to being treated by a physician;¹²² as to past illness;^{106 118} diseases of genital organs, dysentery and surgical operations.¹²² The phrase "material to the risk" was held to mean any fact concerning the health, condition or physical history of the applicant which would naturally have influenced the insurer in determining whether to issue the certificate.¹¹⁵

vision in an insurance policy that statements made in the application, if false, shall render the contract void, shall be of no effect unless the misrepresentations are shown to be material to the risk, etc., does not apply to beneficiary associations. Judgment, 103 S. W. 474, reversed on rehearing.—*Modern Order of Praetorians v. Hollmig*, 105 S. W. 846.

113. "Material to the risk," as used in Rev. St. 1911, Art. 4834, means any fact concerning the health, condition, or physical history of the applicant which would naturally have influenced the insurer in determining whether to issue the certificate.—*Modern Brotherhood of America v. Jordon*, 167 S. W. 794.

114. False statements by the applicant for mutual benefit insurance as to the condition of her health held, under the provisions of the application and certificate, to have been warranties and to preclude recovery by the beneficiary.—*The Homesteaders v. Briggs*, 166 S. W. 95.

115. A negative answer to a question asked insured, "Have you ever had a surgical operation performed or received treatment in a hospital, sanitarium, retreat, or any public or private institution for the treatment of physical or mental disease?" was not made false by proof that insured had been operated on by a physician by surgical instruments at her home.—*Ladies of Maccabees of the World v. Kendrick*, 165 S. W. 110. See 28 Cent. Dig. Insurance, §§ 1859-1865.

116. The applicant's answer that he has never had any serious illness may be considered as a mere expression of opinion, which will not avoid the policy, though untrue, unless he knew of its falsity.—*Supreme Ruling of the Fraternal Mystic Circle v. Crawford*, 75 S. W. 844.

117. An attempt was made to impeach the truth of a statement made by assured in her medical examination, that none of her relatives were ever "afflicted" with any hereditary dis-

ease. The testimony of two physicians, that the remote cause of the death of the mother of assured was consumption, to which, in their opinion, she inherited a predisposition, was squarely contradicted by the grandmother and another relative of assured, who swore that no branch of the family inherited any hereditary disease. A physician testified that he attended the mother of assured shortly before her death, and that there was no symptoms of consumption. Held, that the evidence was sufficient to support the finding that the statement of assured was true.—*Supreme Council of American Legion of Honor v. Larmour*, 16 S. W. 633.

118. Under Acts 31st Leg. 1st Called Sess., ch. 36, § 8, as amended by Acts 31st Leg. 2d Called Sess., ch. 22, § 1, referring to fraternal insurance held, that questions whether the applicant had ever had certain diseases were material, and a false representation would avoid the policy.—*United Benev. Ass'n v. Baker*, 141 S. W. 541. See Cent. Dig. Insurance, § 1859.

119. An answer made to a question in an application for life insurance held not to avoid the policy.—*Supreme Lodge of the Fraternal Brotherhood v. Jones*, 143 S. W. 247.

120. An applicant's failure to disclose facts tending to show a rejection by another order held not to invalidate his benefit certificate.—*Id.*

121. A finding that insured had an ulcer of the rectum held not necessarily inconsistent with his representations in his application as to having had the piles.—*Knights of Maccabees of the World v. Hunter*, 143 S. W. 359, 57 Tex. Civ. App. 115.

122. False statements that one had never had dysentery or any disease of the genital organs or undergone a surgical operation are material to the risk, within Acts 31st Leg. (1st Extra Sess.) ch. 36.—*Supreme Ruling of Fraternal Mystic Circle v. Hansen*, 161 S. W. 54. See 28 Cent. Dig. Insurance, §§ 1859-1865.

Persons Making False Representations Guilty of Misdemeanor.—any person making a false statement, knowingly or willfully, with reference to an application for membership or for the purpose of obtaining money or benefit from a society doing business under this act is guilty of a misdemeanor and can be punished by a fine or imprisonment. (Art. 4859a, Rev. St. 1914.)

Estoppel or Waiver as to Defects or Objections—(A) Waiver of Requirement as to Good Health of Applicant.—Such a waiver may be established by showing that the insurer customarily and knowingly accepted persons not in good health.¹²⁷ In such a case it was competent for plaintiff to show that the agent of insurer prepared the application that the facts were truthfully stated to him, that plaintiff could neither read nor write and did not know that the application contained the statement that the applicant was in good health or that the health of the applicant was material.¹²⁸ It has been held that the clerk of a local camp who had discretion to withhold the certificate during the sickness of the insured and who represented that he had authority to deliver it to the mother of insured, who had no notice of the association's by-laws or regulations, had authority to waive the provision in the certificate that liability should not accrue until the certificate had been delivered to insured and while in good health.¹²⁵

123. Where it appeared that insured had only been given electric treatment for a stiff back, a denial that he had been treated by a physician for any disease within five years held not a representation material to the risk within Rev. Civ. St. 1911, Art. 4834.—*National Council of the Knights and Ladies of Security v. Sealey*, 162 S. W. 455. See 28 Cent. Dig. Insurance, § 1859.

124. Where a life policy provided that the answers to questions contained in the application should be construed as warranties for the purposes of the application, and that the policy should be void if any of the statements "Upon the faith of which it was issued" should be found untrue, such policy, on his subsequent death by smallpox, was not rendered void by reason of the fact that assured falsely stated that he had not been successfully vaccinated, and agreed to waive all claims under the policy if death resulted from smallpox until after he had been successfully vaccinated.—*Sovereign Camp Woodmen of the World v. Gray*, 64 S. W. 801, 26 Tex. Civ. App. 457.

724—Estoppel or Waiver as to Defects or Objections. (See 28 Cent. Dig. Insurance, §§ 1837, 1866-1868.)

125. The clerk of a local camp of a mutual benefit association, to whom a benefit certificate was intrusted for de-

livery, who had a discretion to withhold the benefit certificate during the sickness of the insured, and who represented that he had authority to deliver it to the mother of the insured, who had no notice of the association's by-laws or regulations, had authority to waive a provision in the benefit certificate, and in the constitution and by-laws of the association, that no liability should begin on the certificate until delivered to the insured in person and while in good health.—*Sovereign Camp Woodmen of the World v. Carrington*, 90 S. W. 921.

126. The act of a medical examiner in writing false answers in the application for a policy to be issued by a fraternal insurer held not to estop the insurer from relying on the falsity of such representation to avoid the insurance.—*Sovereign Camp Woodmen of the World v. Lillard*, 174 S. W. 619.

127. In an action on a benefit certificate, a waiver of the requirement that the applicant must be in good health may be established by showing that it customarily and knowingly accepted persons not in good health.—*Home Circle Soc. No. 2 v. Shelton*, 81 S. W. 84.

128. In an action on a certificate of life insurance, issued by a fraternal mutual order, of which plaintiff and his deceased were both members, it was competent for plaintiff to show, if pleaded, that defendant's agent prepared the application; that

(B) Waiver of Payment of First Premium.—The payment of the first premium as a condition precedent to the taking effect of the certificate, whether the condition is express or implied, may be wholly waived by the insurer or its authorized agent.¹³³ It may be waived by an agreement that the premium or a part thereof may be paid at a future date by the taking of a due-bill or note therefor, by the unconditional delivery of the certificate to the insured without prepayment of the premium, or by refusing a sufficient tender of the amount thereof.¹³⁴ It was held that the condition requiring payment of the first premium while insured was in good health as a condition to the commencement of the risk was waived where a check for such payment was turned down, unknown to the insured, and where the agent of insurer accepted the payment of the next premium, demanding from a brother of insured payment of the first premium.¹³⁵ In this case the insured was led by the silence of the company to believe that the policy was in full force and effect.¹³⁵

the facts were truthfully stated to him; and that plaintiff could neither read nor write, and did not know that the application contained the statement that the applicant was in good health, or know that the health of the applicant was material.—*Home Circle Soc. No. 2 v. Shelton*, 85 S. W. 320.

129. Where the by-laws of an insurance order provided that the certificate should be kept by the association, the failure of the order to surrender a certificate to the beneficiary on the death of the member did not operate as a waiver of objections to liability on the certificate, especially where the counsel for the beneficiary was given the right to inspect the certificate at any time.—*Knights of Maccabees of the World v. Hunter*, 132 S. W. 116. See 28 Cent. Dig. Insurance, §§ 1837, 1866.

130. That the committee on claims of an insurance order rejected a claim on a certificate and then referred it to the board of trustees who rejected it without a hearing did not operate as a waiver of objections to the certificate, though it was the practice of the order in passing on contested claims to give notice that the claim was disapproved and then to await the action of claimant in adducing proof before the board of trustees, especially where the beneficiary brought suit on the claim in less than 90 days.—*Id.*

131. Where a member of a mutual benefit association on its change from the assessment to the monthly payment plan surrendered his certificate for another and made payments under the new plan, he thereby consented to the change.—*Supreme Ruling of Fraternal Mystic Circle v. Ericson*, 131 S. W. 92. Reversed, 146 S. W. 160.

132. A fraternal insurance company

held estopped to assert that an answer of an applicant incorrectly transcribed by its medical examiner was false.—*Supreme Lodge of the Fraternal Brotherhood v. Jones*, 143 S. W. 247. See 28 Cent. Dig. Insurance, § 1837, 1866.

133. Payment of the first premium as a condition precedent to the taking effect of a benefit certificate, whether the condition is express or implied, may be wholly waived by the insurer or its authorized agent.—*Supreme Lodge United Benevolent Ass'n v. Lawson*, 133 S. W. 907.

134. A condition of a benefit certificate requiring payment of the first premium before the contract becomes effective is waived by an express agreement between insured and the insurer's agent having authority, express or implied, to bind the insurer, that the premium or a part thereof may be paid at a future date by the taking of a duebill or note therefor, by the unconditional delivery of the certificate to the insured without prepayment of the premium, or by refusing a sufficient tender of the amount thereof.—*Id.*

135. When insured's certificate in defendant society was ready for delivery in April, 1909, the secretary of the local lodge accepted a check of insured's employer in payment of the first assessment for that month, issued the proper receipt therefor, and delivered the certificate. The amount of the premium was deducted from insured's wages by the employer, but defendant claimed that the check, when presented for payment, was refused. The secretary thereafter accepted payment of the May assessment, demanding of insured's brother payment of the April assessment covered by the check. Insured had no knowledge of

Estoppel Where False Answers Have Been Inserted by Medical Examiner.—Where a medical examiner incorrectly transcribed an answer of applicant the insurer was estopped to assert its falsity.¹³² In another case, however, the insurer was not estopped from relying on the falsity of a representation inserted by the medical examiner.¹³⁸

What Will Not Operate as a Waiver.—Where the by-laws of an order provided that the certificate should be kept by the association, the failure of the order to surrender a certificate on the death of the member, did not operate as a waiver of objections to liability on the certificate, especially where the attorneys for the beneficiary were given a right to inspect it at any time.¹²⁹ Neither will a rejection of a claim by a committee on claims and board of trustees without a hearing operate as a waiver of objections, though it was the practice in passing on contested claims to give notice that the claim was disapproved and then to await the action of claimant in adducing proof before the trustees, especially where the beneficiary brought suit on the claim in less than ninety days.¹³⁰

Estoppel by Payment of Premiums.—Where certain fees and dues were collected by an organizer the company was not estopped thereby to deny that decedent was a member.¹³⁷

Who May Not Waive.—A deputy head consul was held without power to waive a by-law requiring adoption as a condition to membership.¹³⁶

Construction and Operation in General—What Constitutes the Contract of Insurance.—The application, certificate and the by-laws, with amendments, were held to constitute the contract of insurance.¹⁴⁴

General Rules of Construction.—The general rule is, as with other forms of insurance, that the certificate will be strictly construed against the insurer and liberally in favor of insured; and

the failure of his employer to pay the check, and at no time before his death had he information of any fact which would invalidate his certificate, but by the silence of defendant and its officers he was induced to believe that his certificate was in full force, and relied on such belief. Neither the application nor the certificate nor defendant's charter or by-laws contained any provision denying to the secretary of the local lodge authority to waive payment of the first premium. Held, that the condition requiring payment of the first premium while insured was in good health as a condition to the commencement of the risk was waived.—Id.

136. A deputy head consul of a mutual benefit society held without power to waive a by-law requiring adoption as a condition to membership.—*McWilliams v. Modern Woodmen of Amer*

ica, 142 S. W. 641. See 28 Cent. Dig. Insurance, §§ 1837, 1866.

137. Collection of certain fees and dues by an organizer of a mutual benefit society held not to estop the society to deny that decedent was a member.—Id.

726—**Construction and Operation in General.** (See 28 Cent. Dig. Insurance, §§ 1870-1872.)

138. A comma will not be supplied by construction after the word "performed" in order to make false a negative answer to a question asked insured, "Have you ever had a surgical operation performed or received treatment in a hospital * * * or any public or private institution for the treatment of * * * disease?" where the proof showed that insured had been operated on at her home.—*Ladies of Maccabees of the World v. Kendrick*, 165 S. W. 110.

where the words admit of two constructions, the one most favorable to the insured will be adopted.¹⁴⁰ Further, the language of the certificate must be construed according to the intent of the parties, derived from the words used, the subject matter to which they relate and the matters naturally incident thereto.¹⁴¹ Forfeitures are not favored by the law and language of a certificate fairly susceptible of an interpretation preventing a forfeiture will be so construed.¹⁴² Therefore, a provision in a policy for forfeiture for non-payment of assessments, being for the benefit of the insurer, will be strictly construed.¹⁴³ And for the same reason, a comma will not be supplied by construction in order to make false a negative answer.¹⁴⁴ Again, in the construction of representations in an application made as warranties, that the applicant had always been temperate in the use of liquors, the words "temperate" and "moderate" should be given their ordinary signification.¹⁴⁵

Exchange of Certificate for a New One.—Where a by-law was passed scaling existing certificates so that no certificate should exceed a certain amount, a member, believing that such by-law applied to him, surrendered his original certificate which was for more than the amount specified as the maximum and accepted a new one, thereafter paying reduced assessments on the new certificate, it was held that though such by-law was not binding on him, his mistake was one of law, and, in the absence of evidence of misrepresentation, his beneficiary was not entitled to recover on the surrendered certificate.¹⁴⁶ The reduction in the insurer's liability and in the insured's assessments constituted sufficient consideration for the exchange.¹⁴⁵

139. In the construction of representations in an application for life insurance, made as warranties, that the applicant had always been temperate in the use of liquors, and that his use was moderate, the words "temperate" and "moderate" should be given their ordinary signification, and the fact that the order issuing the certificate on such application afterwards created a board of control with power to cancel the certificate of any member who became addicted to any vice which, in the opinion of the board, shortened his expectancy of life and rendered the risk more hazardous, does not affect the construction to be placed on the words in the application.—*Knights of Pythias of the World v. Bridges*, 39 S. W. 333.

140. An insurance certificate will be strictly construed against insurer and liberally in favor of insured; and where the words thereof admit of two constructions, the one most favorable to insured will be adopted.—*Daniel v. Modern Woodmen of America*, 118 S. W. 211. See 28 Cent. Dig. Insurance, §§ 1870-1872.

141. The language of an insurance

certificate must be construed according to the intent of the parties, derived from the words used, the subject matter to which they relate and the matters naturally incident thereto.—*Id.*

142. Since forfeitures are not favored by the law, language of an insurance certificate fairly susceptible of an interpretation preventing a forfeiture will be so construed.—*Id.*

143. A provision in a policy for forfeiture for nonpayment of assessments, being for the benefit of insurer, is to be strictly construed.—*Haywood v. Grand Lodge of Texas*, K. P., 138 S. W. 1194. See 28 Cent. Dig. Insurance, §§ 1870-1872.

144. Insured's application to a fraternal benefit insurance company, the certificate, and the by-laws, with amendments, held to constitute the contract of insurance.—*Modern Woodmen of America v. Lynch*, 141 S. W. 1055.

145. Where a member of a beneficial association surrendered his certificate, and was granted a certificate for a less amount and thereafter assessments were paid thereon up to the

Assignment or Other Transfer—Assignment as Collateral Security.—A contract between the beneficiary and a third person by which the latter agrees to pay the assessments on condition that he be reimbursed therefor from the proceeds of the certificate, is assignable.¹⁴⁷ Such an agreement was not invalidated by rules of the society prohibiting assignments and declaring that a member could not dispose of his certificate to a party who will agree to pay all his assessments.¹⁴⁸ These rules can be available to the society alone and the society only can take advantage of them.¹⁵² Such a certificate invested the member with no property right in the benefit whatever.¹⁵⁰ Under the rules he was only entitled to appoint a beneficiary as provided for by the laws of the order, to receive the money at his death.¹⁵⁰ This mere contingent interest of the beneficiary, however, is sufficient to support a pledge of the certificate by such beneficiary as collateral security for sums advanced by third persons for premiums, without regard to the in-

time of his death, which were much less than the assessment he would have been compelled to pay on his original certificate, such reduction of assessments on his part, and the reduction of the association's liability, constituted a sufficient consideration for the exchange.—*Supreme Council A. L. H. v. Garrett*, 85 S. W. 27.

146. A beneficial association passed a by-law scaling existing certificates so that no certificate should exceed \$2,000. A member, believing that such by-law was binding on him, surrendered his original certificate, which was for more than \$2,000, and accepted a new certificate for \$2,000, and thereafter and until his death reduced assessments were paid on the new certificate. Held that, though such by-law was not binding on deceased, his mistake was one of law, and, in the absence of evidence of misrepresentations, his beneficiary was not entitled to recover on the surrendered certificate.—*Supreme Council A. L. H. v. Garrett*, 85 S. W. 27.

727—Assignment or Other Transfer.

147. A contract between the beneficiary named in life insurance certificates and a third person, by which the latter agreed to pay the assessments on condition that he be reimbursed therefor from the proceeds of the certificates was assignable. Judgment, 82 S. W. 1057 affirmed.—*Coleman v. Anderson*, 86 S. W. 730, 98 Tex. 570.

148. Where defendant's assignor paid assessments on certain mutual benefit insurance certificates, under a contract with the beneficiary by which it was agreed that such assignor should be reimbursed for the amounts so paid from the proceeds of the certificates, such agreement was not invalidated by rules of the society prohibiting as-

signments of certificates and declaring that a member could not dispose of his certificate, or a part thereof, to a party who will agree to pay all his assessments; such rules being available to the society alone. Judgment 82 S. W. 1057, affirmed.—*Coleman v. Anderson*, 86 S. W. 730, 98 Tex. 570.

149. The beneficiary in the policy on the life of her son assigned her interest therein to the son, and subsequently, with her approval, he made a will disposing of the policy by making certain specific devises, and directing certain persons to employ the residue in caring for his mother during her life, any residue after her death to become the property of those so caring for her. After the death of insured the mother was cared for as provided for in the will. Held that, irrespective of whether the beneficiary assigned the policy as required by the constitution and by-laws of the insurer, there was a contract binding on her and her representatives; and those claiming under the will were entitled to the policy as provided in the will.—*Kendall v. Morrison*, 77 S. W. 31, 33 Tex. Civ. App. 345.

150. Where the by-laws of a mutual benefit insurance society provided that the member could not dispose of his benefit certificate, or any part thereof, to which his beneficiaries may be entitled, and that it could not be assigned as collateral, but that he was entitled to change the beneficiary at will, such certificate invested the member with no property right in the benefit, but he was only entitled to appoint a beneficiary among the members of his family or dependents as designated by the laws of the order, to receive the money at his death. Judgment, 82 S. W. 1057, affirmed.—*Coleman v. Anderson*, 86 S. W. 730, 98 Tex. 570.

insurable interest of the pledgees, and possession of the certificate cannot be recovered from the pledgees without a repayment of the amount advanced.¹⁵¹ While a certificate cannot be gratuitously assigned to one having no insurable interest, it is, as a chose in action, assignable by one having an interest in such certificate as collateral security for a debt, as the statutes provide that the assignee of any written instrument not negotiable by the law merchant, may transfer to another, by assignment, all the interest he may have in the same.¹⁵² Further, the assignee has a lien on the certificate to secure the payment of the premiums, paid at the request of the assignor to keep the certificate alive.¹⁵⁴

Effect of Will Disposing of Proceeds After Assignment by Beneficiary to Testator.—In a case where the beneficiary assigned her interest to the son who was the insured and he later made a will, with her approval, disposing of the policy by making certain specific devises and directing certain persons to employ the residue in caring for his mother during her life, any residue after her death to become the property of those so caring for her, it was held that, irrespective of whether the beneficiary properly assigned the policy, there was a contract binding on her and her representatives, and those claiming under the will were entitled to the policy as provided in the will.¹⁴⁹

Where Fraud is Alleged.—It was held error to set aside an assignment of a policy on the theory that the widow had been overreached in the transaction as a matter of law, where the contention of plaintiff was that she had assigned the certificate of her husband after his death for a certain amount with the understand-

151. The mere contingent interest of the beneficiary of a certificate of life insurance issued by a fraternal benefit order on the life of the father of the beneficiary, which would be divested on the death of the beneficiary before the insured, and the proceeds of the certificate become payable to the heirs and legal representatives of the insured, in case the insured made no other designation of beneficiaries, is sufficient to support a pledge thereof by the beneficiary as collateral security for sums advanced by third persons in payment of premiums and dues thereon, without regard to the insurable interest of the pledgees in the life of the insured, so that possession of the certificate cannot be recovered from the pledgees or their assigns without a repayment of the amount advanced.—*Coleman v. Anderson*, 82 S. W. 1057, judgment affirmed (1905) 36 S. W. 730, 98 Tex. 570.

152. Provisions in the by-laws of a fraternal benefit society inhibiting a member from assigning the certificate to secure a debt, or as collateral security, can only be taken advantage

39—Ins.

of by the society.—*Coleman v. Anderson*, 82 S. W. 1057, judgment affirmed (1905), 36 S. W. 730, 98 Tex. 570.

153. While a fraternal benefit certificate cannot be gratuitously assigned to one having no insurable interest in the life of the insured, it is, as a chose in action, assignable by one having an interest in the certificate as collateral security for his debt, under Rev. St. 1895, Art. 308, providing that the obligee or assignee of any written instrument not negotiable by the law merchant may transfer to another, by assignment, all the interest he may have in the same.—*Coleman v. Anderson*, 82 S. W. 1057, judgment affirmed (1905), 36 S. W. 730, 98 Tex. 570.

154. One to whom a fraternal benefit certificate is assigned as collateral security to the extent of the debt has a lien thereon to secure the payment of the indebtedness, especially for premiums or dues paid at the request of the assignor to keep the certificate alive.—*Coleman v. Anderson*, 82 S. W. 1057, judgment affirmed (1905) 36 S. W. 730, 98 Tex. 570.

ing that the balance of the proceeds was to be paid to her, but which was disputed.¹⁵⁵

Cancellation, Surrender, Abandonment or Rescission—In General.—No action of a society without the consent of insured, he having performed his part of the contract, will terminate or relieve the society from liability thereon.¹⁶¹ Under this rule an association cannot revoke a binding contract of insurance, after the death of insured, by tendering to the beneficiary the amounts paid therefor.¹⁵⁶

Restraining Cancellation of Certificate.—Where the officers of a foreign society doing business in Texas, are non-residents, a Texas court of equity would not render a decree enforceable only in personam, restraining such officers from cancelling a certificate of a Texas citizen.¹⁵⁸ However, a threatened cancellation by such officers is not ground for an injunction, unless such threats, if carried into execution, would produce some substantial injury to the plaintiff.¹⁵⁹ A judgment enjoining the officers and agents of a foreign insurance society from cancelling a certificate, operates in personam only, and can be enforced only by attaching the bodies of the contumacious individuals and the infliction of punishment.¹⁶⁰

Remedies for Wrongful Cancellation.—In a case where the insurer, after inducing a member to surrender his certificate for a new one for a specified rate per month, refuses to issue the new certificate on either the terms agreed on or to return the old certificate, the member has a cause of action against the order.¹⁶² He

155. Where a widow after the death of her husband, assigned a \$2,000 benefit certificate, to which she was entitled, to defendant R. in consideration of \$200, and in an action for the conversion of the proceeds her contention that the assignment was with the understanding that the balance of the proceeds, less \$200, was to be paid to her, and should be appropriated to the payment of her husband's debts, was disputed, it was error to set aside the assignment on the theory that the widow had been overreached in the transaction as a matter of law.—*Roberts v. Roberts*, 99 S. W. 886. See Cent. Dig. Insurance, §§ 1873, 1875, 1876, 1977, 1978.

730—**Cancellation, Surrender, Abandonment or Rescission.** (See 28 Cent. Dig. Insurance, §§ 1877, 513-515.)

156. A mutual benefit association, cannot revoke a binding contract of insurance, after the death of insured, by tendering to the beneficiary the amounts paid therefor.—*Home Forum Ben. Order v. Varnado*, 55 S. W. 364.

158. Where the officers of a foreign insurance society, doing business in Texas, were non-residents, a Texas court of Equity would not render a

decree enforceable only in personam, restraining such officers from cancelling a certificate of a Texas citizen; the rule that a court of equity in one state may enjoin the performance of acts beyond its territorial jurisdiction being limited to cases where the persons against whom the injunction is sought reside within the jurisdiction.—*Royal Fraternal Union v. Lundy*, 113 S. W. 185. See 28 Cent. Dig. Insurance, § 1877.

159. A threatened cancellation of an insurance certificate by the officers of a society is not ground for an injunction, unless such threats, if carried into execution, would produce some substantial injury to complainant.—*Id.*

160. A judgment enjoining the officers and agents of an insurance society from cancelling a certificate, operates in personam only, and can be enforced only by attaching the bodies of the contumacious individuals, and the infliction of punishment.—*Id.*

161. No action of a mutual benefit society without the consent of insured, he having fully performed his part of the contract, will terminate or relieve the society from liability thereon.—*Id.*

162. The act of a fraternal insurance order in inducing a member to

has a number of remedies—he may enforce specific performance or he may tender his payments in accordance with the policy, so that his beneficiary may collect the face value of the policy, less the amount of premiums due, or he may treat the cancellation as a repudiation of the contract and recover his damages for breach of contract.¹⁶³

Measure of Damages.—In the above case the measure of damages for the wrongful cancellation of the certificate is the value of the policy at the time of cancellation,¹⁶⁴ and does not include the premiums paid on the first policy.¹⁶⁵ In this particular case where the member was forty-two years old, with a life expectancy of twenty-six years at the time of the wrongful cancellation of his certificate, the difference between the amount a reliable insurance company would issue a paid-up policy for the amount of the policy, on which insured was paying an annual premium, and the amount in cash such company would issue a policy for the same amount as the canceled policy on an insurable risk aged forty-two years, with interest from the date of the wrongful cancellation, was the measure of damages, for with such difference, plus what it would cost insured to carry out the contract, if not canceled, he could obtain an equally advantageous contract.¹⁶⁶ (See Ann. 178 and 185.)

Present Value of a Life Policy.—In the case just quoted, the present value of a life policy, not paid-up, is the sum which, at reasonable compound interest, will equal the face of the policy at the end of the period of life expectancy of insured, less the premiums becoming due during that period, with similar interest thereon, provided insured is insurable.¹⁶⁷ If the insured is not

surrender his certificate for a new one for a specified rate per month, and in refusing to issue the new certificate on the terms agreed on or to return the old certificate, gives the member a cause of action against the order.—*Supreme Lodge Knights of Pythias v. Neeley*, 135 S. W. 1046.

^{163.} Where a life insurance company wrongfully cancels a policy, insured may enforce specific performance or he may tender his payments in accordance with the policy, so that his beneficiary may collect the face value of the policy, less the amount of premiums due, or he may treat the cancellation as a repudiation of the contract and recover his damages for breach of contract.—*Id.*

^{164.} The measure of damages for the wrongful cancellation of a life policy is the value of the policy at the time of its cancellation.—*Id.*

^{165.} Where a life policy was cancelled by agreement between the parties and insured obtained a new certificate, which insurer wrongfully cancelled, the measure of damages did

not include the premiums paid on the first policy.—*Id.*

^{166.} Where a member of fraternal insurance order was 42 years old, with a life expectancy of 26 years at the time of the wrongful cancellation of his certificate, the difference between the amount a reliable insurance company would issue a paid-up policy for \$3,000, the amount of the policy on which insured was paying an annual premium, and the amount in cash such company would issue a policy for the same amount as the canceled policy on an insurable risk, aged 42 years, with interest from the date of the wrongful cancellation, was the measure of damages, for with such difference, plus what it would cost insured to carry out the contract, if not canceled, he could obtain an equally advantageous contract.—*Id.*

^{167.} The present value of a life policy, not paid-up, is the sum which, at reasonable compound interest, will equal the face of the policy at the end of the period of life expectancy of insured, less the premiums becoming due

insurable that fact may be shown, so that a greater premium would be required than that shown by the tables of life insurance.¹⁶⁷

DUES AND ASSESSMENTS

Unequal Assessments Sometimes Permissible.—A call on a member for a greater premium rate than that required of others is not, on that account, void, where the amount required to be paid by each is in accordance with the by-laws in force at the time of issuing their respective policies.¹⁷¹

Where Constitution Provides for Re-Rating.—It was held that a provision in the constitution providing for re-rating of members taken over from other associations operated prospectively.¹⁶⁹ In the same case a provision in a certificate requiring the member to comply with the orders and by-laws adopted in the future was held to refer only to such regulations as have reference to the duties and conduct of the members as such and not to a radical change greatly increasing the assessments.¹⁷⁰

Validity of Assessments.—A mortuary call for payment of a bi-monthly premium is not void for including in its list of death claims a member that might have been included in the preceding call.¹⁷² Nor is a mortuary call invalid because the death claims enumerated therein had already been paid out of funds on hand,

during that period, with similar interest thereon, provided insured is insurable; and if he is not insurable that fact may be shown, so that a greater premium would be required than that shown by the tables of life insurance.—*Supreme Lodge Knights of Pythias v. Neeley*, 135 S. W. 1046. See 28 Cent. Dig Insurance, §§ 513-515.

7301—Actions for Breach of Contract.

168. Where the executive officers of a mutual benefit society attempt to enforce an unauthorized resolution, such act is not a breach of a member's contract with the society, the member's remedy being to enjoin the enforcement of the resolution, or, in case he was suspended for refusal to comply therewith, to compel his restoration by mandamus.—*Supreme Ruling of Fraternal Mystic Circle v. Ericson*, 131 S. W. 92. Reversed 146 S. W. 160.

DUES AND ASSESSMENTS. (SEE 29 CYC. 98.)

735—Amount of Assessment.

169. The constitution of a fraternal insurance corporation, providing that members taken over from other associations may be re-rated, held prospec-

tive.—*Ericson v. Supreme Ruling of Fraternal Mystic Circle*, 146 S. W. 160, reversing judgment, *Supreme Ruling of Fraternal Mystic Circle v. Ericson*, 131 S. W. 92.

170. A provision in a fraternal benefit certificate that the member will comply with the orders and by-laws adopted in the future held to refer only to such regulations as have reference to the duties and conduct of the members, as such, and not to a radical change greatly increasing the assessment.—*Id.*

171. A call on a member of a mutual insurance company for payment of a greater premium rate than that required of others is not, on that account, void, where the amount required to be paid by each is in accordance with the by-laws in force at the time of issuing their respective policies.—*Smith v. Covenant Mut. Ben. Ass'n*, 43 S. W. 819, 16 Tex. Civ. App. 593.

Validity of Assessments.

172. A mortuary call for payment of a bimonthly premium is not void for including in its list of death claims a member that might have been included in the preceding call.—*Smith v. Covenant Mut. Ben. Ass'n*, 43 S. W. 819, 16 Tex. Civ. App. 593.

a practice adopted by the company and sanctioned by the by-laws.¹⁷³

Mode and Sufficiency of Payment—(A) Where Camp is Suspended and Member is Entitled to Benefits.—In a case where a member paid benefits in advance to his local camp, and the camp was suspended, he was entitled to receive benefits on account of disability, and, where they more than equalled assessments levied, his certificate could not be forfeited for non-payment of assessments.¹⁷⁵

(B) By Officer of Camp.—A deposit of total amount of premiums collected by an officer without retention of his commission was held to be payment of assessments due on his own policies.¹⁷⁴

Effect of Payment—Question of Estoppel.—A member who pays an illegal assessment is held not estopped from questioning the legality of subsequent assessments.¹⁷⁷ Neither in such a case is his beneficiary estopped.¹⁷⁷

As to When Receipt May Be Given.—A receipt may be given for assessments either at the time of payment or at any time thereafter.¹⁷⁶

Refunding or Recovery of Dues and Assessments Paid—(A) Recovery After Void Expulsion of Member.—In general the fact that the expulsion was void for want of notice and trial as required by the association's laws is no defense where he seeks to recover premiums paid.¹⁷⁹ However, where the member had been

173. Under a policy providing that, for the payment, among other obligations, of all death claims, a bimonthly premium shall be payable on the first of certain months, a mortuary call, made at one of the bimonthly periods, is not invalid by reason of the fact that the death claims enumerated in the call had already been paid out of funds on hand,—a practice adopted by the company and sanctioned by its by-laws.—*Smith v. Covenant Mut. Ben. Ass'n*, 43 S. W. 819, 16 Tex. Civ. App. 593.

740.—**Mode and Sufficiency of Payment.** (See 28 Cent. Dig. Insurance, § 1887.)

174. Deposit of total amount of assessments collected by officer of mutual benefit society without retention of commission held to be payment of assessments due on his own policies.—*Knights of the Maccabees of the World v. Parsons*, 179 S. W. 78.

175. A member of a fraternal beneficiary association who paid benefits in advance to his local camp, and the camp was suspended, was entitled to receive benefits on account of disability, and, where they more than equalled assessments levied, his certificate could not be forfeited for nonpayment of assessments.—*Knights of the Modern Maccabees v. Mayfield*, 147 S. W. 675. See 28 Cent. Dig. Insurance, § 1887.

741.—**Effect of payment.**

176. An officer of a subordinate lodge of a mutual benefit association who is authorized to receive and receipt for payments of monthly dues may receipt therefor at the time of payment or at any time thereafter.—*United Moderns v. Pistole*, 86 S. W. 377.

177. That a mutual benefit certificate holder pays illegal assessments does not estop him or his beneficiary from questioning the legality of subsequent similar assessments.—*Supreme Lodge K. P. v. Mims*, 187 S. W. 835.

743.—**Refunding or Recovery of Dues and Assessments Paid.** (See 28 Cent. Dig. Insurance, § 1883.)

178. Where a life policy was void ab initio, the premiums paid, with interest thereon, were the measure of damages on cancellation.—*Supreme Lodge Knights of Pythias v. Neeley*, 135 S. W. 1046. See 28 Cent. Dig. Insurance, § 1888.

179. The mere fact that the expulsion of a member of a beneficial association was void for want of notice and trial, as required by the association's laws, was no defense to an action by him to recover premiums paid.—*Supreme Council Catholic Knights of America v. Gambati*, 69 S. W. 114.

advised by one of the supreme officers that the expulsion was void, he should have pursued his remedies within the order or there could be no recovery.¹⁸⁰ And further, under the circumstance of this particular case, there was no expulsion in fact as there was no notice or trial, and therefore there could be no recovery of premiums paid.¹⁸¹

(B) Credits.—In the case cited in the preceding paragraph the insurer is not entitled to a credit for the insurance during the time it was in force.¹⁸³

(C) Limitations.—Where a member is wrongfully expelled limitations begin to run against an action to recover the premiums paid by him at the time of expulsion.¹⁸²

Re-Rating Without Authority.—A member may recover assessments paid where a re-rating is made without authority, as being a repudiation of the contract.¹⁸⁴

Exchange of certificates.—A member can only recover assessments and interest on the new certificate, after having surrendered all his right to the old, when defendant breaches the contract after the member has become uninsurable.¹⁸⁵ The general rule is, when certificates are exchanged, members are not entitled to recover premiums paid on the old certificate.¹⁸⁶

180. A beneficial association was composed of a supreme council and subordinate council, and a member was expelled by a subordinate council without trial or notice as required by the association's laws. The member had advice from one of the supreme officers that the expulsion was null, and that his rights had been submitted to the supreme council, but made no appeal thereto, as he might have done, but commenced suit for a recovery of premiums. Held, that he should have pursued his remedies within the order, and there could be no recovery.—*Supreme Council Catholic Knights of America v. Gambati*, 69 S. W. 114.

181. A beneficial association was composed of a supreme council and subordinate council. A member was expelled by a subordinate council without notice or trial as required by the association's laws, but was informed by one of the supreme officers that the act was void, and the supreme secretary wrote the local council to that effect. Held, that there was no expulsion in fact, and the member could not recover premiums paid.—*Supreme Council Catholic Knights of America v. Gambati*, 69 S. W. 114.

182. Where a member of a beneficial association is wrongfully expelled, limitations begin to run against his action to recover premiums paid by him at the time of expulsion.—*Supreme Council Catholic Knights of America v. Gambati*, 69 S. W. 114.

183. When a beneficial association

wrongfully expels a member, and is sued by him for the recovery of premiums paid, it is not entitled to a credit for the value of the insurance during the time it was in force.—*Supreme Council Catholic Knights of America v. Gambati*, 69 S. W. 114.

184. Re-rating, without authority, by a fraternal benefit society of a member held a repudiation of the contract, so as to give the member a right to recover assessments paid.—*Ericson v. Supreme Ruling of Fraternal Mystic Circle*, 146 S. W. 160, reversing judgment *Supreme Ruling of Fraternal Mystic Circle v. Ericson*, 131 S. W. 92. See 28 Cent. Dig. Insurance, § 1888.

185. Where the holder of certain certificates in a benefit society changed them for a single certificate in another class, and to do so agreed to surrender all his right, title, and interest therein, he was only entitled to recover, after he had become uninsurable, for defendant's breach of the contract assessments and interest paid subsequent to the change.—*Supreme Lodge K. P. v. Mims*, 167 S. W. 835.

186. Where, after the passage by a mutual benefit society of a by-law scaling all \$5,000 certificates to \$2,000, the holder of a certificate for \$5,000 returned the same, with a request that a new certificate for \$2,000 be issued, she was not entitled to recover the premiums paid on the \$5,000 certificate.—*Supreme Council A. L. H. v. Lyon*, 88 S. W. 435. See Cent. Dig. vol. 28, cols. 3029-3030, § 1888.

Voluntary Payment of Premiums.—It is held that one not a beneficiary cannot recover voluntary payments of premiums.¹⁸⁷

Measure of Damages on Void Policy.—In a case where a policy is void ab initio the premiums paid, with interest thereon, were the measure of damages on cancellation.¹⁷⁸

FORFEITURE OR SUSPENSION

Grounds in General—Suspension of Lodge.—A suspension of a lodge does not suspend the members so as to require an application by them for reinstatement, where it failed to remit assessments in proper time.¹⁹⁰ The only effect is to deprive the members of the death benefit fund during the period of suspension.¹⁹⁰

Forfeiture for Failure to Pay All Assessments.—Where a certificate stipulated for the payment of all assessments to the benefit fund and compliance with the by-laws and a by-law provided the certificates should be void if insured failed to pay promptly all assessments called by the executive committee it was held that the compliance with the first stipulation did not relieve assured from paying other valid assessments and if he failed to do so the certificate was avoided.¹⁸⁹

Forfeiture Under Obligation.—It was held that a collecting officer in arrears to a local lodge did not forfeit his policy under his obligation to not knowingly wrong or defraud the lodge.¹⁸⁸

Effect of Expulsion or Suspension of Member.—The general rule

187. Voluntary payments of premiums by one not a beneficiary cannot be recovered.—*Lawson v. United Benev. Ass'n*, 185 S. W. 978.

FORFEITURE OR SUSPENSION. (SEE 29 CYC. 31.)

744—**Nature and Grounds in General.**
(See 28 Cent. Dig. Insurance, § 1889.)

188. Collecting officer in arrears to local lodge of mutual benefit society held not to forfeit policy under his obligation to not knowingly wrong or defraud the lodge.—*Knights of the Maccabees of the World v. Parsons*, 179 S. W. 78.

189. A benefit certificate stipulated that liability should attach only on compliance by assured with all the by-laws of the order, and on payment by him for all assessments to the benefit fund within the time and in the manner required by the by-laws. A by-law provided that the certificate should be void if assured failed to pay within a specified time all assessments called by the executive committee. Held, that the fact that the certificate required a payment of the assessment

due the benefit fund, did not relieve the assured from the duty of paying other valid and legal assessments and of complying with the by-law providing therefor; and, if he failed to do so, the certificate was avoided.—*Supreme Council, American Legion of Honor, v. Landers*, 72 S. W. 880.

190. The by-laws of a fraternal benevolent association provided that the failure of a subordinate lodge to remit assessments to the supreme lodge within a certain time should suspend the subordinate lodge, and that in such case the supreme president could deprive the members of the subordinate lodge of all benefits from the death benefit fund. Held, that the suspension of the lodge did not suspend its members so as to require an application by them for reinstatement, but its only effect was to deprive the members of the death benefit fund during the period of suspension, especially where other sections provided explicitly as to suspension and reinstatement of members for failure to pay assessments.—*Supreme Lodge Nat. Reserve Ass'n v. Turner*, 47 S. W. 44, 19 Tex. Civ App. 346.

is that there can be no recovery on a certificate where the member is not in good standing at the time of his death.¹⁹²

Violations of Terms or Conditions of Contract—(A) Conviction of a Felony.—A policy providing for forfeiture in case of conviction of a felony is not forfeited where the insured dies before the motion for a rehearing is passed on by the Court of Criminal Appeals.¹⁹³

(B) Use of Narcotics or Intoxicants.—Where the applicant stated that he never used narcotics, an association cannot defeat liability unless the use amounted to a habit.¹⁹⁴ In a case where the policy provided that it should become void if the holder became so far intemperate as to impair his health permanently and he could be expelled, the question whether the deceased was insane at the time of expulsion was immaterial.¹⁹⁷

(C) Sale of Intoxicants.—A certificate was held rendered void by insured engaging in the sale of malt liquors,¹⁹⁵ even though he received no compensation.¹⁹⁶

Non-Payment of Dues or Assessments—In General.—Where the constitution and by-laws provide that a member failing to pay any

745—Statutory Provisions Against Forfeiture. (See 28 Cent. Dig. Insurance, § 1890.)

191. Acts 31st Leg. (1st Extra Sess.) c. 36, declaring untrue statements in an application for membership in a fraternal beneficiary association shall not prevent recovery on the benefit certificate unless shown to be material, does not govern a certificate on a member reinstated before the act took effect.—Supreme Ruling of Fraternal Mystic Circle v. Hansen, 161 S. W. 54. See 28 Cent. Dig. Insurance, § 1890.

747—Effect of Expulsion or Suspension of Member. (See 28 Cent. Dig. Insurance, § 1892.)

192. Where a member of a fraternal organization was not in good standing at the time of his death in the only subordinate temple to which he belonged or could belong, there could be no recovery on the certificate.—International Order of Twelve Knights & Daughters of Tabor v. Wilson, 151 S. W. 320. See 28 Cent. Dig. Insurance, § 1892.

748—Violations of Terms or Conditions of Contract. (See 28 Cent. Dig. Insurance, §§ 1893, 1894.)

193. Where a benefit certificate provided for forfeiture if a member was convicted of a felony, the policy was not forfeited where insured died pending a motion for rehearing on appeal from a conviction of manslaughter,

under Code Cr. Proc. Art 884, providing that the judgment of conviction if suspended does not become final while an appeal remains undetermined, and Penal Code, Art. 27, declaring that an accused person is a convict only after final condemnation by the court of last resort to which it may have been thought proper to appeal.—Woodmen of the World v. Dodd, 134 S. W. 254. See 28 Cent. Dig. Insurance, § 1893.

194. Where an applicant for a life certificate states that he has never used narcotics, the association cannot defeat liability thereon by showing a use of narcotics which did not amount to a custom or a habit.—National Fraternity v. Karnes, 60 S. W. 576.

195. A mutual benefit certificate held rendered void by insured engaging in the sale of malt liquors.—Modern Woodmen of America v. Lynch, 141 S. W. 1055.

196. The fact that insured did not receive compensation for performing the services incident to the sale of intoxicants prohibited by a mutual benefit certificate held not to prevent its forfeiture.—Id.

197. A benefit life insurance policy provided that it should become void if the holder became so far intemperate as to permanently impair his health, and he could then be expelled from the fraternity. Deceased was expelled because of his excessive drinking, and that habit ultimately caused his death. Held that, in an action on the policy, the question whether the deceased was insane at the time of his expulsion was immaterial.—Kempe v. Woodmen of the World, 44 S. W. 688.

assessment "shall stand suspended," a member so failing ipso facto is suspended without further action on the part of the society.^{198 200} Most policies contain this provision and suspension for non-payment of dues is the general rule. In a case where the policy set forth a number of causes for forfeiture, ending with the clause "or shall violate any of the conditions," etc., this clause was held to refer to the conditions enumerated and not to the condition contained in another section providing for the payment of bi-monthly premiums and forfeiture for non-payment thereof.¹⁹⁹

Notice of Time of Payment.—The general rule is that notices of assessments, if mailed, would be presumed to have been received.²⁰³ However, in an early case, under by-laws providing that notice shall be given of assessment due before there shall be a forfeiture, notice to a member put in the mail, directed to him, but not shown to have reached him, was held insufficient to support a forfeiture.²⁰¹

What Is Sufficient Notice.—A notice stating that it is a mortuary call for payment of death claims according to an annexed list showing the number and amount of each policy, the name and residence of the deceased, and the name of, and the amount and date of payment to, each beneficiary, is sufficient.²⁰²

749—Nonpayment of Dues or Assessments. (See 28 Cent. Dig. Insurance, §§ 1895-1906.)

198. Where the constitution of a mutual benefit insurance society, which was made a part of the certificate sued on, provided that, if the beneficiary's dues were not paid to the clerk of his camp as required by the constitution and by-laws of the order, the certificate should be null and void, such provision authorized the forfeiture of the certificate without further action on the part of the society on the member's failure to pay dues as required. —Sovereign Camp W. O. W. v. Hicks, 84 S. W. 425.

199. A policy provided that, if it shall come to the knowledge of said association that the insured made false statements in his application, on the good faith of which this certificate was issued, or if the insured shall be guilty of any criminal act, or shall injure his health by the use of alcoholic or other stimulants, or shall become an habitual user of intoxicants, "or shall violate any of the conditions or agreements contained in the application or this certificate," etc. Held, that the clause, "or shall violate any of the conditions," etc., refers to the conditions and agreements of the nature particularly enumerated, and not to the condition contained in another section providing for the payment of bi-monthly premiums, and for forfeiture for nonpayment thereof. —Smith v. Covenant Mut. Ben. Ass'n, 43 S. W. 819, 16 Tex. Civ. App. 593.

200. Where the constitution of a mutual benefit association provides that a member failing to pay any assessment "shall stand suspended," a member by failure to pay his assessments ipso facto is suspended, without any vote of the lodge. Supreme Lodge v. Wickser, 12 S. W. 175, 72 Tex. 257, distinguished. —Supreme Lodge Knights of Honor v. Keener, 25 S. W. 1084, 6 Tex. Civ. App. 267.

751—(a) Notice of Time of Payment. (See 28 Cent. Dig. Insurance, §§ 1897-1902.)

201. Under by-laws providing that notice shall be given of assessment due before there shall be a forfeiture, notice to a member put in the mail, directed to him, but not shown to have reached him, is insufficient to support a forfeiture. —McCorkle v. Texas Benevolent Ass'n, 8 S. W. 516.

202. Under Act Ill. June 16, 1887, § 6, prescribing the form of assessment notice, a notice stating that it is a mortuary call for payment of death claims according to an annexed list showing the number and amount of each policy, the name and residence of the deceased, and the name of, and the amount and date of payment to, each beneficiary, is sufficient. —Smith v. Covenant Mut. Ben. Ass'n, 43 S. W. 819, 16 Tex. Civ. App. 593.

203. Notices of assessments, if mailed, would be presumed to have been received. —State Division, Lone Star Ins. Union v. Blassengame, 162 S. W. 6.

Sufficiency of Payment or Tender of Payment—Payment Through Third Party.—In a case where payments were made through a third party, who did not remit all such payments to insurer, the fact that the officers permitted this mode of payment without making contrary instructions precludes the association from setting up the defense that dues and assessments had not been paid.²⁰³ In another case, where the insured directed his mother to pay the premium and she did so, but after the note became due, he could not prevent forfeiture by asserting that he did not know the facts concerning the payment, though he continued his payments thereafter, she being his agent.²⁰⁴

Default as a Ground of Forfeiture—In General.—The rule is that if the premiums, dues or assessments are not paid at the time stated in the certificate, such certificate is forfeited if the rules of the association so provide.^{205 212 214 216} However, the statutes of 1914 do not provide that the certificates shall contain conditions of premium payment as did the statutes of 1911. Obscurity in by-laws other than the one providing for payment of the monthly rate, have no bearing on the issue of failure to pay such rate.^{216a}

Where Vote of Association is Required After Default.—Under a law of an order requiring the time of suspension to be fixed by a vote of the association, an order of an officer suspending a member is inoperative without the vote.²⁰⁷ It would be only prima facie evidence of its legality and parol evidence would be admissible to show it was by order of an officer alone.²⁰⁹ Further, in such case, where the beneficiaries have done everything required

753—(b) Sufficiency of Payment or Tender to Prevent Forfeiture. (See 28 Cent. Dig. Insurance, §§ 1903, 1905.)

204. Where, under a life insurance contract, the assured directed his mother to pay his premium and she did so, but after it became due, forfeiture cannot be prevented by asserting that he did not know the facts concerning the payment, though he continued his payments thereafter, she being his agent in the transaction.—United Moderns v. Pike, 76 S. W. 774.

205. Where a member at large of a fraternal order paid dues and assessments to a third person, who remitted them to the supreme officers, who received them without objections, and the officers did not instruct the member not to make payments to such person, and the member continued to do so until her death, and such person did not remit them all, a recovery on the certificate could not be defeated on the ground that dues and assessments had not been paid.—Supreme Hive of Ladies of Maccabees of the World v. Owens, 167 S. W. 233.

750—(c) Default as a Ground of Forfeiture in General. (See 28 Cent. Dig. Insurance, §§ 1895, 1896, 1903.)

206. Where the constitution and laws of a mutual benefit society provided that nonpayment of a monthly assessment before the first day of the succeeding month should forfeit the certificate without action by the association, and at the time deceased was taken sick he was in default and had been returned by the local secretary as delinquent, and no effort was made to pay such delinquent assessments prior to his death, the certificate was forfeited.—Fletcher v. Supreme Lodge Knights and Ladies of Honor, 135 S. W. 201. See 28 Cent. Dig. Insurance, §§ 1895, 1903.

207. Where the laws of a mutual association require the payment of all assessments within 30 days after the date of the notice thereof, on penalty of suspension, the time of which is to be fixed by vote of the association, an order of an officer of the association, suspending a member for nonpayment of an assessment, but without the required vote, is inoperative.—Knights of Honor v. Wickser, 12 S. W. 175.

of them, the refusal of the society to credit the insured with assessments paid after the illegal suspension or to give the proper officers the required notice of death does not prejudice the rights of beneficiaries in recovering on the certificate.²⁰⁸ A provision in the by-laws that on a member's failure to pay his dues the lodge "shall suspend him" rendered him subject to suspension but did not on his failure to pay ipso facto suspend him without any action of the lodge.²¹⁰

Provisions Prohibiting Forfeiture During Sickness.—Where the laws of an order provide that a certificate shall not be forfeited for non-payment of dues during sickness it is immaterial that during her sickness the member stated that she knew she was in arrears, that she did not intend to pay any dues and did not care to keep up the insurance.²¹¹

Funeral Benefits Not Forfeited When.—A beneficiary is often entitled under a certificate to funeral benefits even though the insured is in arrears as to dues.²¹⁵ In a case where the laws provided for forfeiture of funeral benefits in arrears for different assessments to amount of three months' dues, it was held that forfeiture thereunder could be only arrears in all such assessments for three months.²¹³

208. Where the suspension of a member of a mutual association for nonpayment of an assessment is illegal, the refusal of the association to credit the insured with assessments paid thereafter, or to give to the proper officers the required notice of his death, does not prejudice the right of the beneficiaries under his certificate to recover thereon, they having done everything required of them, and there being funds subject to such payment.—*Knights of Honor v. Wickser*, 12 S. W. 175.

209. The entry of an order upon the minutes of a mutual association, suspending a member for nonpayment of an assessment, being only prima facie evidence of its legality, parol evidence is admissible to show that it was by order of an officer alone.—*Knights of Honor v. Wickser*, 12 S. W. 175.

210. A provision in the by-laws of a lodge, that, on a member's failure to pay his dues, the lodge "shall suspend him," rendered him subject to suspension, but did not, on his failure to pay, ipso facto suspend him, without any action of the lodge.—*Grand Lodge, F. & A. M. of Texas v. Dillard*, 162 S. W. 1173. See 28 Cent. Dig. Insurance, §§ 1895, 1896, 1903.

211. The constitution and by-laws of an association providing that a member cannot be suspended for non-payment of dues while sick, it is immaterial that during her sickness she had stated that she knew she was in arrears, that she did not intend to pay any dues, and did not wish to keep

up the insurance.—*Grand Temple & Tabernacle in the State of Texas of the Knights & Daughters of Tabor of the International Order of Twelve v. Counts*, 157 S. W. 1180. See 28 Cent. Dig. Insurance, §§ 1895-1903.

212. Member of fraternal association having until January 30th to pay endowment dues, and who died on February 29th without paying, held not in arrears under provision forfeiting endowment right for being in arrears one month.—*Grand Court of Texas Independent Order of Calanthe v. Johns*, 181 S. W. 869.

213. Where benefit association's laws provided forfeiture of funeral benefits of member in arrears for different assessments to amount of three months' dues, held, that forfeiture thereunder could be only for arrears in all such assessments for three months.—*Id.*

214. Under Rev. St. 1911, Art. 4834, a death benefit cannot be recovered where the member was in default in his assessments, and the certificate provided that no benefit could be recovered in such event.—*Grayson v. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of the International Order of Twelve*, 171 S. W. 489.

215. Beneficiary of member in fraternal association held entitled to funeral benefits, notwithstanding the member was in arrears to the general society, and also in arrears in payment of dues to the local society.—*Id.*

Excuses for Non-Payment of Dues or Assessments—(A) Custom of Secretary to Collect.—Where the rules did not require the secretary to go to the homes of members and collect the dues, his previous custom, of which the supreme lodge had no notice, in so doing was a mere courtesy, on which no rights could be based.²¹⁷

(B) Custom of Paying Dues and Not Suspending at Once.—Where the by-laws provided that a sick member should be taken care of by the lodge in whose jurisdiction he was while away from home and where the local lodges knew of his sickness, where it was customary for local lodges not to suspend until the member had been delinquent for some months and where the dues were tendered almost two weeks after they were due, it was held that the non-payment of the monthly dues did not forfeit the certificate.²¹⁸ In this case the rules provided that the society should be notified in writing of the sickness of the member before the first of each month in which event the society should pay the dues for the member. This being a condition precedent it was held, in the absence of such notice, the lodge was under no obligation to pay the dues of insured while ill and his failure to do so was insufficient to excuse a forfeiture for non-payment,²¹⁹ even though he was un-

216. Holder of policy in a mutual benefit association, by failure to pay assessments within 15 days after notice, as required by by-laws on face of policy, declaring forfeit for noncompliance, forfeited his rights.—*Hawkins v. Lone Star Ins. Union*, 146 S. W. 1041. See 28 Cent. Dig. Insurance, §§ 1895, 1896, 1903.

216a. In an action on a benefit policy, where a by-law provided that a member, failing to pay his monthly rate within the month, shall be suspended without notice, held that obscurity in other by-laws pleaded would have no bearing upon issue of failure to pay monthly rate.—*Cole v. Knights of Maccabees of the World*, 188 S. W. 699.

754—Nonpayment of Dues or Assessments. (d) Excuses for Nonpayment.

217. Where the rules of a mutual benefit society did not require its secretary to go to the homes of members to collect assessments, his previous custom, of which the supreme lodge had no notice, in so doing was a mere courtesy on which no rights could be based.—*Fletcher v. Supreme Lodge Knights and Ladies of Honor*, 135 S. W. 201. See 28 Cent. Dig. Insurance, § 1906.

218. The by-laws of a fraternal benefit society composed of a grand and local lodges provided that, where a member, while at a distance from his lodge became sick, the lodge in whose jurisdiction he then was should make reasonable provision for his temporary

care and report to the lodge of which he was a member, etc. A member was taken sick while away from home about 15 days before the maturity of monthly dues. The local lodge at the place where he then was, and the local lodge at the place to which he was later removed, and the home lodge knew of his sickness. The monthly dues were not paid. They were tendered about 14 days after maturity, but refused. It was customary for local lodges not to suspend a member for nonpayment of dues until after a member had been delinquent for some months. Held, that the nonpayment of the monthly dues did not work a forfeiture of the member's certificate.—*Brotherhood of Railway Trainmen v. Dee*, 108 S. W. 492, judgment reversed, 111 S. W. 396, 101 Tex. 597. See 28 Cent. Dig. Insurance, § 1906.

219. A rule of a mutual benefit society provided that, if a brother in good standing becomes sick or disabled, he shall immediately notify the financier of his lodge in writing, and on receipt of such notice by the financier before the 1st day of the month the brother's dues shall be paid by his lodge for such period as the lodge shall determine; but such written notice shall be a condition precedent to the brother's rights under the section. Held that, in the absence of such notice, the lodge was under no obligation to pay the dues of insured while ill, and that his failure to do so was insufficient to excuse a forfeiture for nonpayment of dues.—*Id.*

conscious at the time the assessment was payable.²²¹ It was further held that the custom of the society to advance dues of sick members was at most a courtesy which would not estop the association from forfeiting the certificate.²²⁰

(C) Agreement of Clerk to Pay Dues.—It is no defense that the clerk agrees to pay the dues for a member, where it is not authorized by the by-laws.²²²

(D) Insanity of Member.—Where the by-laws require an association to pay the dues of a member who was insane and financially unable to pay his dues, provided the payments were not in arrears more than three months, such association is not required to pay the dues where proof of his insanity was offered six months after his suspension for non-payment and more than three months after his death.²²³

(E) Suspension of Local Camp.—After the suspension of a local camp unless a member takes steps to secure a reinstatement under the rules of the order, of which he is charged with knowledge, and attends to the payment of his dues, his beneficiary cannot recover.²²⁵ However, his certificate would not be forfeited for non-payment of dues for a month when he sought the clerk to pay his dues but was unable to find him.²²⁴

220. A custom on the part of local lodges of mutual benefit societies to advance dues of sick members to prevent their expulsion for failure to pay dues was at most but a courtesy, which could not estop the association from enforcing a forfeiture of a member's certificate for nonpayment of dues.—Id.

221. It was no excuse for insured's failure to pay assessments levied on his benefit certificate, for nonpayment of which a forfeiture was declared, that insured was unconscious and unable to attend to business at the time the assessment was payable.—Id.

222. Under Rev. St. 1911, Art. 4847, prohibiting waiver of the constitution or laws of a fraternal beneficiary association by a subordinate body, an agreement by the clerk not authorized by the by-laws to pay the assessments of a member is no defense to his suspension.—*Sovereign Camp W. O. W. v. Wagon*, 164 S. W. 1082. See 28 Cent. Dig. Insurance, § 1906.

223. Where the by-laws of a mutual benefit association required it to pay the dues of a member who was insane, and financially unable to pay his dues, but provided that such payments should not be made if the member was in arrears more than three months, the association was not required to pay the dues, where no proof of the insanity of a member was offered until six months after his suspension for nonpayment and more than three months after his death.—Id.

224. Where a member of a mutual benefit society was required to pay dues to the clerk of his local camp, and within the month of January, 1901, during which he was required to pay an assessment, his agent sought such clerk to pay the same, but was informed that he was absent, and his wife did not know of his whereabouts, and he did not appear until February 15th, when he informed insured's agent that he was no longer clerk, and that the camp had been disbanded, insured was not subject to a forfeiture of his certificate for failure to pay the assessment levied for January.—*Sovereign Camp Woodmen of the World v. Hicks*, 84 S. W. 425.

225. The constitution of a mutual benefit society provided that whenever a suspended camp failed to reinstate within 30 days thereafter no benefits should be paid on the death of any of its members, unless the deceased member should have paid all assessments and dues at his death, or held an unexpired withdrawal, transfer, or recognition card, issued by the camp before its suspension, and official receipts showing him to be in good standing. A subsequent provision declared that a member in good standing in a camp at the time of its suspension on payment of all arrearages and 50 cents to the sovereign clerk might be transferred to another camp, or be made a member at large. Held, that on suspension of a camp to which a member in good standing belonged he was

Estoppel or Waiver Affecting Right of Forfeiture—(A) Acceptance of Dues and Assessments.—The custom of a local lodge in accepting dues four or five days overdue will not estop the supreme lodge from claiming a forfeiture, the latter not being chargeable with the knowledge of the former.²²⁶ Neither will the acceptance by the supreme lodge of overdue assessments from a local lodge estop it from forfeiting the policies.²²⁷ Where insurer elects not to return the dues for any particular months it waives any failure of the member to comply with the rules of the order in the payment of dues for such months.²⁴⁶ It has been held that an association is not estopped to deny the rights of a divorced husband as beneficiary on his wife's policy by the fact that it accepted payments of premiums from him after the divorce.²³⁰

(B) Failure of Insurer to Send Notices or Drafts as Per Custom.—The association is estopped to forfeit a certificate where a member relied on the promise of the manager to draw on him for assessments as he had theretofore done.²²⁹ In the same way an insured who relied on a custom of the collecting officer to send out notices can defend on the ground of estoppel.²⁴² He must rely on a continuance of the custom and be misled by failure to receive such notice or there is no estoppel.²⁴²

(C) Use of Intoxicating Liquor.—An association having knowledge with knowledge of his duties in order to retain his standing, and hence, he having taken no steps to procure reinstatement at the time of his death, during which two assessments became due and were unpaid, his beneficiary was not entitled to recover on the certificate.—*Sovereign Camp Woodmen of the World v. Hicks*, 84 S. W. 425.

755—Estoppel or Waiver Affecting Right of Forfeiture. (See 28 Cent. Dig. Insurance, §§ 1907-1916.)

226. Where members of a benevolent insurance association make their contract with the supreme lodge, the custom of the local lodge in accepting dues four to five days overdue, unknown to the supreme lodge, does not estop the supreme lodge from claiming a forfeiture when dues are paid in that way, the supreme lodge not being charged with knowledge possessed by the officers of the local lodge, and they not having authority as agents to waive forfeitures.—*United Moderns v. Pike*, 76 S. W. 774.

227. The custom of the financier of a local lodge of a benevolent insurance association of sending reports to the supreme lodge, and their acceptance, without protest, later than directed by the by-laws, does not estop the supreme lodge from claiming a forfeiture for delay in payment of dues, since the promptness of these reports in no way affects the rights of members.—*United Moderns v. Pike*, 76 S. W. 774.

228. Where a member of a mutual benefit society on the suspension of his local camp failed to comply with the society's constitution and by-laws with reference to maintaining his standing, the fact that the sovereign clerk wrote him a letter, after he was in arrears for assessments, inclosing a blank application for reinstatement, and informing him that if he would fill out the application and forward it to the clerk, together with all assessments unpaid, he could be reinstated, with which directions he did not comply, did not constitute a waiver of his failure to pay previous assessments and comply with the laws of the society.—*Sovereign Camp Woodmen of the World v. Hicks*, 84 S. W. 425.

229. Where a member, relying on the promise of the manager to draw on him for assessments, and, being misled by the fact that such drafts have been twice made on him, is suspended for nonpayment of an assessment for which no draft was made, and cannot be reinstated because his health has become impaired, the association is estopped to insist on a forfeiture.—*McCorkle v. Texas Benevolent Ass'n*, 8 S. W. 516.

230. An association is not estopped to deny the rights of a divorced husband as beneficiary on his wife's policy by the fact that it accepted payments of premiums thereon from him after divorce, or that it paid him, after her death, a funeral benefit.—*Lawson v. United Benev. Ass'n*, 185 S. W. 976.

edge of insured's excessive drinking long prior to his expulsion therefor is not estopped from setting up such expulsion where the certificate provided it should become void if the holder drank so as to injure his health.²³³

(D) **Knowledge of Habits of Insured.**—A local lodge as agent of the supreme lodge was held to waive in its behalf the breach of warranty caused by the habits of insured where such local lodge had full knowledge of the continued violation of the rules of the order by insured.²³⁵

(E) **False Statements as to Age in Application.**—Such statements cannot be held to be waived because the insurer had notice of facts that would put a reasonable man on notice—it must have actual knowledge.²³⁷

231. The officers of the supreme lodge of a benevolent association have the authority to waive a by-law suspending a subordinate lodge for failure to remit an assessment within a certain time, and also, if suspended, to waive the payment of a fine for each member fixed by the by-laws as a penalty against said lodge, to be paid before its reinstatement.—*Supreme Lodge Nat. Reserve Ass'n v. Turner*, 47 S. W. 44, 19 Tex. Civ. App. 346.

232. The acceptance of subsequent assessments by the supreme lodge of a benevolent association from a subordinate lodge, after knowledge that a cause of suspension exists, where the members paid the same believing the suspension was not to be enforced, estops the supreme lodge from setting up such cause of suspension to defeat a recovery by a member of said subordinate lodge.—*Supreme Lodge Nat. Reserve Ass'n v. Turner*, 47 S. W. 44, 19 Tex. Civ. App. 346.

233. The knowledge of a fraternal life insurance company through its officers, of a member's excessive drinking, long prior to the time he was expelled therefor, does not estop the company, in a suit on the policy, from setting up the expulsion, since the terms of the certificate provided that it should become void if the holder drank to excess, so as to permanently injure his health.—*Kempe v. Woodmen of the World*, 44 S. W. 688.

234. The mere fact that the local secretary of a fraternal insurance order had, without authority, permitted a member of two years' standing, who had full knowledge of the rules of the association, to pay two delinquent monthly assessments without complying with the required conditions for reinstatement, while he enforced the rules against all other members, does not show a custom, binding on the order, to receive assessments tendered after the time for payment has expired; it not appearing that the su-

perior officers had any knowledge of the violation.—*Fraternal Union of America v. Hurlock*, 75 S. W. 539.

235. Application for insurance in a fraternal order was made, as required by its rules, to a local council. Two of the members were required to recommend the applicant. Assessments were collected by the local council, membership in which was required to precede the issuance of the certificate. The supreme council could proceed only through the local council against a member violating its rules. The certificate was issued on an application containing a false statement as to habits, which by the terms of the certificate worked a forfeiture thereof, and barred the applicant from membership. Insured continued, till he died, to violate the contract, with the knowledge of the officers of the local council, but his actions were ignored. The examiner, who was also secretary of the local council, knew of the breach of warranty, and the habits of insured were generally known. Held, that the local council bore the relation of agent to the supreme council with reference to its business at the place in question, and that it had waived in its behalf the breach of warranty, and the subsequent failure of insured to abide by the rules of the order.—*Order of Columbus of Baltimore City, Md., v. Fugua*, 60 S. W. 1020.

236. Where insured, in support of an application for reinstatement in a mutual benefit association, submitted a physician's certificate which showed that he could not be reinstated in any event, and he never was in fact reinstated, the insurer was not estopped to rely on the forfeiture because of a mistake of its local officer in informing insured that a medical certificate was required in order to secure his reinstatement. Judgment, 103 S. W. 492, reversed.—*Brotherhood of Railway Trainmen v. Dee*, 111 S. W. 396, 101 Tex. 597. See 28 Cent. Dig. Insurance, §§ 1907-1916.

(F) Estoppel by Acts of Insurer.—If the insurer by its conduct misleads the insured to his expense and harm it may be estopped to assert a forfeiture.^{238 239 240}

Authority to Waive Suspension.—It has been held that the officers of a supreme lodge have authority to waive a by-law suspending a local lodge for non-payment of dues and the payment of a fine by each member.²³¹

As to Enforcing Suspension.—Where the supreme lodge accepts assessments after it has knowledge that a cause of suspension exists, where the members paid same believing the suspension would not be enforced, it is estopped from setting up such cause of suspension to defeat a recovery by a member of the local lodge.²³² In another case a society was held to waive its right to suspend a member who had disappeared, by accepting dues and assessments and failing to enforce suspension under its laws.²⁴³

As to Reinstatement.—Where insured who was in good health, took no steps towards reinstatement, the forfeiture of the policy was not waived by subsequent notices.²⁴¹ Nor is the sending of a blank application for reinstatement and a request to pay up back assessments a waiver of insured's failure to pay such back assessments where he does not take advantage of his opportunity to be reinstated.²²⁸ A single instance where a local secretary, without authority permitted the payment of delinquent dues without

237. The defense, to an action on a benefit certificate, that insured made false statements in his application as to his age and as to whether he had previously been a member of the order, cannot be held to have been waived because the insurer had notice of facts which would cause a person of ordinary prudence to make inquiry, and that such inquiry, if prosecuted with reasonable diligence, would have resulted in actual knowledge of the falsity of the statements, since the doctrine of waiver or ratification is founded upon actual and not constructive knowledge.—*Brotherhood of Railroad Trainmen v. Roberts*, 107 S. W. 626.

238. Where the policy or benefit certificate provides for termination on failure to pay premiums or dues, without affirmative act of the insurer, conduct of the insurer misleading the insured to his expense or harm may estop the insurer from asserting forfeiture.—*Lone Star Ins. Union v. Brannan*, 184 S. W. 691.

239. Evidence held to make a strong case against the insurer of estoppel to plead forfeiture on account of acts of its general manager, though conditions of the policy as to forfeiture may have been self-executing.—*Id.*

240. Whether the local agent of an insurance company was authorized to

waive the forfeiture provisions of the policy is immaterial, where the jury found that the general manager waived such conditions.—*Lone Star Ins. Union v. Brannan*, 184 S. W. 691.

241. Forfeiture of policy for non-payment of assessments held not waived by subsequent notices, nor by invitation to pay arrearages and be reinstated, if in good health, where insured took no steps towards reinstatement.—*Hawkins v. Lone Star Ins. Union*, 146 S. W. 1041. See 28 Cent. Dig. Insurance, § 1907.

242. The failure of the collecting officer of the insurer to comply with a custom of sending out notices not required by the policy held available as excuse for the nonpayment of fixed dues only as ground for an estoppel, and that, unless a member in default or the one assuming to pay his assessments relied on a continuance of the custom, and was misled by failure to receive such notice, there was no estoppel.—*Bennett v. Sovereign Camp, Woodmen of the World*, 168 S. W. 1023.

243. Benefit society, by failing to suspend member who disappeared, and continuing to accept dues and assessments, held to have waived its right to suspend him pursuant to its laws, and estopped from asserting a suspension.—*Supreme Ruling of Fraternal Mystic Circle v. Hoskins*, 171 S. W. 812.

complying with the required conditions for reinstatement, does not show a custom, binding on the order, to receive assessments after the time for payment has expired, where it does not appear that the superior officers knew of it.²³⁴ In another case it was held that an association was not estopped to rely on a forfeiture because of a mistake of the local officer in telling insured that a medical certificate was necessary to accompany the application for reinstatement, where such certificate showed he could not be reinstated in any event.²³⁶ Where a constitution required a local lodge to hold monthly meetings and provided that if more than sixty days had elapsed since a member's suspension he must present a medical certificate before reinstatement and his application must be favorably voted on, it was held that where no monthly meetings were held for several months after the suspension of a member and such member presented his application at the first meeting but before he presented his medical certificate he was killed, the failure of the local lodge to hold regular meetings did not estop the supreme lodge to set up the suspension as a bar to benefits.²⁴⁴ The fact that the local lodge received his delinquent dues would not constitute such estoppel.²⁴⁵

Notice and Proceedings to Give Effect to Forfeiture.—The policy is held to be sufficient notice to the insured of conditions as to payment necessary to keep the policy in force.²⁵⁰ Before a member forfeits his right under a policy, notice of his delinquency must be given in the manner provided by the constitution of the insurer,²⁴⁹ and no other method will suffice in the absence of a custom or contract binding upon the insured to receive notice in a different manner.²⁴⁸ Neither does a member forfeit his endowment right where he is summarily suspended where the laws of the association provided the course of procedure with notice and hear-

244. The constitution of the supreme lodge required each subordinate lodge to hold monthly meetings, and provided that, if more than 60 days had elapsed since a member's suspension, he must present a medical certificate, and his application for reinstatement must be favorably voted upon by a majority of the subordinate lodge. Held, that where no meeting of a lodge was held for several months after a member was suspended, and at the next meeting he presented his application for reinstatement, but failed to present the medical certificate, but presented it later, and, before it was accepted, was killed, the failure of the subordinate lodge to hold regular meetings does not estop the supreme lodge to set up the suspension of the member as a bar to his right to benefits.—*Supreme Lodge Knights of Honor v.*

40—Ins.

Keener, 25 S. W. 1084, 6 Tex. Civ. App. 267.

245. Nor does the fact that the subordinate lodge received the member's delinquent dues, and gave him a receipt therefor, constitute such an estoppel.—*Supreme Lodge Knights of Honor v. Keener*, 25 S. W. 1084, 6 Tex. Civ. App. 267.

246. Where a fraternal insurance order, after receiving notice of the death of a member, tendered a return of dues received for a certain month, but elected to retain dues for preceding months, and it did not at any time prior to an action on the certificate offer to return such dues, it waived any failure to the member to comply with the rules of the order in the payment of the dues for such months.—*Grand Fraternity v. Mulkey*, 130 S. W. 242. See 28 Cent. Dig. Insurance, §§ 1907-1916.

ing for suspension of members.²⁴⁷ (For case showing no notice of forfeiture necessary under the by-laws, see Ann. 250a.)

Effect of Suspension.—It has been held that under a certificate providing for forfeiture for default in payment of assessments and suspension of members, the beneficiaries could not recover where the member died during suspension.²⁵¹

Reinstatement.—The legal representatives of the deceased are not entitled to sixty days after the forfeiture to reinstate a policy after the death of the insured.²⁵⁴ Neither is a contract reinstated when the insurer either retains the money paid after the death of insured or does not promptly return it.²⁵²

(A) Right in General.—The right to reinstatement is a contractual right on compliance with the laws of the order.^{254a}

(1) Damages for Failure to Reinstate.—An insured is not entitled to damages for failure of collector by mistake, to receive his dues, after forfeiture and seeking reinstatement, which mistake was rectified the following day by an offer to receive them and where further developments did not show a refusal to receive them.²⁵³

756—Notice and Proceedings to Give Effect to Forfeiture. (See 28 Cent. Dig. Insurance, §§ 1917, 1918.)

247. Member of fraternal benefit association, summarily suspended by local lodge, held not to forfeit endowment right thereby, where laws of association provided procedure with notice and hearing for suspension of members.—Grand Court of Texas Independent Order of Calanthe v. Johns, 181 S. W. 869.

248. Where the laws of a benefit society expressly provide the manner of giving a notice, that manner must be followed and no other will suffice, in the absence of a custom or contract binding upon the member to receive notice in a different manner.—Haywood v. Grand Lodge of Texas, K. P., 138 S. W. 1194. See 28 Cent. Dig. Insurance, §§ 1917, 1918.

249. A member in a fraternal beneficiary association held not to have forfeited his rights against the insurer until notice of his delinquency had been given in the manner provided by the constitution of the insurer.—Id.

250. Policy in mutual benefit association, held notice to the insured of condition as to payment necessary to keep the policy in force.—Hawkins v. Lone Star Ins. Union, 146 S. W. 1041.

250a. Under by-laws of a mutual benefit insurance association, held that no affirmative action or notice to assured of forfeiture on part of association was necessary to forfeit the certificate.—Cole v. Knights of Maccabees of the World, 188 S. W. 699.

757—Effect of Forfeiture or Suspension. (See 28 Cent. Dig. Insurance, § 1919.)

251. On forfeiture of a benefit certificate for default in payment of an assessment and suspension of members, held that beneficiaries could not recover where the member died during such suspension.—Tabor v. Modern Woodmen of America, 163 S. W. 324. See 28 Cent. Dig. Insurance, § 1919.

758—Reinstatement. (See 28 Cent. Dig. Insurance, §§ 1920-1926.)

252. The fact that insurer did not promptly, upon learning of a forfeiture, after the death of insured, return the money paid after forfeiture, or that it retained the money, did not reinstate the contract.—Moore v. Supreme Assembly of Royal Soc. of Good Fellows, 93 S. W. 1077. See 28 Cent. Dig. Insurance, §§ 1041-1070.

253. Plaintiff was suspended January 1st, for nonpayment of dues and assessments; March 1st, under the laws of the order, providing for the reinstatement of a member so suspended on payment of his arrearages within 60 days from the date of suspension, he tendered to the local collector the amount due, which was refused. On discovery of his mistake, on the following day, the collector advised plaintiff thereof and offered to receive the money tendered, which offer plaintiff made no effort to accept. March 4th plaintiff wrote to the supreme commander of the order, demanding payment of the

(B) Payment of Arrears as a Preliminary to Reinstatement.—

Where the certificate provided that failure to pay dues within the time specified terminated such certificate but a provision in the constitution allowed the member to be readmitted on filling out the proper application and paying all arrearages within sixty days, it was held that a member under such provision is not entitled to reinstatement on payment of dues as a matter of right within sixty days after forfeiture.²⁵⁵ Where the laws so provide, in order to become reinstated a member must pay all assessments levied during his suspension even though he was not entitled to the benefits of the order,²⁵⁶ even though he had no notice of an assessment, where the laws make lack of notice no excuse.²⁵⁷ It has been further held that the acceptance of arrearages by an agent, after the insured's death will not have a retroactive effect to revive a forfeited policy.²⁵⁹ Neither will an unaccepted tender of arrearages, after it has become known that a member could not live, revive a policy.²⁶⁰ Finally, a sovereign camp is not estopped always to deny that a member has been reinstated by the action of a clerk of a local camp who retains a less sum than the total amount of arrears.²⁵⁸

amount of his policy; and about May 1st again applied to the local collector to be reinstated, by whom he was referred to the grand secretary. Held not to show a refusal to reinstate on compliance with the rules of the order, so as to authorize a suit for damages.—*American Legion of Honor v. Giesberg*, 42 S. W. 785, 17 Tex. Civ. App. 2.

254. Benefit certificate held forfeited by default in payment of assessment, and that legal representatives of deceased were not allowed 60 days after such forfeiture to reinstate the policy by payment of such assessment after deceased's death.—*Tabor v. Modern Woodmen of America*, 163 S. W. 324. See 28 Cent. Dig. Insurance, § 1920.

759—(a) Right in General. (See 28 Cent. Dig. Insurance, §§ 1920, 1921.)

254a. It is a contractual right of a member of a mutual benefit association to reinstatement on compliance with the laws of the order as to reinstatements.—*Grand Lodge of Brotherhood of Railroad Trainmen v. Kennedy*, 188 S. W. 447.

760—(b) Payment of Arrears. (See 28 Cent. Dig. Insurance, § 1923.)

255. A benefit certificate provided that failure to pay dues and assessments imposed within a time specified should terminate the certificate; but a provision of the society's constitution allowed a member expelled for nonpayment of dues to be readmitted on application on a form provided by the grand secretary and treasurer and

on paying all arrearages, etc., according to the laws governing application for membership or initiation except that, where less than 60 days have elapsed, a medical examiner's certificate was not required. Held, that a member under such provision was not entitled to reinstatement on payment of dues as a matter of right within 60 days after forfeiture. Judgment, 108 S. W. 492, reversed.—*Brotherhood of Ry. Trainmen v. Dee*, 111 S. W. 396, 101 Tex. 597. See 28 Cent. Dig. Insurance, § 1923.

256. Where the laws of a mutual benefit order provide that a suspended member can be reinstated only on paying all "arrearages of every kind," a member cannot claim reinstatement without paying assessments levied while he was suspended, though during such time he was not entitled to the benefits of the order.—*Sovereign Camp, Woodmen of the World, v. Rothschild*, 40 S. W. 553.

257. Where such laws contain an additional provision that the failure to receive a notice of assessment shall not relieve a member from forfeiture for nonpayment thereof, a member who has been regularly suspended for nonpayment of one month's assessment is not entitled to reinstatement on paying such assessment, after another assessment has become due, without paying the latter, though he had not received notice that the second assessment was due.—*Sovereign Camp, Woodmen of the World, v. Rothschild*, 40 S. W. 553.

258. Where the laws of a mutual benefit order require payment of all

(C) Certificate of Health as a Preliminary to Reinstatement.—

Where the by-laws make such a certificate essential a tender of dues after suspension without it will not entitle the member to reinstatement.²⁶⁵ It is held to be a warranty in an application for reinstatement that the insured has had none of the diseases mentioned in the original application after the certificate was issued,²⁶³ and the breach of such a warranty works a forfeiture.²⁶⁴ However, where the certificate or by-laws do not require the insured to be in good health it is not necessary that he be so.^{265a}

BENEFICIARIES AND BENEFITS

Insurable Interest of Beneficiary.—It was held in an early case that an assignment to a cousin, who lived with insured as an adult male member of his family and who was dependent on him for support and employment, upon agreement to pay the assessments was void, there being no insurable interest and it being

arrears before a suspended member can be reinstated, and provide that clerks of subordinate camps cannot bind the sovereign camp by any acts outside their express authority, and such agents are not authorized by the constitution and laws to reinstate suspended members, the sovereign camp is not estopped to deny that a member has been reinstated by the action of a clerk of a subordinate camp in receiving from a suspended member, and retaining, a less sum than the total amount in arrears.—*Sovereign Camp, Woodmen of the World v. Rothschild*, 40 S. W. 553.

²⁵⁹. Acceptance by insured's agent of the arrears after the member's death held to have no retroactive effect to revive a forfeited policy.—*Bennett v. Sovereign Camp, Woodmen of the World*, 168 S. W. 1023.

²⁶⁰. A policy in a mutual benefit association, forfeited by a failure of the insured to pay assessments, was not revived by an unaccepted tender of the arrears, made in behalf of insured at a time when it was known that he could not live.—*Hawkins v. Lone Star Ins. Union*, 146 S. W. 1041.

761—Reinstatement. (C) Health and Condition of Insured. (See 28 Cent. Dig. Insurance, § 1924.)

²⁶¹. False statements, in an application for reinstatement in a mutual benefit association, that the applicant was in good health, had had no severe illness or disease or injury since his original petition, when in fact he had suffered from various diseases and been operated upon, held "material" misrepresentations within Rev. Civ. St. 1911, Art. 4834, precluding recovery.—*Supreme Ruling of Fraternal Mystic Circle v. Hansen*, 153 S. W. 351.

²⁶². False representations, in a pe-

tition for reinstatement in a mutual benefit association, will avoid the insurance when material to the risk, though ignorantly made, especially where their truth is expressly warranted.—*Id.* See 28 Cent. Dig. Insurance, § 1924.

²⁶³. An application for reinstatement in a fraternal mutual benefit association held a warranty that the member had had none of the diseases mentioned in the original application after the certificate was issued.—*Supreme Ruling of Fraternal Mystic Circle v. Hansen*, 161 S. W. 54.

²⁶⁴. In the absence of a statute limiting the effect of a breach of warranty, on which one is reinstated to membership in a fraternal mutual benefit association which has issued a benefit certificate on his life, that he has not had certain diseases, the breach works a forfeiture of the contract.—*Id.* See 28 Cent. Dig. Insurance, § 1924.

²⁶⁵. Where the by-laws of a mutual benefit association required the payment of dues for reinstatement after suspension to be accompanied by a certificate that the insured was in good health, a tender not accompanied by such certificate does not entitle a member to reinstatement.—*Sovereign Camp W. O. W. v. Wagon*, 164 S. W. 1082. See 28 Cent. Dig. Insurance, § 1924.

^{265a}. Where a mutual benefit certificate or the by-laws of the association do not require the insured to be in good health as a condition to reinstatement upon the payment of arrears, it is not necessary that he be in good health in order to be so reinstated.—*Mutual Life Ins. Ass'n of Donley County v. Rhoderick*, 164 S. W. 1067. See 28 Cent. Dig. Insurance, § 1924.

against public policy.²⁶⁸ A divorced husband has no insurable interest in the life of his former wife,²⁶⁹ but illegitimate children who are recognized and maintained by their putative father have an insurable interest in his life.²⁶⁷

Recovery of Dues Paid by Beneficiary Without Insurable Interest.—Where the association has no notice that a beneficiary without insurable interest, has been paying the dues on a certificate, such beneficiary cannot recover the dues so paid as money paid on a consideration which has failed.²⁶⁹

Persons Who May Be Beneficiaries—(A) Statutory Provisions.—The payment of death benefits shall be confined to the following persons: Wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by adoption, or to a person or persons dependent upon the member. If after the issuance of a certificate a member shall become dependent upon an incorporated charitable institution he shall have the privilege, with the consent of the society, of making such institution his beneficiary. Within the above restrictions each member has the right to designate his beneficiary and may change the same in accordance with the rules of the society. (Art. 4832, Rev. St. 1914.)

By an act passed by the 35th legislature any association, society or corporation, organized and operated for religious, eleemosynary or educational purposes, may be named as beneficiary. (Chap. 162, p. 372, General Laws 35th Leg.)

It is also provided that any society may, by its laws, limit the scope of beneficiaries within the above classes. (Art. 4832, Rev. St. 1914.)

(B) In General.—Nephews, nieces²⁷⁰ and cousins²⁷¹ may be

BENEFICIARIES AND BENEFITS. (SEE 29 CYC. 105.)

767—Insurable Interest of Beneficiary. (See 28 Cent. Dig. Insurance, §§ 1929-1931.)

266. A divorced husband has no insurable interest in the life of his former wife.—Lawson v. United Benvolent Ass'n, 185 S. W. 976.

267. Illegitimate children, recognized and maintained by their putative father, have an insurable interest in his life.—Overton v. Colored Knights of Pythias, 173 S. W. 472.

268. In Texas, the assignment by one of an insurance policy issued upon his own life to his cousin, who lives with him as an adult male member of his family, and is dependent on the insured for employment and support, upon an agreement by the assignee to pay the assessments necessary to keep the policy in force, is void as being to one who has no insurable interest in the life of the insured, and as being against public policy and the in-

surance money should be paid to the original beneficiaries.—Price v. Supreme Lodge Knights of Honor, 4 S. W. 633.

269. When the beneficiary named in the certificate of an assessment insurance association has no insurable interest in the life of the insured, he cannot recover from the association dues and assessments paid by him for the insured as money paid on a consideration which has failed, the association having no notice that the beneficiary, and not the insured, was paying the dues and assessments.—Knights and Ladies of Honor y. Burke, 15 S. W. 45.

768—Persons Who May Be Beneficiaries. (A) In General. (See 28 Cent. Dig. Insurance, §§ 1932-1938.)

270. Under Vernon Sayles' Ann. Civ. St. 1914, Art. 4832, nephews and nieces may be designated as beneficiaries of fraternal insurance certificates.—Wright v. Grand Lodge K. P., Colored, 173 S. W. 270.

named beneficiaries under the statute. The foster mother of the insured, who he had adopted as his legal heir could be made a beneficiary.²⁷⁴ It has been held that the statute does not deny to the member the right to designate a beneficiary within the classes mentioned in view of the section which exempts the benefits from liability for the debts of any beneficiary named in such certificate.²⁷² The statute is further held to merely name the classes from which a member may select a beneficiary and does not require distribution to such classes in the order in which they are named, irrespective of the member's designation.²⁷³

Provisions of Charter or By-Laws.—The foster mother of the insured whom he had legally adopted, as his heir was held to come under the class of "adopted children" as used in a by-law.²⁷⁵ A divorced husband, however, cannot take as beneficiary under the words "bearing relationship of husband" in the policy, where the by-laws limit beneficiaries to husband or wife or certain relatives.²⁷⁶ Nieces and nephews may be treated as legal representatives where the constitution authorizes the designation of a member's legal representatives as beneficiaries.²⁷⁷ An illegitimate daughter is related to the father by blood and therefore eligible for benefits

770—(B) Statutory Provisions. (See 28 Cent. Dig. Insurance, §§ 1933, 1937.)

271. Acts 26th Leg. (Sess. Acts 1899, p. 195, ch. 115) designating the classes of persons who may be named as beneficiaries in certificates issued by a fraternal beneficiary association, recognizes and names blood relatives as a class to whom certificates may be payable, and hence the designation of a cousin is not against the public policy of the state.—*Gray v. Sovereign Camp W. O. W.*, 106 S. W. 176, 47 Tex. Civ. App. 609. See 28 Cent. Dig. Insurance, §§ 1933, 1937.

272. Acts 26th Leg. ch. 115, § 1, held not to deny to member of fraternal beneficiary association the right to designate a beneficiary within the classes mentioned, especially in view of section 11, exempting such benefits from liability for the debts of "any beneficiary named in such certificate."—*Green v. Grand United Order of Odd Fellows*, 163 S. W. 1071. See 28 Cent. Dig. Insurance, § 1933.

273. Acts 26th Leg. ch. 115, § 1, construed in connection with section 5, subds. 1, 23, 24, merely names the classes from which a member of a benefit society may select the beneficiary and does not require distribution to such classes in the order in which they are named, irrespective of the member's designation.—*Green v. Grand United Order of Odd Fellows*, 163 S. W. 1068. See 28 Cent. Dig. Insurance, §§ 1933, 1937.

274. The word "children," as used in Rev. St. 1911, Art. 4832, providing that death benefits in beneficial associations may be made payable to children by legal adoption, held to designate the relationship and not the age of the beneficiary, and to include the foster mother of the insured, whom he adopted as his legal heir.—*Mellville v. Wickham*, 169 S. W. 1123.

771—(C) Provisions of Charter or By-Laws. (See 28 Cent. Dig. Insurance, §§ 1935, 1937.)

275. "Adopted children," as used in a law of a beneficial association authorizing the making of adopted children beneficiaries, held to include the foster mother of the insured, whom he had legally adopted as his heir.—*Mellville v. Wickham*, 169 S. W. 1123.

276. Under a mutual benefit association, policy designating one as beneficiary by name, followed by the words, "bearing relationship of husband," and expressly subject to the association constitution and laws, limiting beneficiaries to husband or wife or certain relatives, a divorced husband cannot take as beneficiary.—*Lawson v. United Benev. Ass'n*, 185 S. W. 976.

277. Under the constitution of a fraternal insurance society, authorizing the designation of a member's legal representatives as beneficiaries, nieces and nephews will be treated as legal representatives.—*Wright v. Grand Lodge K. P., Colored*, 173 S. W. 270.

under a constitution requiring a beneficiary to be so related.²⁷³ An assignment to one who does not come within any of the classes designated in the constitution is void.²⁷⁹ Where a charter stated its object to be "to insure pecuniary relief to the widow, orphans or legatees of the deceased members" and further provided that upon the death of a member a certain sum should be paid to the person designated in the application it was held that the charter must be construed as restricting the choice of a beneficiary to one of the three classes named.²⁸⁰ A mistress of a member, who becomes such in consideration of an assignment of a policy, is not a blood relative or a dependent within the meaning of a certificate.²⁸¹ Where the constitution and by-laws recognize the heirs as beneficiaries, the word "heirs" means those who are entitled to receive the estate under the statute.²⁸² A subsequent amendment to a constitution, in the absence of express stipulations to the contrary, will not affect beneficiaries previously designated.²⁸⁴ In a

278. Where the constitution of a mutual benefit society provided that each member should designate the beneficiaries, who should be members of his family, or some one related to him by blood, or who should be dependent on him, a member might designate as a beneficiary an illegitimate daughter; she being related to him by blood, and being dependent on him.—*Stahl v. Grand Lodge A. O. U. W.*, 98 S. W. 643.

279. The constitution of an insurance association provided that the benefits due on a certificate should be paid to the family, or heirs, widow, or orphans, of deceased members, and its by-laws declared that a candidate for membership should embody in his petition the name of the member or members of his family and those dependent on him to whom he desired the benefit to be paid. In 1893 the insured took out a policy payable to his brother, the plaintiff, and in 1896 wrote the supreme recorder of the association that he assigned all his interest to W., and commanded that his former beneficiary's name be erased from the policy, and that the same be paid to W. W., who was only 10 years of age, paid nothing for the assignment, and did not agree to pay anything, and was not related to the insured by blood or otherwise. Held, that the assignment of the certificate to W. was void.—*Williams v. Fletcher*, 62 S. W. 1082, 26 Tex. Civ. App. 85.

280. The charter of a mutual benefit association stated its object to be "to insure pecuniary relief to the widow, orphans, or legatees of the deceased members." The charter further provided that upon the death of a member a certain sum should be paid to the person designated as beneficiary in the application for membership. Held, that the charter must be construed as re-

stricting the choice of a beneficiary to one of the three classes named.—*Grand Lodge Order of Sons of Herman v. Iselt*, 37 S. W. 377.

281. A woman who, as a business transaction, agrees to become the mistress of a member in consideration of an assignment to her of the certificate of insurance on his life, is not a dependent, within a regulation requiring the beneficiary to be a blood relative of the member or a "dependent."—*West v. Grand Lodge of the Ancient Order of United Workmen of Texas*, 37 S. W. 966.

282. Where the constitution and by-laws of a mutual benefit association recognizes as beneficiaries the heirs of a deceased member, the word "heirs," if not otherwise limited, means those who are entitled to receive the estate under the statute.—*Hanna v. Hanna*, 30 S. W. 820.

283. Where the constitution and by-laws of a mutual benefit association show that its object is to provide a fund for the benefit of families of deceased members, and the widow and heirs are recognized by provisions therein as the beneficiary class, and no provision is made therein for the assignment of policies, the widow and minor child of a deceased member are entitled to the proceeds of a policy providing that all payments due heirs of the insured under the policy "are payable to his mother or his lawful heirs," although the policy was delivered to his mother, and she has paid all the assessments thereon.—*Hanna v. Hanna*, 30 S. W. 820.

284. Where there was no law of defendant lodge restricting the right of a member to designate a beneficiary in his benefit certificate at the time the certificate in suit was taken out, a subsequent amendment to defendant's

case where the constitution and laws showed that the object of the association was to provide a fund for the benefit of the families of deceased members, the widow and heirs being recognized as the beneficiary class, the widow and child of an insured will take under a policy payable to insured's mother and his lawful heirs, although the policy was delivered to the mother and she had paid all the assessments thereon.²⁸³ A by-law as to beneficiaries cannot be taken advantage of by outside parties, claiming the insurance under the original charter.²⁸⁵

Designation of Beneficiary.—A certificate which designated the children of insured generally without naming them was held to include children born after its issuance, although the member had named his children and requested the benefit be paid to them, as it appeared that one of the main objects of the association was to provide a fund for the entire family and the charter contained no provision allowing an applicant to designate a beneficiary.²⁸⁶ Again, in a case where the insured designated certain children as beneficiaries whose names insurer promised but failed to insert in the policy, such children are proper plaintiffs to sue thereon, though he had other children than those named.²⁸⁷

Revocation.—The subsequent marriage of an insured does not change the beneficiary,²⁸⁸ in the absence of any statutory provision to that effect. Under a policy limiting beneficiaries to husband, wife and relatives and which was payable to the husband, who was later divorced, no right to recover on the policy was given him by the will of his former wife in this favor.²⁸⁹

constitution limiting persons who could be beneficiaries to certain relatives of the member, which would exclude plaintiff, would not be construed so as to affect a member's certificate which had been previously issued, in the absence of express words requiring such construction.—Grand Lodge, A. O. U. W., v. Stumpf, 58 S. W. 840.

285. A by-law of a corporation, merely directory in its character, pointing out a way in which the right to dispose of the insurance money may be exercised by insured, and the object of which is to protect the corporation, cannot be taken advantage of by outside parties claiming the insurance under the charter of such corporation.—Splawn v. Chew, 60, Tex. 532.

772—Designation of Beneficiary. (See 28 Cent. Dig. Insurance, §§ 1939-1941.)

286. A member requested that his certificate be issued payable to his children, naming them, upon his death. The certificate as issued was payable to his children generally, without naming them. Held, that the certificate included children born after its issuance, it appearing that one of the main

objects of the association was to provide a fund for the benefit of the entire family of a member, and not to restrict it to a portion, and that the charter contained no provision allowing an applicant to designate the beneficiary.—Thomas v. Leake, 3 S. W. 703.

287. Where assured designated certain children as beneficiaries, whose names insurer promised, but failed, to insert in the policy, such children are proper plaintiffs to sue thereon, though assured had other children than those named.—International Order of Twelve Knights, etc., v. Boswell, 48 S. W. 1108.

774—(A) Revocation. (See 28 Cent. Dig. Insurance, § 1940.)

288. In the absence of any statutory provision to that effect, where the father and mother of a member of a benefit society were designated as beneficiaries, his subsequent marriage did not change the beneficiary.—Green v. Grand United Order of Odd Fellows, 163 S. W. 1068. See 28 Cent. Dig. Insurance, § 1940.

289. Where a mutual benefit policy, limiting beneficiaries to husband and wife and relatives, was payable to a

Invalid or Ineffective Designation.—Oral statements or declarations of the insured as to who would receive benefit will not constitute a legal designation where the laws of the insurer provide for the appointment of beneficiaries by the issuance of certificate.^{289a}

Failure to Make Designation.—Where, in the surrender of an original certificate the insured failed to designate an eligible beneficiary within the law, the matter stood just as it would had insured failed in the first place to designate any eligible person and the benefit was payable to those entitled to it under the statute.²⁹⁰ In an early case, where no beneficiary was appointed, it was held that a divorced wife was not entitled to any share of the benefit fund which by the rules of the association went to the member's heirs.²⁹² Where a member might designate a beneficiary but never did so it was held that his mortuary fund reverted to the society.²⁹¹ Under the statute, where a certificate had never been issued to the deceased, payment should be made to her husband.^{290a}

Rights of Beneficiary Previously Designated.—The rule is that where the insured has or reserves the right to change the beneficiary the latter has no vested rights in the certificate, not being a party to the contract.²⁹⁵ Where the by-laws provide that a member may change his beneficiary upon delivering his certificate and receiving another certificate naming another beneficiary, the original certificate is revoked and the rights of the beneficiary named

husband, who was later divorced, no right to recover on the policy was given him by the will of his former wife in his favor.—*Lawson v. United Benev. Ass'n*, 185 S. W. 976.

Lodge Colored Knights of Pythias v. Mackey, 104 S. W. 907.

777—Invalid or Ineffective Designation.

289a. Where the constitution and by-laws of defendant fraternal insurance association provide for the appointment of beneficiaries by issuance of certificate, oral statements and declarations of insured as to who would receive benefit, held not to constitute a legal designation.—*Carr v. Grand Lodge United Brothers of Friendship of Texas*, 189 S. W. 510.

778—Failure to Make Designation. (See 28 Cent. Dig. Insurance, § 1945.)

290. Where, on the surrender of an original beneficiary certificate, insured failed to designate one who was eligible as a beneficiary within Laws 1899, p. 195, c. 115, § 1, providing that death benefits shall be paid to insured's family, heirs, affianced wife, etc., the matter stood just as it would, had insured failed in the first place to designate any eligible person and the benefit was payable to those entitled to it under the statute in the order of precedence named therein.—*Grand*

290a. Under Rev. St. 1911, § 4832 and constitution and by-laws of defendant, where no benefit certificate had ever been issued to deceased either before or after marriage, held, that payment of death benefits should be made to her husband, and plaintiff whom she had intended to make a beneficiary had no claim.—*Carr v. Grand Lodge United Brothers of Friendship of Texas*, 189 S. W. 510.

291. The laws of a mutual benefit society provided that each member might designate the person to whom his mortuary fund should be paid; that should such person die before the member, the fund should be paid to the member's surviving widow and children; and that if there should be no one living, entitled to the fund, it should revert to the society. Held, that where a member had never designated any beneficiary, his mortuary fund reverted to the society, even though he left a widow.—*Grand Lodge A. O. U. W. v. Cleghorn*, 42 S. W. 1043.

292. A divorced wife is entitled to no share of a benefit fund which by the rules of the association goes to the member's heirs, no beneficiary having been appointed by him.—*Schonfield v. Turner*, 12 S. W. 626, 75 Tex. 324.

therein are destroyed, even though the designation of beneficiary in the second certificate was illegal.²⁹⁴ Neither under such circumstances can the insurer be enjoined from issuing a new certificate changing the beneficiary when the latter had paid out money to keep it alive under an agreement with the insured that he was to receive the money so paid by him out of the proceeds of the certificate.²⁹³ It has been held also that the original beneficiary cannot complain that a by-law in force at the time of the issuance of the original certificate was amended to omit the necessity of consent on the part of the beneficiary to a change of beneficiary.²⁹⁵

The Vested Interest of the Beneficiary.—As a general rule a person who procures insurance is held to divest himself of all interest in the policy and to vest it exclusively in the beneficiaries.²⁹⁶ However, he may reserve the right to change the beneficiary and in such case there is no indefeasible interest vested in the beneficiary which cannot be revoked.²⁹⁹ The statute provides that no beneficiary shall have or obtain any vested interest in a benefit until the same shall become due and payable. (Art. 4832, Rev. St. 1914.) It is held further that a beneficiary has no vested property right in a benefit during the life of the member where the member has the power to change beneficiaries at will.²⁹⁸ In a case where a member agreed with his wife that, in consideration of her paying the assessments she should have the proceeds of the certificate at his death, and the wife stopped paying the assessments after a

782—Change of Beneficiary. (A) Rights of Beneficiary Previously Designated. (See 28 Cent. Dig. Insurance, § 1948.)

293. Where the by-laws of a mutual benefit association provide that a member may change his beneficiary upon delivering his certificate, etc., and a certificate is issued subject to and is to be construed by the laws of the order, and the beneficiary complies with the provisions for making a change of beneficiary, the association cannot be enjoined from issuing a new certificate to the new beneficiary, though plaintiff, to whom the certificate was formerly payable as trustee, had paid out money to keep the insurance alive, under an agreement with the insured and his beneficiary by which plaintiff was to receive the money so paid by him out of the proceeds of the certificate.—Grand Lodge A. O. U. W. of Texas v. Jones, 106 S. W. 184, 47 Tex. Civ. App. 533. See 28 Cent. Dig. Insurance, § 1948.

294. The surrender of an original beneficiary certificate to and acceptance thereof by the grand lodge of an order, and the issuance of another certificate naming another beneficiary, revoked the original certificate and destroyed the rights of the beneficiary named therein, though the designation of ben-

eficiary in the second certificate was illegal.—Grand Lodge Colored Knights of Pythias v. Mackey, 104 S. W. 907.

295. Where the constitution of a mutual benefit society provides that its by-laws may be amended at any time, a beneficiary in a benefit certificate, resulting from the insured's membership therein, who is not a member of the society, cannot complain that a by-law in existence at the time the certificate was issued, providing that the member may surrender the certificate, and receive a new one, with the consent of the beneficiary, was amended so as to omit the consent of the beneficiary; the beneficiary having no vested rights in such certificate, not being a party to the contract; nor can he recover on the original certificate, it having been surrendered, and a new one issued.—Byrne v. Casey, 8 S. W. 38.

783—(B) Vested Interest of Beneficiary.

296. Where a member of a mutual benefit insurance society was invested with the power to change the beneficiary at will, a beneficiary named in the certificate had no vested property right in the benefit during the life of the member.—Judgment 82 S. W. 1057, affirmed. Coleman v. Anderson, 86 S. W. 730, 98 Tex. 570.

while, the husband could change beneficiaries.²⁹⁷ The fact that the wife ceased making payments lost her her right to prevent her husband from changing the beneficiary and the payments by the lodge inured to his benefit alone.²⁹⁸

Mode of Changing Beneficiary.—The rule is that where the constitution provides a method by which a change of beneficiary may be effected that method is exclusive of all others and must be substantially complied with.^{300 305} Any attempted change which does not comply with the constitution and by-laws is ineffectual.^{301 304} Neither can a defective application for a change of beneficiary be regarded as an assignment of the certificate to the proposed beneficiary where there was no delivery or written transfer and where the method of making changes was prescribed by the constitution.³⁰³ Where the insured makes an application for change

297. Where a husband holding a mutual benefit certificate agreed with his wife that, if she would pay the assessment, the money due on the certificate on his death should belong to her, and the wife paid the assessments and then stopped, the husband could after her ceasing to make payments change the beneficiary.—*Eatman v. Eatman*, 135 S. W. 165. See 28 Cent. Dig. Insurance, § 1949.

298. A husband holding a mutual benefit certificate agreed with his wife that, if she would pay the assessments, the money due on the certificate on his death should belong to her. She paid the assessments for a time, but later became unable to do so, and the local lodge then made payments in accordance with the constitution, providing that on any member in good standing becoming disabled the lodge might pay assessments. Held, that the wife ceasing to make payments lost her rights to prevent the husband from changing the beneficiary, though the lodge made payments which were for the benefit of the husband alone.—*Id.*

299. A person who procures insurance is held to divert himself of all interest in the policy and to vest it exclusively in the beneficiaries. However, he may reserve the right to change the beneficiaries and in such case there is no indefeasible interest vested in the beneficiaries which cannot be revoked.—*Splawn et al v. Chew et al*, 60 Tex. 532.

784—(C) Mode of Changing Beneficiary. (See 28 Cent. Dig. Insurance, §§ 1950-1954.)

300. In an action by decedent's son to charge the widow with proceeds of fraternal life insurance, payable to plaintiff and a brother who predeceased decedent, plaintiff could not show a letter to him from decedent indicating that decedent intended that plaintiff

should have the deceased brother's share, where the association's by-laws, requiring certain procedure to be had before beneficiaries could be changed, were not complied with.—*Wooden v. Wooden*, 116 S. W. 627.

301. The constitution and by-laws of a fraternal beneficiary association provided that a beneficiary might be changed on payment of a certain fee, with the member's written request, giving the name of the new beneficiary, and that on receipt thereof the sovereign clerk should issue a new certificate in the name of the new beneficiary. Held, that where the constitution and by-laws were not complied with, but the clerk of the local camp, on request of the member, filled out the form for a change of beneficiary, which the member signed, such attempted change of beneficiary was ineffectual.—*Gray v. Sovereign Camp W. O. W.*, 106 S. W. 176, 47 Tex. Civ. App. See 28 Cent. Dig. Insurance §§ 1950-1954.

302. The constitution of a mutual benefit society which provides that in case of the loss of the certificate the member desiring a change of beneficiary must furnish the sovereign clerk satisfactory proof under oath of such loss, whereupon the clerk shall issue a new certificate, with the desired change of beneficiary, requires the member whose certificate is lost to actually furnish the request for a change of beneficiary and proof of loss of the certificate before the rights of the original beneficiary can be affected, and where a member whose certificate was lost mailed an application for change of beneficiary and died before the change was made the rights of the original beneficiary were unaffected.—*Flowers v. Sovereign Camp, Woodmen of the World*, 90 S. W. 526.

303. A defective application for a change of beneficiary in a mutual benefit certificate could not be regarded as an assignment of the certificate to the proposed beneficiary, where there

of beneficiary but dies before the change is effected, the rights of the original beneficiary are unaffected.³⁰² A by-law requiring the certificate to be delivered to the insured only while in good health does not apply to the delivery of a new certificate after change of beneficiary;³⁰⁸ it applies only to the original. Neither in such case is the acceptance by the insured necessary unless expressly prescribed as a condition precedent.³⁰⁷

Beneficiary May Be Changed By Will.—It has been held that beneficiaries can be changed by will and the right to the insurance money is vested in such beneficiaries.³⁰⁹

Death of Beneficiary Before Insured.—It has been held that a regulation providing that in case of the death of the beneficiary before the insured and failure of the latter to secure a new certificate, the benefit should go to the heirs is a valid regulation.³¹² Where the constitution provides that the benefit shall be payable to the next living relative, the beneficiary being dead, a man's wife will take in preference to his brothers.³¹³ The next living relative was held to mean the one next in relationship to the deceased member and not the dead beneficiary.³¹³ In another case where insured's first wife had died and he had not designated a new beneficiary, his second wife was entitled to the benefit, where the

was no delivery or written transfer of the certificate to her, and where the power of disposition by the member was through a change of beneficiary in the method prescribed by the constitution of the society.—*Flowers v. Sovereign Camp, Woodmen of the World*, 90 S. W. 526.

304. Where the constitution of a mutual benefit society provided a method by which the beneficiary in the certificate might be changed, which required the member applying for a change to waive for himself and beneficiary all rights under the certificate, a change of the beneficiary could not be made on the application of the member which failed to waive the rights of the original beneficiary.—*Flowers v. Sovereign Camp, Woodmen of the World*, 90 S. W. 526.

305. Where the constitution of a mutual benefit society provides a method by which a change of beneficiary may be effected, the method provided is exclusive of all others, and must be substantially complied with.—*Flowers v. Sovereign Camp, Woodmen of the World*, 90 S. W. 526.

306. Where a member of a mutual benefit society changed the beneficiary in accordance with the instructions of the grand lodge through its officers, but not in accordance with the by-laws of the society, and the society acquiesced in the change and paid the fund into court, for it to determine whether it should be paid to the original beneficiary or the new one, the

original beneficiary could not raise the question of non-compliance with the by-laws, and the new beneficiary was entitled to the fund.—*Coleman v. Grand Lodge Colored Knights of Pythias*, 104 S. W. 909. See 28 Cent. Dig. Insurance, §§ 1951-1954.

307. Where a member of a fraternal insurance order applied for a change of beneficiary and for a new certificate, and the new certificate was mailed to him, his acceptance of it was unnecessary unless expressly prescribed as a condition to the taking effect of the new certificate, and the fact that the new certificate contained a blank for acceptance did not make acceptance essential.—*Eatman v. Eatman*, 135 S. W. 165. See 28 Cent. Dig. Insurance, §§ 1950-1954.

308. The by-laws of an insurance order, stipulating that the liability of the order on a certificate shall not begin until after the delivery of the certificate while the member is in good health, and providing for a change of beneficiary on written request and the payment of a fee whereon the order shall issue a new certificate subject to the same conditions as the original certificate, do not require the delivery of a new certificate changing the beneficiary while the member is in good health; such provision referring only to the original certificate.—*Id.*

309. The beneficiaries can be changed by will and the right to the insurance money is vested in such beneficiaries.—*Splawn v. Chew*, 60 Tex. 532.

constitution provides it shall be paid to the next living relation.³¹³ Where a certificate payable to a wife, provides that a change in beneficiaries must be by a surrender of the old certificate and the issuance of a new one, and there is no provision in the constitution or by-laws of the association which gives any rights to any other person on the death of the beneficiary, a child of insured cannot recover on the certificate without showing that insured died prior to his wife.³¹⁰

Simultaneous Death of Member and Beneficiary.—Where both member and beneficiary die at the same time the latter is as incapable of taking the benefit as if he had died first.³¹⁴ In such a case, the constitution of the order so providing, the member's heirs would be entitled to the proceeds.³¹⁴

Contingency on Which Benefits Become Payable—(A) Suicide.—Having agreed to be bound by the rules of the order, a member is bound by a provision that self-destruction, whether sane or insane, would render his certificate null and void.³¹⁵ In another case

785—Death of Beneficiary Before Insured. (See 28 Cent. Dig. Insurance, §§ 1943, 1974.)

310. Where life certificate, payable to a wife, provides that a change in beneficiaries must be by a surrender of the old certificate and the issuance of a new certificate, and there is no provision in the constitution or by-laws of the association which gives any right to any other person on the death of the beneficiary, a child of insured cannot recover on the certificate without showing that insured died prior to his wife.—*Screwmen's Benev. Ass'n v. Whitridge*, 68 S. W. 501, 95 Tex. 539.

331. Insured's wife, the original beneficiary in a certificate of insurance in a mutual benefit association, having died, and insured having failed to designate a new beneficiary, his second wife was entitled to the proceeds of the certificate under a provision therein making it subject to the conditions named in the constitution of the association, and a provision in such constitution making the proceeds in such case payable to the next living relation, and providing that, in determining who is such next living relation, the order "shall be his wife, children, adopted children, parents, brothers, sisters, or other blood relatives, or to persons dependent on the member."—*Harris v. Harris*, 97 S. W. 504. See 28 Cent. Dig. Insurance, §§ 1943, 1974.

312. A provision in the by-laws requiring a member desiring to change the beneficiary to surrender his certificate, pay a fee, and receive a new one, and providing that no such change could be made by will, and that in case of death of the beneficiary before insured, and failure of the latter to secure new certificate, the benefit

should go to his heirs, are valid regulations.—*Bollman v. Supreme Lodge Knights of Honor*, 53 S. W. 722.

313. The constitution of a mutual benefit insurance society provided that, on the death of a member, his certificate should be paid to his beneficiary, which should be his wife, children, adopted children, parents, brothers, sisters, or other relatives, and that if the relative named should be deceased at the time of the member's death, and no change of beneficiary had been made, the benefit should be paid to the "next living relative," in the order named. M. took a certificate in favor of his mother, and subsequently married, and on the death of his mother made no change in the designation of his beneficiary. Held, that M.'s wife was entitled to the benefits in preference to his brothers, since the words, "next living relative," meant the one next in relationship to the deceased member, and not to the dead beneficiary.—*Mattison v. Sovereign Camp, Woodmen of the World*, 60 S. W. 897.

314. Where the constitution of a benevolent association provides that the insurance should be paid to the heirs of the member should the beneficiary named in the policy die before the member, the instantaneous death of the member and the beneficiary renders the latter as incapable of taking the benefits as if he had died first, and the member's heirs are entitled thereto.—*Paden v. Briscoe*, 17 S. W. 42.

786—Loss or Contingency on Which Benefits Become Payable. (See 28 Cent. Dig. Insurance, §§ 1955-1959.)

315. Where a mutual benefit certificate provided that the member was entitled to benefits according to the

the certificate was held avoided if the member was conscious of the physical nature of his act when he inflicted the wounds on himself which caused his death.³¹⁶

(B) Violation of Law.—A member's insurance was not forfeited where he was killed while insane, and while resisting arrest under a provision for forfeiture while violating the criminal laws of the state.³¹⁷ In general it is immaterial whether the person shooting a member while violating the law, committed an offense,³¹⁸ and self-defense must be shown.³¹⁹

Notice and Proof of Death.—In an early case it was held that where the by-laws require a report of the cause of death by the subordinate council to the supreme secretary, the beneficiary need not make proof of death.³²¹ Where the insurer denies liability proofs of death are unnecessary even though the certificate stipulates that it was payable on satisfactory proof of death.³²⁰

False Statement to Force Payment—Statutory Penalties.—Any person who willfully makes a false statement of any material fact in a sworn statement as to the death or disability of a certificate holder in such a society for the purpose of procuring the payment of a benefit named in the certificate shall be guilty of perjury and punished accordingly. (Art. 4859a, Rev. St. 1914.)

constitution and laws of the order, and the member, in addition to the terms of the certificate, agreed to be bound by the order's constitution, laws, rules, and regulations, he was bound by a provision of such laws that self-destruction of a member, whether sane or insane, should render his certificate null and void.—*United Moderns v. Colligan*, 77 S. W. 1032, 34 Tex. Civ. App. 173.

316. Under a benefit certificate conditioned to be void if the member dies by self-destruction, whether sane or insane, the certificate is avoided if the member was conscious of the physical nature of his act when he inflicted the wounds on himself causing his death.—*Brown v. United Moderns*, 87 S. W. 357.

317. Where insured while insane and resisting arrest was killed by the sheriff, his insurance was not forfeited under a provision for forfeiture in case insured met his death while violating the criminal laws of the state.—*Woodmen of the World v. Dodd*, 134 S. W. 254.

318. Where the evidence, in an action on a benefit certificate, shows that the insured was shot and killed in consequence of his violation of law, it is immaterial whether the person shooting him committed an offense.—*Woodmen of the World v. Hipp*, 147 S. W. 316. See 28 Cent. Dig. Insurance, §§ 1955, 1957-1959.

319. Where the defense was that insured died by reason of a violation of

law, and there was evidence that he went to another's house, and that the other was angered by language of insured, and approached him without any weapon, and that insured then struck him a violent blow, following which insured was shot, held not to show self-defense, so as to exempt him from a breach of the certificate.—*Id.*

789—**Notice and Proof of Loss.** (See 28 Cent. Dig. Insurance, §§ 1963-1965.)

320. Where a fraternal insurance order in response to a letter from attorneys of the beneficiary containing a notice of the death of a member, replied by stating that the member was suspended for nonpayment of dues, and that he had not been reinstated, and subsequently returned dues which it had received, on the ground that the certificate had previously lapsed for nonpayment of dues, there was a denial of liability so that proof of the death of the member was unnecessary though the certificate stipulated that it was payable on satisfactory proofs of death.—*Grand Fraternity v. Mulkey*, 130 S. W. 242. See 28 Cent. Dig. Insurance, §§ 1963-1965.

321. Where the by-laws of a beneficial association require a report of the cause of death by the subordinate council to the supreme secretary, the beneficiary need not make proof of death.—*Supreme Council American Legion of Honor v. Landers*, 57 S. W. 307, 23 Tex. Civ. App. 625.

Amount of Benefits.—The words "face value" in a by-law mean the amount stated in the body of the certificate.³²² In a case where a certificate calls for the payment of a certain amount and the emergency fund has not been exhausted, the full amount is payable notwithstanding a by-law passed subsequently.³²² Where the by-laws provide that one form of permanent total disability shall be insanity so adjudged by the courts, in which event the member should receive one-half of his certificate, the insanity must be such as would authorize an adjudication of the insured's mental status by the proper courts.³²³

Value of a Paid-Up Policy.—The present value of a paid-up life policy is such sum as, at a reasonable rate of compound interest will equal the face of the policy at the end of the period of expectancy of insured.³²⁴

Rights of Beneficiaries to Proceeds.—Where a certificate by reason of permanent disability benefits matured during the insured's life, the beneficiary at his death is not entitled to recover as the proceeds have become a part of the insured's estate.³²⁵ An agreement that one person shall collect the proceeds and pay it over to the adopted legal heir of insured is valid and enforceable.³²⁶ Where a certificate provides an extra fund with which to buy a monument but does not state to whom it shall be paid it is held payable to the beneficiary, the decedent's wife.³²⁷ In a case where one by-law limits the amount recoverable to the sum realized from one assessment and another provides that if a stated number of

791—Amount of Benefits. (See 28 Cent. Dig. Insurance, §§ 1961, 1962.)

322. The words "face value" in a by-law of a beneficial association, providing that \$2,000 shall be the highest amount paid on a benefit certificate, provided that the amount paid shall not exceed the amount of a full assessment on each of the members, and provided "that the face value of the benefit certificate shall be paid, so long as the emergency fund . . . has not been exhausted," means the amount stated in the body of the certificate, so that, the emergency fund not being exhausted at the death of a member whose certificate, issued before passage of the by-law, provided for payment of \$5,000, all of it is payable.—Supreme Council, American Legion of Honor v. Storey, 75 S. W. 901.

323. The by-laws of a fraternal benefit society provided that, "when-ever any member . . . shall become permanently and totally disabled from pursuing the ordinary vocations of life, . . . he shall be entitled to receive one-half of his certificate." One form of permanent total disability was declared to be "insanity so adjudged by the courts." Held that, in order to recover on a certificate of

membership on the ground of insanity, it must be such degree of insanity as would authorize an adjudication of the insured's mental status by the proper courts.—Knipp v. United Benev. Ass'n, 101 S. W. 273. See 28 Cent. Dig. Insurance, §§ 1959, 1961, 1962.

324. The present value of a paid-up life policy is such sum as, at a reasonable rate of compound interest, will equal the face of the policy at the end of the period of expectancy of insured.—Supreme Lodge Knights of Pythias v. Neeley, 135 S. W. 1046. See 28 Cent. Dig. Insurance, § 1303.

793—Rights of Beneficiaries to Proceeds. (See 28 Cent. Dig. Insurance, §§ 1967-1972, 1980.)

325. Where an insurance certificate provided that the amount, in the event of total or permanent disability, should be paid to insured, or at his death to plaintiff, if living, if the certificate matured in insured's life time because of total disability, plaintiff, on insured's death, was not entitled thereto, as the proceeds would then become the property of insured's estate. Judgment 108 S. W. 492, reversed.—Brotherhood of Ry. Trainmen v. Dee, 111 S. W. 396, 101 Tex. 597. See 28 Cent. Dig. Insurance, §§ 1967-1972, 1980.

assessments levied in any one year were insufficient to pay death claims the reserve fund should be drawn on, it was held that more than one assessment had to be made and the reserve fund had to be drawn on to pay a death claim.³²⁸ The reason for this is that when two by-laws of insurer are inconsistent the one most favorable would control.³²⁸

Proceeds as Community Property.—A policy being payable to two brothers, and no valid change of beneficiaries having been made on the death of one of them, one-half of the proceeds on insured's death becomes the community property of himself and his wife.³²⁹

Rights of Representatives of Insured.—The minor son and heir may recover in his own right and the administrator of the insured need not be made a party where the by-laws restricted beneficiaries to such persons as would be entitled to the estate of an insured should he die intestate.³³⁰ The administrator cannot recover and a benefit fund payable to a beneficiary who dies before the member, lapses to the society where the certificate contains an agreement that it shall only bind the society to pay the beneficiary named.³³¹

328. A by-law of a mutual insurance company limited the amount recoverable on a death claim to the sum realized from one assessment on the members, less a stated portion thereof. Another by-law adopted at the same time, provided that, if a stated number of assessments levied in any one year were insufficient to pay death claims, the reserve fund should be drawn on. Held, that, to pay a death claim, more than one assessment on the members had to be made, and the reserve fund had to be drawn on, because, the two by-laws being inconsistent, the one most favorable to insured would control.—*Supreme Lodge National Reserve Ass'n v. Mondrowski*, 49 S. W. 919, 20 Tex. Civ. App. 322.

327. A benefit certificate for \$1,000 on the life of decedent, payable to his wife, provided also that there should be paid \$100 for a monument at decedent's grave; but the society did not retain the privilege of selecting the monument or performing any duties connected with decedent's burial, and there was no express recital as to whom the money should be paid. Held, that it should be paid to decedent's wife.—*Woodmen of the World v. Torrence*, 103 S. W. 652. See 28 Cent. Dig. Insurance, §§ 1967-1972, 1979.

328. Where insured adopted M. as his legal heir, she being thereby rendered competent to take under a benefit certificate in accordance with Rev. St. 1911, Art. 4832, an agreement that the certificate should be made payable to W., and that she on collecting it should pay the money to M., was valid and enforceable.—*Mellville v. Wickham*, 169 S. W. 1123.

329. Where a fraternal life insurance policy was payable to two brothers, and no valid change in beneficiaries was made on the death of one of them, one-half of the proceeds on insured's death became community property of himself and his wife.—*Wooden v. Wooden*, 116 S. W. 627.

795—Rights of Representatives of Insured.

330. The by-laws of a fraternal association restricted beneficiaries to such persons as would be entitled to the estate of an insured should he die intestate, and to the affianced wife, or one dependent on him for support. Held, that the minor son and heir of a member, who had failed to name a new beneficiary after the death of his wife, was entitled to recover on the certificate in his own right, and that the administrator of the insured need not be a party.—*Order of Columbus, of Baltimore City, Md., v. Fuqua*, 60 S. W. 1030.

331. Where the certificate issued by a benevolent society contains an agreement that it shall only bind the society to pay the beneficiary named, and the laws of the society do not confine the beneficiaries to any particular class, but prescribe the means by which the member can change the beneficiary, but make no provision for the payment of the benefit in case of the death of the designated beneficiary during the life of the member, or of the member's failure to designate a beneficiary, a benefit fund payable to a beneficiary who dies before the member, and in whose place no substitute

Rights of Representatives of Beneficiary.—It has been held that the fund due under a policy to one of joint beneficiaries who survived the insured was not exempt from administration at the death of deceased beneficiary.³³² However, where the fund due upon certificate is exempt property it is not subject to administration.³³²

Rights of Creditors—General Rule.—If the insurance is effected at the expense of the debtor, either with his proper consent or by his not objecting to charges for premiums and appears to have been intended as a security only, the debtor or his representative is entitled to the surplus after payment of the debt; but if the creditor insures with his own funds the debtor or his representatives have no claim.³³⁹ Subsequently acquired claims cannot be paid the creditor out of the proceeds of the certificate as they were not in contemplation of the parties when the certificate was issued or renewed.³³⁹ Where the insured is charged with the assessments paid by the creditor such assessments are regarded in the light of loans.³³⁹

Rights of Creditors—In General.—In a case where a person paid the dues on a certificate with the understanding that he was to be reimbursed at insured's death and later the beneficiaries died and insured attempted to make a charge upon the proceeds of the certificate in favor of the person so paying the dues, by will, it was held that the fund became payable to insured's children under the constitution and could not be subjected to the claim for reimbursement under the contract with insured and the former beneficiaries whose interest died with them.³³³ However, it was further

is named by the member, lapses to the society, and cannot be recovered by the administrator of the member after the latter's decease.—*Home Circle Soc. of Goliad and Refugio Counties v. Hanley*, 86 S. W. 641.

796—Rights of Representatives of Beneficiary.

332. Fund due under policy of insurance to one of joint beneficiaries who survived the insured held not exempt from administration under Acts 33rd Leg., ch. 113, Par. 21, at the death of a deceased beneficiary.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

Where the fund due upon certificate of insurance is exempt property it is not subject to administration.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

797—Rights of Creditors.

333. A person insured in a fraternal insurance society, being unable to pay his dues and assessments, allowed his benefit certificate to lapse, but subsequently an agreement was entered into between insured, the beneficiaries

under the certificate of insurance, and plaintiff, by which plaintiff agreed to pay the money required to reinstate insured, and to pay the dues and assessments required to keep the benefit in force during the life of insured, for which he was to be reimbursed out of the proceeds of the certificate at insured's death. Before the death of the insured the beneficiaries died, and no new designation was made. Thereafter insured attempted by his will to make a charge in favor of plaintiff upon the fund to be derived from the certificate. Held, that such fund became payable to insured's children under the express provisions of the constitution of the society, and could not be subjected to plaintiff's claim for reimbursement, under his contract with insured, who never had any interest in the funds, and the former beneficiaries whose interest therein died with them; the fund being by both the charter and constitution of the society for the benefit of such members of the family of the member, or persons dependent upon him as he may direct or designate by name to be provided for as provided by general law.—*Searcy v. Kelly*, 98 S. W. 1080, judgment reversed, *Kelly v. Searcy*, 102 S. W. 100.

held that such children having received the benefit of the contract made with the original beneficiaries the funds which they received should be subjected to the claim of the party who had paid the assessments as they became due.³³⁴

Rights Where Certificate is Assigned.—Where the assignor of a defendant paid the assessments on his certificate, under an agreement with the beneficiary, he has a lien on the beneficiary's expectancy even though such assignor had no insurable interest in the life of the member.³³⁵ And, the fact that such assignor discontinued such payments is no defense to his right to reimbursement for the sums actually paid.³³⁷ It is against public policy to permit the assignment of a certificate to one not related to the insured and who has merely advanced him a sum of money.³³⁸ In such case the fund would go to the heirs, after deducting dues and advancements paid by the assignee.³³⁸ It is immaterial that such a certificate may have been surrendered and a new one issued to the assignee, according to the constitution and that according to the rules the fund was to be paid to the member's "family or as he may direct."³³⁸

334. A person insured in a fraternal insurance society, being unable to pay his dues and assessments, allowed his benefit certificate to lapse, but subsequently an agreement was entered into between insured, the beneficiaries under the certificate of insurance, and plaintiff, by which plaintiff agreed to pay the money required to reinstate insured and to pay the dues and assessments required to keep the benefit in force during the life of insured, for which he was to be reimbursed out of the proceeds of the certificate at insured's death. Before the death of insured the beneficiaries died, and no new designation was made. By the laws of the society the minor children of insured succeeded to the rights of the original beneficiaries. Held that, such children having received the benefit of the contract made with the original beneficiaries for the preservation of the certificate through the payment of the installments which fell due at different times, the funds which they thereby received should be subjected to plaintiff's claim for reimbursement. Judgment, *Searcy v. Kelly*, 98 S. W. 1080, reversed.—*Kelly v. Searcy*, 102 S. W. 100.

335. One who voluntarily pays a member's dues without being designated as beneficiary, has no claim on the mortuary fund.—*Grand Lodge A. O. U. W. v. Cleghorn*, 42 S. W. 1043.

336. Where a member of a mutual benefit society delivered his certificate to the beneficiary, without any agreement as to which should pay the assessments, and the beneficiary, considering it his duty to pay them, agreed with defendant's assignor that, if the

latter would pay such assessments, he should be reimbursed out of the proceeds of the certificate, which was then delivered to him, defendant's assignor had a lien for the amounts so paid on the beneficiary's expectancy, though such assignor had no insurable interest in the life of the member, who was entitled to change his beneficiary at will.—Judgment, 82 S. W. 1057, affirmed.—*Coleman v. Anderson*, 86 S. W. 730, 98 Tex. 570.

337. Where defendant's assignor agreed to pay assessments on certain benefit certificates on condition that he be reimbursed therefor from the proceeds of the certificates, the fact that, on a dispute arising between such assignor and the beneficiary, who objected to further payments, no further payments were made, was no defense to the assignor's right to reimbursement for the money actually expended. Judgment 82 S. W. 1057, affirmed.—*Coleman v. Anderson*, 86 S. W. 730, 98 Tex. 570.

338. Assignment of a benefit certificate in a benevolent association to one not related to the member, but who has merely advanced him \$50, is against public policy, and the fund goes to the heirs, after deducting dues and advancements paid by the assignee; and it is immaterial that by the rules of the order the fund was to be paid to the member's "family, or as he may direct," and that the certificate was surrendered, and a new one issued to the assignee, according to the constitution.—*Schonfeld v. Turner*, 12 S. W. 626.

339. A party secured a benefit certificate from the A. O. U. W. in favor

Voluntary Payment of Dues.—One who voluntarily pays a member's dues without being designated as beneficiary, has no claim on the mortuary fund.³³⁵

Renewal for Benefit of Creditor.—If a lapsed certificate is renewed for the benefit of a creditor in the creditor's name and he thereafter pays all the assessments thereon and charges them to the debtor, the creditor will not be entitled at the insured's death to more than the amount of the debt and the amount of assessments paid.³⁴⁰

Benefits Not Attachable—Statutory Provisions.—Benefits are not liable to attachment, garnishment or other process to pay any debt or liability of a member or beneficiary or any other person who may have a right thereunder, either before or after payment. (Art. 4848a, Rev. St. 1914.)

Damages for Refusal of Payment.—The statutes exempt fraternal benefit insurance societies from the application of all insurance laws except those expressly applying to them. (Art. 4830, Rev. St. 1914.) Therefore Article 4746 (Rev. St. 1914) making life, health and accident insurance companies, which shall fail to pay losses within thirty days after demand therefor, liable for a penalty of twelve per cent and attorney's fees additional, does not apply to fraternal benefit companies. The Supreme Court recognizes the exception as applying to mutual relief associations organized under the laws of another state, having no capital and purposing to provide a fund for the benefit of deceased members.³⁴¹ The same exception

of his wife but, having failed to pay the assessments the right to receive under it was suspended. The certificate was renewed by a creditor who paid past and future assessments and charged them to the account of the insured. The creditor also came into possession of other claims against the insured and after the latter's death sought to subject the insurance to the payment of all the claims. The court held that the renewal of the certificate, by which the creditor instead of the wife was made the beneficiary, was intended solely to give to the creditor a security for the debt then existing and to pay assessments, which assessments were understood to be loans. The rule is that if the insurance is effected at the expense of the debtor, either with his prior consent or by his not objecting to charges for premiums and appears to have been intended as a security only, the debtor or his representative is entitled to the surplus after payment of the debt; but if the creditor insures with his own funds, the debtor's representatives have no claim. The court also held that subsequently acquired claims could not be paid the creditor out of the proceeds of the certificate as they were not in contemplation of the parties when the certificate was re-

newed.—*Levy v. Taylor*, 66 Tex. 652.

340. If a certificate in a mutual benefit association, in favor of a member's wife, having lapsed, is renewed for the benefit of one of the husband's creditors in the latter's name, and he thereafter pays the assessments thereon and charges the payments to the debtor, the creditor will not be entitled to hold from the proceeds of the certificate, upon the member's death, more than the amount of his debt, and the sums paid to keep up the certificate, although he has meanwhile become the holder of other claims against the debtor.—*Levy v. Taylor*, 1 S. W. 900.

300—**Damages for Refusal of Payment.**

341. Rev. St. Tex. Art. 2953, provides that an insurance company which fails to settle a risk for which it is lawfully liable, within a certain time, shall forfeit a sum equal to 12 per cent thereof; but article 2971a Sayles Civil St., excepting "mutual relief associations" organized under the laws of another state, applies to a mutual relief association having no capital, but purposing to provide a fund for the benefit of deceased members.—*Supreme Council of American Legion of Honor v. Larmour*, 16 S. W. 633.

was recognized in a later case but in this case the exception could not be recognized where the principal officer of the society failed to make the required statement to the commissioner of insurance.³⁴² However, it must be shown affirmatively that the defendant society is a fraternal beneficiary association as defined in the statutes; otherwise it is liable for the statutory penalties.³⁴³

Discharge From Liability.—Where a receipt is given in full, on payment of part of the sum called for in the certificate, it is without consideration as to the balance, liability for the amount paid not being denied but conceded.³⁴⁴

ACTIONS

Resort to Courts for Settlement of Disputes.—In general, the courts will not interfere with the internal policy of a fraternal benefit association unless some valuable or property right is involved.³⁴⁵ It has been held that an association which denied liability on account of non-membership of a decedent waived any further proceedings by the beneficiary under its by-laws.³⁴⁵

^{342.} Rev. St. 1895, Art. 3096, provides that the general insurance laws shall not apply to mutual relief associations which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members, provided that the principal officer shall make an annual statement to the insurance department, etc. Article 3071, applicable to life insurance companies, provides that, where a company shall fail to pay a loss within the time specified, it shall be liable for 12 per cent. damages and reasonable attorneys' fees. Held, that a fraternal beneficiary corporation created under the laws of a sister state, whose relief funds are created by assessments on its members, which has subordinate lodges to which application is made for membership, and which issues benefit certificates, the amount payable on which is under a by-law dependent on the sum collected by assessments, is within article 3096, and is not liable under article 3071, except in case of failure of its principal officer to make the required statement. Judgment, Supreme Council A. L. H. v. Storey, 75 S. W. 901, modified. —Supreme Council A. L. H. v. Storey, 78 S. W. 1, 97 Tex. 264.

^{343.} It not being shown that defendant fraternal beneficiary society is a fraternal beneficiary association, as defined by Act May 12, 1899 (Acts 1899, p. 196, ch. 115), § 1, it is, like an insurance company, liable for 12 per cent. damages and attorney's fees; having failed to pay in full its certificate at maturity, and after demand, according to its liability.—Supreme Council, American Legion of Honor v. Storey, 75 S. W. 901. See 78 S. W. 1.

^{344.} Release or Discharge of Association from Liability. (See 28 Cent. Dig. Insurance, § 1984.)

^{345.} A receipt or release in full, given on payment by a beneficial association of \$2,000 of the \$5,000 which a certificate provided should be paid, is without consideration as to the \$3,000; liability for the \$2,000 not being denied, but conceded.—Supreme Council, American Legion of Honor v. Storey, 75 S. W. 901. See 78 S. W. 1.

ACTIONS. (SEE 29 CYC. 210.)

^{345.} Resort to Courts for Settlement of Disputes. (See 28 Cent. Dig. Insurance, §§ 1987, 1988.)

^{345.} A fraternal beneficiary association which denied liability on a certificate of membership on account of nonmembership of decedent at the time of his death waived any further proceedings by the beneficiary under its by-laws providing for an appeal from the executive committee—Knights of the Modern Maccabees v. Mayfield, 147 S. W. 675. See 28 Cent. Dig. Insurance, § 1987.

^{346.} The courts will not interfere with the internal policy of a fraternal benefit association, whether incorporated or not, and will not decide questions relating to the discipline of its members, but will leave the association free to carry out any lawful purpose in accordance with its rules, unless some valuable or property right is involved, in which case it will entertain jurisdiction and afford relief.—Lone Star Lodge No. 1,935, Knights and Ladies of Honor v. Cole, 131 S. W. 1180.

Limitations.—An action on a certificate is subject to the four years statute of limitations when not brought within that time.³⁴⁷

Parties.—The rule is that a voluntary unincorporated fraternal life association may be sued without making all its members parties.³⁴⁹ A divorced husband is not a necessary or indispensable party in a suit on a certificate of the wife, though issued in favor of such husband.³⁴⁸ It was held not error in failing to make the original beneficiary a party where the plaintiff claimed, through him by assignment of the heirs, it appearing that he was dead.³⁵⁰

Venue—Statutory Regulations.—Suits against life and accident insurance companies or associations may be commenced in the county in which the persons insured, or any of them, resided at the time of such death or injury. (Art. 1830 (29), Rev. St. 1914; also Art. 2308 (12), Rev. St. 1914.)

Defenses.—The fact that there were not sufficient members to pay the amount named and the endowment fund was not sufficient are matters of defense on an assessment policy, promising to pay a certain amount for each member of the order, not exceeding a specified amount.³⁵¹ It is no defense to a policy that it was delivered to the insured while he was sick, where the policy provides that the company shall not be liable if it is delivered to him while not in good health, where the sickness was of a trivial character, although he never recovered.³⁵⁴ Neither is it a defense that the beneficiaries' names were inserted by the agent after the death of the insured where they were omitted by the fault of the insurer at the time the policy was issued.³⁵³ It was held that the entry

812—Limitations. (See 28 Cent. Dig. Insurance, § 1993.)

347 An action on a fraternal benefit certificate brought in 1914, while the court found that the member died after September 7, 1902, and before December 31, 1905, held barred by the four-year statute of limitations.—*Supreme Lodge of Pathfinder v. Johnson*, 168 S. W. 1010.

813—Parties. (See 28 Cent. Dig. Insurance, § 1994.)

348. Where defendant issued a benefit certificate insuring the life of deceased in favor of her husband, and they were divorced, he was not a necessary or indispensable party in a suit by her children on the certificate.—*United Benevolent Ass'n of Texas v. Lawson*, 166 S. W. 713.

349. Under Acts 31st Leg. 2nd. Ex. Sess. ch. 22, and Acts 30th Leg. ch. 128, a voluntary unincorporated fraternal life association may be sued without making all its members parties.—*Home Benefit Ass'n No. 3 of Coleman County v. Wester*, 146 S. W. 1022. See 28 Cent. Dig. Insurance, § 1994.

350. In a suit on a certificate, failure to make plaintiff's father, original-

ly named as a beneficiary, and through whom she claimed by assignment by his heirs, a party, held not error where it appeared that he was dead.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

803—Defenses.

351. In an action on an assessment policy, promising to pay a certain sum for each member of the order, not exceeding a specified amount, the fact that there was not sufficient members to pay the amount named, and that the endowment fund was not sufficient to pay the policy, are matters of defense.—*International Order of Twelve Knights and Daughters of Tabor v. Boswell*, 48 S. W. 1108.

352. By the constitution of a beneficial association, death benefits were payable only if the member at his death was in good financial standing; and it was declared that on a certain day in each year all members of the association should join in a Labor Day parade, and that each member failing to do so should be fined \$2.50. No provision was made by which a member might justify his absence, but the management assumed the right to remit such fine if the member was ill or absent from the city. Held, that

of a fine for not taking part in a ceremony enjoined by the constitution was no defense to an action on a certificate where the member was shown to have been too ill to attend and there was no trial.³⁵²

Process and Appearance.—It has been held that the special mode for service of citation on fraternal beneficiary associations prescribed by the legislature is not exclusive of the ordinary mode prescribed by the general law.³⁵³ The special mode referred to is the service on the commissioner of insurance and banking, who holds a power of attorney from the company to accept service. (Art. 4844, Rev. St. 1914.) The president of a subordinate lodge is regarded as a local agent, on whom service may be had, under the statute authorizing citations on local agents of foreign associations.³⁵⁵

where a member failed to attend a Labor Day parade, and the secretary of the association, without authority under the constitution or by-laws, entered a fine against him for \$2.50, there having been no trial as to the reason of his absence, and it appeared that he was actually too ill to attend, and might have been excused upon a hearing, the entry of the fine was no defense to an action on the certificate. —Screwmen's Benevolent Ass'n v. O'Donohoe, 60 S. W. 683.

353. It is no defense to a policy that the beneficiaries' names were inserted by the insurer's agent after the death of assured, where they were omitted by the fault of the insurer at the time the policy was issued.—International Order of Twelve Knights and Daughters of Tabor v. Boswell, 48 S. W. 1108.

354. Where insured is sick on the day on which he receives his life policy, which provides that the company shall not be liable if he is not in good health when he receives his policy, but such sickness is of a trivial character, and does not affect the risk, it is not a defense to the policy, though he never recovers from the sickness.—Woodmen of the World v. Locklin, 67 S. W. 331, 28 Tex. Civ. App. 486.

354—Process and Appearance. (See 28 Cent. Dig. Insurance, § 1995.)

355. The president of a subordinate lodge of a beneficiary association organized under the authority of the supreme lodge, having the power to decide all questions of law and order, subject to the approval of the president of the supreme lodge, and to approve every claim before payment is made, and the members of the subordinate lodge having the power to admit members in accordance with the laws of the association, is a local agent of the association, within the

statute authorizing the service of citations on local agents of foreign associations.—Bankers Union of the World v. Nabors, 81 S. W. 91, 36 Tex. Civ. App. 38.

356. Acts 31st Leg. (1st Ex. Sess.) c. 36, § 19, prescribing a mode for service of citation on fraternal beneficiary associations, is not exclusive of the ordinary mode prescribed by general law.—Modern Woodmen of America v. Metcalfe, 154 S. W. 662. See 28 Cent. Dig. Insurance, § 1995.

355—Filing. (See 28 Cent. Dig. Insurance, §§ 1996-1998.)

357. Where the petition in an action on a certificate issued by a fraternal organization alleged that decedent was a member of a subordinate temple, it was error to introduce in evidence the financial card of another temple.—International Order of Twelve Knights & Daughters of Tabor v. Willson, 151 S. W. 320, 28 Cent. Dig. Insurance, §§ 1996-1998.

358. In an action on a benefit certificate, there was no variance between the petition setting up the legal effect of the certificate and alleging a positive obligation and the certificate containing conditions and provisos on which liability was made to depend; it being defendant's duty, if it relied on any of the matters in the provisos to defeat recovery, to plead the same.—Modern Order of Praetorians v. Taylor, 127 S. W. 260. See 28 Cent. Dig. Insurance, §§ 1996-1998.

359. If delivery of a benefit certificate was not essential to the completion of the contract, a plea in an action on the certificate that such delivery was delayed by the negligence of defendant tendered an immaterial issue, and should have been stricken out on exception.—Modern Woodmen of America v. Owens, 130 S. W. 858.

Pleading of Insured.—It is not necessary to allege that the written policy sued on was based upon a sufficient consideration.³⁶⁰ Where there was an administration of the original beneficiary, who was dead, and the plaintiff claimed under him, the petition must allege such administration.³⁶¹ The petition must show the plaintiff's legal right to sue,³⁶² and this question may be raised by general demurrer.³⁶² Where delivery of certificate is not essential to the completion of the contract, a plea that the delivery was delayed by the negligence of the defendant will be stricken out on exception.³⁶³ Allegations that the representations of insured, which were made express warranties, were made in good faith, in the belief that they were true, were surplusage, as such matters could be proven under the general allegation that insured complied with the terms of the contract.³⁶⁵

Pleading of Insurer.—Where an answer sets out representations in the application, which shows they are warranties and alleges their falsity, and that insured knew they were false, it is a sufficient allegation that the representations were warranties to require an instruction that the falsity of such representations, though made through mistake and in good faith, is sufficient to defeat a recovery on the policy.³⁶⁶ The insurer cannot prove a by-law, passed after the issuance of the certificate, changing the contract, to defeat recovery, not having pleaded it.³⁶⁷ An allegation in the answer that the member committed suicide, whereby the certificate

360. Under Rev. St. 1911, art 7093, providing that written contracts shall import consideration, and article 1906, concerning the impeachment of the consideration of a written instrument, in an action on a written policy, it was not necessary for the plaintiffs to allege in their pleadings that the written contract sued upon was based upon a sufficient consideration.—*Royal Neighbors of America v. Heard*, 185 S. W. 882.

361. In action on policy, failure of petition to allege any administration of plaintiff's deceased father, the original beneficiary under whom she claimed, held error of law apparent upon the face of the record and fundamental.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

362. The want of allegations in petition to recover on policy that no administration of plaintiff's father, the original beneficiary, was pending, and that none was necessary, could properly be raised upon a general demurrer.—*Id.*

363. Petition not showing plaintiff's legal right to sue for interest of her deceased father, one of two original separate beneficiaries, did not give trial court jurisdiction to adjudicate interest of deceased beneficiary, and judgment disposing of such interest was fundamental error.—*Id.*

363a. In an action on a policy of benefit insurance, where plaintiff beneficiary alleged specifically the duty of defendant to notify deceased of suspension, it was not necessary for defendant to allege notice before introducing evidence that all delinquent members were duly notified.—*Cole v. Knights of Maccabees of the World*, 188 S. W. 699.

364. In an action against a beneficial association for personal injuries, caused while plaintiff was being initiated, an allegation that he was tripped by one of the officers and agents of the organization is broad enough to cover tripping by a sword or saber of any other kind of tripping.—*Grand Temple and Tabernacle of Knights and Daughters of Tabor v. Johnson*, 135 S. W. 173.

365. In an action on a benefit certificate, a supplemental petition alleging that representations of insured, which were made express warranties, were made in good faith, in the belief that they were true, were at best unnecessary, since the matter which could be legally proven thereunder could have been proven under the general allegation of the petition that the insured complied with the terms of the contract.—*Modern Woodmen of America v. Owens*, 130 S. W. 858.

became void, is put in issue perforce the statute, notwithstanding a mere implied admission of the reply.³⁶⁶ Where the plaintiff beneficiary alleges the duty of the insurer to notify the deceased of suspension it is not necessary for the insurer to allege same before introducing evidence that all delinquent members were notified.³⁶³

Interpleader.—Where the insurer paid the proceeds of the certificate into court and required the claimants to interplead, it is entitled to reimbursement for attorney's fees.³⁶⁹ An answer admitting liability and stating that defendant had no personal interest in fund is a sufficient bill of interpleader.^{370a 370b}

Issues, Proof and Variance.—There is no variance between the petition setting up the legal effect of the certificate and alleging a positive obligation and the certificate containing conditions and provisions on which liability was made to depend.³⁶⁸ It is the insurer's duty, if it relies on such provisos to defeat recovery, to plead the same.³⁶⁸ Also, where the defendant pleads certain conditions in the certificate, the plaintiff cannot prove a waiver of such provisions without pleading the facts showing such waiver.³⁷¹ It has been held that there is no variance between an allegation that on a certain day the insured became a member of S. lodge of insurer and he was in good standing in the order when he died, and

^{366.} Under Rev. St. 1895, Art. 1193, declaring it unnecessary for plaintiff to deny any special matter of defense, but that it shall be regarded as denied unless expressly admitted, the allegation of the answer in an action for a death benefit that the member committed suicide, whereby the benefit certificate became void, is put in issue perforce the statute, notwithstanding a mere implied admission of the reply.—*Brown v. United Moderns*, 87 S. W. 357.

^{367.} Defendant, in an action against a beneficial association on a certificate, may not prove a by-law, passed after issuance of the certificate, changing the contract, to defeat recovery; not having pleaded it.—*Supreme Council, American Legion of Honor v. Storey*, 75 S. W. 901.

^{368.} Where the answer of a life association in an action on a certificate sets out representations made by the insured in the application, which shows that they are warranties, and alleges their falsity, and that insured knew that they were false, it is a sufficient allegation that the representations were warranties to make it error to refuse an instruction that the falsity of such representations, though made through mistake, and in good faith, is sufficient to defeat a recovery on the policy.—*National Fraternity v. Karnes*, 60 S. W. 576.

^{369.} A fraternal insurer, which paid the proceeds of a certificate into court and required the claimants to inter-

plead, is entitled to reimbursement for attorney's fees so expended.—*Wright v. Grand Lodge K. P., Colored*, 173 S. W. 270.

^{370.} An insurer, which, when sued in the county court, paid the money into court and asked that court to determine the owner, held not entitled to attorney's fees for the filing of a bill of interpleader in the circuit court.—*Id.*

^{370a.} In an action on a policy of insurance, an answer admitting liability and stating that defendant had no personal interest in fund, etc., held, a sufficient bill of interpleader, making it duty of court to require other claimant to answer.—*Grand Lodge, Colored K. P. of Texas, v. Cleo Lodge No. 222, Colored K. P.*, 189 S. W. 764.

^{370b.} In an insurance case upon filing of a bill of interpleader by defendant, only issue raised was whether alleged claimant be required to interplead with plaintiff for fund.—*Grand Lodge, Colored K. P. of Texas, v. Cleo Lodge No. 222, Colored K. P.*, 189 S. W. 764.

Issues, Proof and Variance.

^{371.} Where defendant, in an action on a certificate issued by it, insuring plaintiff against bodily injuries, pleads provisions in the certificate, plaintiff cannot prove a waiver of such provisions without pleading the facts showing such waiver.—*United Benev. Soc. v. Shepherd*, 66 S. W. 577.

proof that insured was a member of B. lodge when he died.³⁷² Where the petition alleged that decedent was a member of a subordinate temple it was error to introduce in evidence the financial card of another temple.³⁵⁷

Presumption and Burden of Proof—In General.—The members of an association are conclusively presumed to have notice of the by-laws.³⁸⁴

(A) As to Insurer Being a Fraternal Benefit Association.—In order to receive the benefit of the laws governing fraternal benefit associations the burden is on the insurer to plead and prove that it not only possesses the essential statutory qualifications of such an association but also that it has been admitted to do business in the state as such an association.³⁷⁵ However, the burden of showing that such an association is withdrawn from the protection of the article of the statute governing the same by a failure to make the required statement to the insurance department is on the beneficiary suing on the certificate.^{379 382}

(B) As to Forfeiture.—The insurer, whose constitution provided for a forfeiture on delinquency and notice thereof has the burden of proving the forfeiture and the notice necessary to effect same.³⁸³ The beneficiary has the burden of proving that the certificate, subject to forfeiture for non-payment of dues was in force at the death of the member.³⁸⁵ Where the insured had suffered a forfeiture the burden was on the beneficiary to show that some one during insured's life time took such action as under the constitution and laws of the association avoided the forfeiture.³⁷⁸

(C) As to Suicide.—No presumption of suicide can be indulged in; the presumption, if any, being against the forfeiture of the certificate. The insurer has the burden of establishing that the insured intentionally took his own life, where the certificate stipulates that it shall be void if the member dies by self-destruction.^{374 380}

(D) As to Violation of Law.—The insurer has the burden of

³⁷². There is no variance between an allegation that on a certain day insured became a member of S. Lodge of insurer, a fraternal order, and that he was in good standing in the order when he died, and proof that insured was a member of B. Lodge when he died.—*Supreme Lodge, Knights of Honor, v. Rumpy*, 45 S. W. 422.

³⁷⁷—**Evidence—Presumptions and Burden of Proof.** (See 28 Cent. Dig. Insurance, §§ 1999-2002.)

³⁷³. Where insured had suffered a forfeiture of his benefit certificate, and had not been reinstated in defendant association prior to his death, the burden was on the beneficiary, claiming under such certificate, to show that some one during insured's life time

took such action as under the constitution and laws of the association avoided the forfeiture, in order to entitle plaintiff to recover. Judgment 108 S. W. 492, reversed.—*Brotherhood of Ry. Trainmen v. Dee*, 111 S. W. 396, 101 Tex. 597. See 28 Cent. Dig. Insurance, §§ 1999-2002.

³⁷⁴. A fraternal insurance society issuing a certificate stipulating that it shall be void if the member shall die by self-destruction, sane or insane, has the burden of establishing that the member intentionally took his life and no presumption of suicide can be indulged in; the presumption, if any, being against a forfeiture of the certificate. —*Grand Fraternity v. Melton*, 111 S. W. 967, reversed (1909) 117 S. W. 788, 102 Tex. 399. See 28 Cent. Dig. Insurance, §§ 1999-2007.

proving that the insured was the aggressor in a difficulty in which he lost his life, where the policy provides that it should be void if the insured should die in consequence of the violation of the law.³⁷⁸

(E) As to Validity of Change of Beneficiary.—Persons attacking the validity of a change of beneficiary on the ground of mental capacity of the insured have the burden of proof.³⁷⁹

(F) As to Delay in Delivery of Certificate.—It devolves on parties asserting delay in the delivery of a certificate to prove it.³⁷⁷

(G) As to Survivorship.—Where the insured and beneficiary perish in the same disaster, the burden is on the representatives of the beneficiary to prove that such beneficiary survived the insured.³⁸¹

(H) As to Presumption of Death.—Under the statute the presumption of death arises on proof of absence of the person from

375. A foreign corporation sued for failure to pay a death benefit certificate issued by it, in order to receive the benefit of the laws and rules of construction pertaining to death benefit certificates issued by fraternal benefit association must plead and prove not only that it possesses the essential qualifications of such an association as prescribed by Rev. St. Mo. 1899, § 1408 Ann. St. 1906, (p. 1111), but also that it has been admitted to do business in the state as such an association, as provided by section 1410 (page 1113), and where, though it may be a fraternal benefit association as defined by section 1408, it does not appear that it has been admitted to do business in the state as provided by section 1410, the contract cannot be considered otherwise than one of regular insurance as to which under the express provisions of section 7896 (page 3750) that suicide of the insured is no defense.—*Loyal Americans of the Republic v. McClanahan*, 109 S. W. 973. See 28 Cent. Dig. Insurance, §§ 1999-2007.

376. Persons attacking the validity of a change of beneficiary in a policy of insurance on the ground of mental incapacity of insured have the burden of proof.—*Hasard v. Western Commercial Travelers' Ass'n*, 116 S. W. 625.

377. If delay of a beneficiary association in delivery of a benefit certificate was of any avail to the beneficiary, it devolved on the party asserting the delay to prove it.—*Modern Woodmen of America v. Owens*, 130 S. W. 858. See 28 Cent. Dig. Insurance, §§ 1999-2002.

378. Insurer held to have the burden of proving that insured was the aggressor in the difficulty in which he lost his life, as regards the condition of the policy that it should be void if insured should die in consequence of

the violation or attempted violation of the laws.—*Sovereign Camp W. O. W. v. Jackson*, 138 S. W. 1137. 28 Cent. Dig. Insurance, §§ 1999-2002.

379. The burden of showing that a mutual relief association, excepted by Rev. St. 1895, Art. 3096, from the operation of the general insurance laws, provided that its principal officer shall make an annual statement to the insurance department, etc., is withdrawn from the protection of the article by a failure to make such statement, is on a beneficiary suing on a certificate. Judgment, *Supreme Council A. L. H. v. Story*, 75 S. W. 901, modified.—*Supreme Council A. L. H. v. Story*, 78 S. W. 1, 97 Tex. 264.

380. Where a benefit certificate exempted the association from liability for death by suicide, and in an action on the certificate it appeared that the member came to his death by a gunshot while alone in his room, the burden was on the association to show suicide.—*Sovereign Camp of Woodmen of The World v. Boehme*, 97 S. W. 847. 28 Cent. Dig. Insurance, §§ 1999-2007.

381. Where a benefit certificate, issued by a beneficial association, payable to the wife of the insured, provides that in case of the death of the designated beneficiary before that of the insured the benefit, in the absence of a new designation, shall be paid to the insured's relatives in a certain order, the relatives are entitled to the benefit, as against the representatives of the beneficiary, where the beneficiary and the insured perish in the same disaster, and there is no proof that the beneficiary was the survivor; her representatives having the burden of proving that she survived the insured.—*Males v. Sovereign Camp Woodmen of The World*, 70 S. W. 108.

382. The burden was on a party suing on a benefit insurance certificate, claiming to be entitled to the penalty

his home for seven years without showing that he has not been heard from during that time.³⁸⁶ However, this presumption may be destroyed by proof of his existence within that time.³⁸⁶ The presumption is not limited to an absence for a space of seven years but on proper evidence death before the expiration of such time may be inferred.³⁸⁹ Where insured left home stating that he would be back that night or the next day the presumption was raised that he had died at some time within seven years after his disappearance.³⁸⁷ Evidence of character, habits, domestic relations, etc., making the abandonment of home and family improbable may be sufficient to raise presumption of death, or from which the death of one absent and unheard of may be inferred without regard to the duration of such absence.³⁹⁰

Admissibility of Evidence—(A) As to Payment of Dues.—An assessment may be shown by parol where the by-laws do not require that it be recorded in the minutes.⁴⁰⁶ Evidence that other members had received notices of assessments mailed at the time plaintiff's notice was alleged to have been mailed was inadmissible on the question of whether plaintiff had received timely notice.⁴¹⁵ An affidavit in the proof of death blank by the financier of the local lodge that the deceased was a member in good standing is admis-

and attorney's fees provided in *Sayles' Ann. Civ. St. 1897, Art. 3071*, for failure to pay after demand, to show failure to file an annual report which, under article 3096, would except mutual relief associations from liability therefor.—*Grand Lodge F. & A. Masons of Texas v. Moore*, 154 S. W. 362. See 28 Cent. Dig. Insurance, §§ 1999-2002.

383. Insurer whose constitution provided for a forfeiture of a member's policy on delinquency and notice thereof held to have the burden of proving a forfeiture, and the notice necessary to effect a forfeiture.—*Haywood v. Grand Lodge of Texas, K. P.*, 138 S. W. 1194. See 28 Cent. Dig. Insurance, §§ 1999-2002.

384. Members of a fraternal beneficiary society are conclusively presumed to have notice of the by-laws of the order.—*McWilliams v. Modern Woodmen of America*, 142 S. W. 641.

385. A beneficiary suing on a fraternal benefit certificate has the burden of proving that the certificate subject to forfeiture for non-payment of dues was in force at the death of the member.—*Supreme Lodge of Pathfinder v. Johnson*, 168 S. W. 1010.

386. Under *Rev. Civ. St. 1911, Art. 5707*, the presumption of death arises on proof of absence of a person from his home for seven years without showing that he has not been heard from during that time but may be destroyed by proof of his existence within that time.—*Sovereign Camp Woodmen of the World v. Ruedrich*, 158 S. W. 170.

387. In an action on a benefit insurance certificate, evidence that insured left home stating that he would be back that night or the next day held to raise a presumption that he had died at some time within seven years after his disappearance under *Rev. Civ. St. 1911, Art. 5707*.—*Id.*

388. Where the executive officers of a mutual benefit society promulgate and attempt to enforce a resolution ratering members, the burden is on an objecting member to show that the officers' acts were unsustainable.—*Supreme ruling of the Fraternal Mystic Circle v. Ericson*, 131 S. W. 92. Reversed 146 S. W. 160.

389. The law or rule of evidence embodied in *Rev. St. 1911, Art. 5707*, that death is presumed at the end of seven years unexplained absence does not limit such presumption to an absence for a space of seven years, but on proper evidence death before the expiration of such time may be inferred.—*Sovereign Camp W. O. W. v. Robinson*, 187 S. W. 215. See 28 Cent. Dig. Insurance, § 1833.

390. Evidence of character, habits, domestic relations, etc., making the abandonment of home and family improbable may be sufficient to raise presumption of death, or from which the death of one absent and unheard of may be inferred without regard to the duration of such absence.—*Sovereign Camp W. O. W. v. Robinson*, 137 S. W. 215. See 28 Cent. Dig. Insurance, § 1833.

sible as tending to show timely payment of all dues.⁴¹⁶ A wife was held a competent witness, after the death of her husband, to testify as to conversations with him referring to payment of his dues.³⁹² Proofs of loss including an affidavit of defendant's finance keeper that certain assessments were paid at a certain time were admissible.³⁹⁵ Statements of a husband who had joined his wife in a suit on a benefit certificate, on a former trial as to payment of dues, were held admissible as the husband was so far the representative of the wife that the jury might consider his statements, which had been changed in the last trial, as admissions against her interest.³⁹⁴ Such statements should not be limited to impeaching purposes alone.³⁹⁴ An insurer's denial under oath of the date and contents of a receipt for dues, the authority of the officer executing same having been questioned, does not affect its admissibility.^{391 408} Under the statute, evidence that the deceased

318.—Evidence.—Admissibility. (See 23 Cent. Dig. Insurance, §§ 2003-2005.)

391. In an action on a mutual benefit association certificate, defendant claimed a forfeiture therefor for non-payment of dues for a certain month. Plaintiff pleaded a receipt, signed by the financier of the local lodge of which deceased was a member, showing payment of such dues before the latter's death. Defendant's plea under oath did not deny the execution of the receipt, but denied the authority of the financier to execute it after the member's death. Held, that defendant's denial under oath of the date and contents of the receipt did not affect its admissibility as evidence.—*United Moderns v. Pistole*, 86 S. W. 377.

392. In an action on a benefit certificate issued to plaintiff's husband, in which she was named as beneficiary, so that upon his death in good standing she became at once entitled to moneys due, she was a competent witness to testify as to conversations with him referring to payment of his dues.—*Grand Lodge, F. & A. M. of Texas v. Dillard*, 162 S. W. 1173.

393. Under a general denial in an action for injuries alleged to have been received by a fall during plaintiff's initiation, defendant might show the plaintiff's injury was in fact caused by the willful act of a stranger, or by a spirit of malice.—*Grand Temple and Tabernacle in State of Texas of Knights and Daughters of International Order of Twelve v. Johnson*, 156 S. W. 532.

394. G. having joined his wife in a suit on a benefit certificate, testified that he paid an assessment on decedent's certificate on the first Monday of October, 1906. Defendant thereupon showed by the stenographer who took G.'s testimony on a former trial that he then testified the payment was

made in November, 1906. Held, that G. was so far the representative of his wife that the jury might consider his statements on the former trial as admissions against her interest, so that the court erred in limiting the stenographer's evidence to its impeaching purpose.—*Knights of Modern Maccabees v. Gillis*, 125 S. W. 338.

395. Where an action on a benefit certificate depended on an issue as to the payment of assessment No. 134 on or before October 30, 1906, proofs of loss including an affidavit by defendant's finance keeper of the tent to which decedent belonged that assessments Nos. 134 and 135 were paid on November 1, 1906, were admissible, though not conclusive on such issue.—*Knights of Modern Maccabees v. Gillis*, 125 S. W. 338.

396. A letter from a negro fraternal organization, written after the death of a member, notifying the beneficiary of her expulsion, held inadmissible on the issue as to whether insured was a member in good standing at his death.—*International Order of Twelve Knights & Ladies of Tabor v. Wilson*, 151 S. W. 320. See 28 Cent. Dig. Insurance, §§ 2003-2005; 11 Cent. Dig. Coroners 28.

397. In an action upon a benefit certificate, defended on the ground that the insured falsely stated in her application that she had never had malaria, evidence that insured completely recovered from the attack within a few days was admissible upon the issue whether the false statement was material to the risk.—*Modern Brotherhood of America v. Jordan*, 167 S. W. 794.

398. Evidence that answers of an assured made to the soliciting agent of a fraternal insurance association, who was also its medical examiner, were truthful, though mistated by the examiner in the application, was ad-

had stated that he did not want to keep up his insurance, is admissible against the beneficiary.^{398a}

(B) **As to Health of Applicant or Member.**—Evidence of statements by insured to the order's medical examiner is admissible.⁴¹² It has been held that witnesses may state from their personal knowledge that applicant was unable to speak above a whisper, was emaciated and that her father stated she had consumption.⁴¹⁰ A witness may state that in his opinion the insured recovered in a few days from a disease which the insurer had shown contradicted the statement in the application, such witness stating the facts upon which the opinion was based.⁴¹¹ ^{397 407} Evidence that the defendant order had the reputation of taking anybody, whether in good health or not, is competent, where the plaintiff and insured allege that they had been led to believe that the condition of insured's health was immaterial.⁴⁰² On the question of whether insured had consulted a physician within a certain length of time and one physician whom he had consulted within that time with reference to granulated eyelids, testified that such affection was a mere inflammatory condition of the eyelids, the evidence of another physician that granulated eyelids was not a condition of health, but a mere local inflammation, was admissible.⁴⁰¹ The evidence of a

missible to show notice to the order of the facts as they existed; the assured not having had any notice, so far as appears, of any restrictions on the agent's authority.—*Order of Columbus of Baltimore City, Md. v. Fugua*, 60 S. W. 1020.

398a. Under *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4832*, evidence that deceased, when asked by witness to pay his July assessment, said that he would not keep it up, or did not want to keep it up, held admissible against the beneficiary.—*Cole v. Knights of Maccabees of the World*, 188 S. W. 699.

400. In an action on a benefit certificate issued by a fraternal insurance association, evidence as to declarations by one of the parties who was present when insured was killed, made immediately after the killing, held admissible as part of the res gestae.—*Sovereign Camp Woodmen of the World v. Bailey*, 163 S. W. 683.

401. Where insured stated that he had not been consulted or advised by any physician regarding his health within five years prior to his application for insurance, and a physician whom he had consulted within that time with reference to granulated eyelids testified that such affection was a mere inflammatory condition of the eyelids, etc., evidence of another physician that granulated eyelids was not a condition of health, but a mere local inflammation, was admissible.—*Brock v. United Moderns*, 81 S. W. 340, 38 Tex. Civ. App. 12.

402. In an action to recover insur-

ance against a fraternal mutual life insurance company, in which plaintiff alleged that he and the insured had been led to believe that the condition of the insured's health at the time of application for insurance was immaterial, evidence that the defendant order had the reputation of taking anybody, whether in good health or not, was competent.—*Home Circle Soc. No. 2 v. Shelton*, 85 S. W. 320.

403. Where a party had signed an instrument reciting that on a particular day he received a stated sum of money from a certain person, his denial under oath of the fact that he received the money, or that he received it on the day stated, is not a plea of non est factum, and cannot affect the question of the admissibility of the receipt in evidence.—*United Moderns v. Pistole*, 86 S. W. 377.

404. A report concerning insured's standing when he died, made to the supreme lodge of a fraternal insurance order in the discharge of official duties, is admissible on behalf of the beneficiary.—*Supreme Lodge, Knights of Honor v. Rampsy*, 45 S. W. 422.

405. Where a beneficiary in a fraternal insurance order introduces a report of insured's death made by certain officers of the order, to show insured's standing in the order, the insurer cannot claim that a written statement of the physician who attended insured in his last sickness is admissible as a part of such report.—*Supreme Lodge, Knights of Honor, v. Rampsy*, 45 S. W. 422.

beneficiary who is unable to read, that he did not know that certain statements as to the applicant's health were in the application is admissible over the objection that the application spoke for itself.⁴⁰⁸ The evidence of a member's husband that up to the time of her last illness the insured did all her own house work is admissible as bearing on her health at the time she was reinstated.⁴¹⁴ It was not admissible to show that about one-fourth of American women have abdominal trouble where the issue was as to whether insured died of the same trouble.⁴¹³

(C) **As to Representations of Agent.**—Where the facts do not show any limitation on the power of an agent, his representations and statements made at the time a contract of insurance is entered into are admissible in an action on the contract.⁴⁰⁸

(D) **As to Misstatements of Examiner.**—Evidence that the answers made to the agent of insured were truthful, though misstated in the application, was admissible to show notice of the facts as they existed, the insured having had no notice of any restrictions on the agent's authority.³⁹⁸

406. Where the by-laws of a beneficial association do not require that an assessment be recorded in the minutes, the fact that an assessment was made may be shown by parol.—*Supreme Council American Legion of Honor v. Landers*, 57 S. W. 307, 23 Tex. Civ. App. 625.

407. Where, in an action upon a benefit certificate, the defenses being that insured in her application falsely stated that she had never had a certain disease, defendant had introduced a physician showing that he had treated her for the disease, it was proper to permit plaintiff to show on cross-examination that she completely recovered from the disease in a few days.—*Modern Brotherhood of America v. Jordan*, 167 S. W. 794.

408. Where the facts do not show any limitation on the power of an agent, his representation and statements made at the time a contract of insurance is entered into are admissible in an action on the contract.—*Home Forum Ben. Order of Illinois v. Jones*, 48 S. W. 219, 20 Tex. Civ. App. 68.

409. In an action on a benefit certificate, evidence by the beneficiary that he was unable to read, that the agent failed to disclose certain statements in the application as to the applicant's health or the family physician, and that he did not ascertain the statements were in the application until after the applicant's death, is admissible, under similar allegations, over objection that the application spoke for itself and was not denied.—*Home Circle Soc. No. 1 v. Shelton*, 81 S. W. 84.

410. In an action on a benefit certificate, witnesses may state from

their personal knowledge that applicant was unable to speak above a whisper, was emaciated, and that her father stated she had consumption.—*Home Circle Soc. No. 1 v. Shelton*, 81 S. W. 84.

411. Where, in an action upon a benefit certificate, defendant had shown that insured had had an attack of malaria, contradicting her statement to the contrary in her application, plaintiff, her husband, was properly permitted to testify that, in his opinion, she recovered in a few days; he stating the facts upon which the opinion was based.—*Modern Brotherhood of America v. Jordan*, 167 S. W. 794.

412. In an action on a fraternal insurance certificate, evidence of statements made by insured to the order's medical examiner held admissible.—*National Council of the Knights and Ladies of Security v. Sealey*, 162 S. W. 455.

413. In an action on a benefit certificate, in which the issue was as to whether female insured died of an abdominal disease evidence that about 25 per cent. of the women of the United States have trouble down in the abdominal front held inadmissible.—*Modern Brotherhood of America v. Chandler*, 146 S. W. 626. See 28 Cent. Dig. Insurance, § 2003; 11 Cent. Dig. Coroners, § 28.

414. In an action on a mutual benefit certificate, evidence of insured's husband that up to the time of her last illness insured did all her household work held admissible as bearing on the health of deceased at the time she was reinstated as a member, and before she was taken sick.—*Id.*

(E) **As to Expulsion.**—A letter written after the death of a member, notifying the beneficiary of the expulsion of such member, was inadmissible on the issue as to whether insured was a member in good standing at his death.³⁹⁶

(F) **Res Gestae.**—Declarations by one of the parties present when insured was killed, made immediately after the killing, were admissible.⁴⁰⁰

(G) **Report of Death.**—A report concerning insured's standing at the time of his death, made to the supreme lodge in the discharge of official duties, is admissible on behalf of the beneficiary.⁴⁰⁴ But the insurer cannot introduce a written statement of the physician who attended insured in his last sickness as a part of such report.⁴⁰⁵

(H) **As to Condition of Association.**—Evidence of the membership and financial condition of the order is admissible to show that one assessment, this being the limit of a single recovery, was sufficient to raise the amount called for by the certificate.⁴¹⁷

(I) **As to Pleading.**—Admissions in the insurer's answer are admissible but open to explanation as well as contradiction.^{417a}

Weight and Sufficiency of Evidence—(A) To Show Suicide.—Suicide of insured, as a defense, must be established by a preponderance of the evidence.^{418 419 420 431 439}

415. Where the question was whether insured had received timely notice of assessments, evidence that other members had received notices mailed at the time plaintiff's notice was alleged to have been mailed held inadmissible.—*State Division, Lone Star Ins. Union, v. Blassengame*, 162 S. W. 6. See 28 Cent. Dig. Insurance, § 2003.

416. Where, in an action on a mutual benefit association certificate, defendant claimed a forfeiture thereof for nonpayment of dues for a certain month, and the financier of the local lodge of which deceased was a member—such officer being authorized to receive payments of dues—testifies that an entry made by him on the receipt book of the lodge, showing timely payment of such dues, was false, an affidavit made by such officer on a printed blank furnished by defendant, and in the manner required by it, for the purpose of furnishing proof of death, and stating that at the time of his death deceased was a member in good standing of such lodge, is admissible as tending to show timely payment of all dues, though defendant's answer admitted that proper death proof had been made.—*United Moderns v. Pistole*, 86 S. W. 377.

417. In an action on a mutual benefit certificate, which provides that its payments will be based on one assessment on the entire beneficiary membership of the order, the full amount so paid not to exceed the amount of one

assessment, evidence of the membership and financial condition of the order was admissible to show that one assessment was sufficient to raise the amount called for by the certificate.—*Sovereign Camp, Woodmen of the World, v. Carrington*, 90 S. W. 921.

417a. In an action for fraternal insurance, defendant's original answer containing admissions of relevant issues, held admissible, but open to explanation or contradiction like other admissions.—*Carr v. Grand Lodge, United Brothers of Friendship of Texas*, 189 S. W. 510.

819.—**Evidence—Weight and Sufficiency.** (See 28 Cent. Dig. Insurance, §§ 2006, 2007.)

418. In an action on a mutual benefit certificate void if the member committed suicide, evidence held to justify a verdict that the member did not commit suicide.—*Grand Fraternity v. Melton*, 111 S. W. 967, reversed (1909) 117 S. W. 788, 102 Tex. 399. See 28 Cent. Dig. Insurance, §§ 2006, 2007.

419. Evidence in an action for damages for failure and refusal to pay a death benefit certificate held to show that insured committed suicide.—*Loyal Americans of the Republic v. McClanahan*, 109 S. W. 973. See 28 Cent. Dig. Insurance, §§ 2006, 2007.

420. Evidence held not only to raise an issue for the jury, but to establish to a moral certainty that insured shot himself with intent to destroy his life.

(B) **To Show Violation of Law.**—A judgment is warranted against an insurer who does not show that insured met his death in consequence of a violation or attempted violation of law, where the policy contains a stipulation for non-liability in such a case.⁴²¹ This defense must also be shown by a preponderance of the evidence.^{423 437}

(C) **To Show Knowledge of Insurer as to Habits of Insured.**—A sovereign camp will be presumed ignorant of false statements of a member as to habits of temperance where after being advised of such member's intemperance took steps immediately to ascertain its truth, only to learn that the report was untrue.⁴²⁴ And even where one of the committee knew of the applicant's habits but did not know of his false statement.⁴²⁵

inflicting the wound from which he died. Judgment, 111 S. W. 967 reversed.—Grand Fraternity v. Melton, 117 S. W. 788, 102 Tex. 399. See 28 Cent. Dig. Insurance, §§ 1555, 1707-1728.

421. In an action on a beneficiary certificate providing that there should be no recovery if insured died in consequence of violation or attempted violation of law, evidence held to warrant judgment against the insurer not showing that insured so met his death.—Sovereign Camp W. O. W. v. Bailey, 183 S. W. 107.

422. Evidence, in an action on mutual benefit certificates, held to authorize a finding that assured was dead.—Knights of the Maccabees of the world v. Parsons, 179 S. W. 78.

It is not necessary that the evidence conclusively shows the death of assured.—Id.

423. In an action against a beneficial association for injuries to one of its members from a fall caused by tripping, evidence held to show that, even if the person who tripped plaintiff was the duly constituted agent of the association, he was acting outside of his principal's business, for purposes of his own, so that the association is not liable.—Grand Temple and Tabernacle, etc., v. Johnson, 135 S. W. 173.

424. A finding that the sovereign camp of a benefit order was ignorant of false statements of a member as to habits of temperance, made in an application for membership in a subordinate camp, is supported by the evidence, though, after the application was made, a co-member of the subordinate camp advised the sovereign commander that such member was drinking, where the commander immediately wrote the clerk of the subordinate camp in reference thereto, and he replied that the report was untrue.—Brown v. Sovereign Camp, Woodmen of the World, 49 S. W. 893, 20 Tex. Civ. App. 373.

425. A finding on a special issue, that there was no evidence that a ben-

efit order knew that a statement in a member's application as to his use of intoxicants was false, is supported by the evidence, though one of the committee appointed to report on his application knew that the applicant was drinking, where he did not know of the false statement.—Brown v. Sovereign Camp, Woodmen of the World, 49 S. W. 893, 20 Tex. Civ. App. 373.

425a. In an action on a policy of fraternal benefit insurance, where it was undisputed that no certificate had been issued naming plaintiff beneficiary, evidence held insufficient to support a finding that plaintiff was named as beneficiary in obligation when deceased joined the lodge.—Carr v. Grand Lodge United Brothers of Friendship of Texas, 189 S. W. 510.

426. For eight years an intimacy existed between deceased and beneficiaries under a certificate on decedent's life, during which time deceased lived with such beneficiaries, who nursed him when sick. Decedent gave them provisions, clothing, etc., more than sufficient to pay his board; and, during the four years preceding his death, deceased, though he lived in another state, sent such beneficiaries money amounting to \$300. Held sufficient to support a finding that the beneficiaries were dependent on deceased, within the terms of the certificate, and therefore entitled to recover thereon.—Grand Lodge A. O. U. W. of Texas v. Bollman, 53 S. W. 829, 22 Tex. Civ. App. 106.

427. Evidence in an action on a fraternal benefit certificate held to show that insured was engaged in performing duties incident to the sale of intoxicating liquors when he died.—Modern Woodmen of America v. Lynch, 141 S. W. 1055. See 28 Cent. Dig. Insurance, § 2006.

428. Evidence in an action on an insurance policy held to show that the insured acted in good faith in answering a question.—Supreme Lodge of the Fraternal Brotherhood v. Jones, 143 S. W. 247.

(D) **To Show Death of Insured.**—It is not necessary that the evidence conclusively shows the death of insured.^{422. 440}

(E) **To Show Non-Payment of Dues.**—Non-payment of assessments and dues must be affirmatively proved by the fraternal society by clear and satisfactory evidence.^{432 438 441 442 443 444} An

429. Evidence in an action on a benefit certificate held to sustain a finding that the insured did not die of a concealed disease.—Id.

430. Evidence, in an action on a mutual benefit certificate, held to sustain a finding that insured was not affected with lung disease or tuberculosis, and had not changed his residence for his health.—*Knights of Maccabees of the World v. Hunter*, 143 S. W. 359, 57 Tex. Civ. App. 115.

431. In an action on an insurance policy, evidence held to sustain a finding that insured did not commit suicide.—*Knights of Maccabees of the World v. Johnson*, 143 S. W. 718.

432. Evidence held insufficient to show that member of benefit insurance society was not suspended for non-payment of assessments at the time of his death.—*Knights of the Modern Maccabees v. Gillis*, 144 S. W. 713.

433. Evidence, in an action on a benefit certificate, defended on the ground that insured died in consequence of his violation of law, held sufficient to show that insured was killed because of an assault made by him in violation of a penal statute.—*Woodmen of the World v. Hipp*, 147 S. W. 316.

434. An entry made on the receipt book of a subordinate lodge of a mutual benefit association by the proper officer of such lodge, who was authorized to receive payments of dues, showing payment to him of monthly dues on a certain date, may be taken as true by the jury, though such officer testifies that the entry was false, and that the payment was not in fact made on that date.—*United Moderns v. Pistole*, 86 S. W. 377.

435. Evidence held not to show that a false statement made by insured in her application that she had never had malaria was material to the risk.—*Modern Brotherhood of America v. Jordan*, 167 S. W. 794.

436. Where, in an action on a benefit certificate stipulating that the answers of the applicant were warranted to be true and that if they were not the certificate should be avoided, it appeared that the applicant stated that he had never changed his residence on account of his health, that he had never been afflicted with habitual cough, or consumption, or with a disease of the lungs, etc., and the undisputed evidence showed that he had changed his residence for his health and that he was suffering from tuberculosis of the bowels and lungs prior

42—Ins.

to the making of the application, it was error to refuse to direct the jury to find that his answers were false, so that the certificate was void.—*Knights of Maccabees of the World v. Hunter*, 132 S. W. 116. See 28 Cent. Dig. Insurance, §§ 2006, 2007.

437. Evidence, in an action on a life certificate, conditioned to be void if insured died in consequence of the violation, or attempted violation, of the law, held to authorize a finding that K. was the aggressor in the fight in which insured was killed.—*Woodmen of the World v. McCoslin*, 126 S. W. 894.

438. Evidence held to justify a finding that a member of a fraternal insurance order had not defaulted in the payment of dues for specified months.—*Grand Fraternity v. Mulkey*, 130 S. W. 242.

439. In an action on a mutual benefit certificate, evidence held to sustain a finding that insured's death was not by suicide.—*Grand Fraternity v. Green*, 131 S. W. 442.

440. A finding that a member of a fraternal insurance association died before a designated date held authorized by the evidence.—*Supreme Lodge of Pathfinder v. Johnson*, 168 S. W. 1010.

441. In an action on a policy, defended on the ground of default in the payment of dues, evidence held to show that the plaintiff was depending on a local officer to pay the dues, and not upon the custom to send written notices of dues.—*Bennett v. Sovereign Camp, Woodmen of the World*, 168 S. W. 1023.

442. Evidence, in an action on a policy, held to warrant a finding by the court, notwithstanding a finding of the jury, that the local camp never in effect undertook to carry insured, but that that was done in his behalf as a private undertaking of the local officer.—Id.

443. In an action on a policy, defended on the ground of default in assessments, evidence held to warrant a conclusion that insured by his intemperate habits was not a proper subject for relief in the matter of carrying sick or indigent members, and, in view of Rev. St. 1911, Art. 4847, providing that no subordinate body or officer may waive any provision of the constitution or laws, to justify a refusal to render judgment for him, notwithstanding the findings of a local custom to carry sick and indigent members.—Id.

entry on a receipt book made by the proper officer showing payment of dues may be taken as true by the jury, though the officer testifies it was false.⁴⁴⁴ Service of notice of assessment on the member must be clearly shown to have been made at the proper time to justify a forfeiture.⁴⁴⁸

(F) **Miscellaneous.**—To show dependency of beneficiary on insured;⁴⁴⁶ truth of answers in application;^{428 445 447} to show good health of applicant at time of receiving certificate;⁴⁵⁰ to show death by tuberculosis and change of residence;^{429 430 436} to show sale of intoxicating liquors by insured;⁴²⁷ to show materiality of false statement to risk;⁴³⁵ to show loss of certificate;⁴⁴⁹ and not to show that plaintiff was named as beneficiary in obligation when the deceased joined the lodge.^{425a}

Trial—Questions for the Jury.—The general rule is that questions of law are for the court, while questions of fact are for the jury.

(A) **Payment of Dues.**—Where the evidence was conflicting as

444. In an action upon a policy of an order whose constitution fixed the amount each member should pay monthly, held, on findings, that the assessment claimed to be due was unpaid, etc., that the court, in the absence of evidence to the contrary, might assume that there was an assessment due at the death of insured.—*Id.*

445. Proof that decedent had been attended by a physician at a natural childbirth held not to show that her negative answer to a question, "Have you consulted or been attended by a physician during the past five years?" was false.—*Ladies of Maccabees of the World v. Kendrick*, 165 S. W. 110. See 28 Cent. Dig. Insurance, § 2006.

446. Neither the by-laws of a beneficial association nor its contracts provided for any change of beneficiary. A member changed the beneficiary by an indorsement on the benefit certificate, and thereafter the original beneficiary, her husband, sued on the certificate. It appeared that there was a custom in the society by which a member was permitted to change the beneficiary. There was no evidence that the insured knew of the custom, but the original beneficiary did not testify that he did not know of it. Held, that the facts were sufficient to show that the custom was known to insured and the association, and that they contracted with reference to it, and hence the change was binding.—*Schmitt v. New Braunfels Unterstuetzungs Verein*, 73 S. W. 568.

447. An applicant for life insurance answered negatively questions as to whether he had had any serious illness, local disease or disease of the lungs, pleurisy, pneumonia, or inflammation of the lungs. The evidence tended to show that he was suffering

from tuberculosis, and had had pleuropneumonia when he made the several answers. Physicians stated that, because he died of general tuberculosis, they attributed his former illness to a tubercle. The applicant stated he had been treated for la grippe, and the physician who treated him stated that his lungs were not attacked until just prior to his death. The examining physician examined him thoroughly, found him sound. The physicians did not tell his wife he had tuberculosis until after his death. There was other similar testimony. Held sufficient to sustain a finding that deceased's answers in his application were true.—*Supreme Ruling of the Fraternal Mystic Circle v. Crawford*, 75 S. W. 844.

448. Evidence, in an action upon a fraternal beneficiary certificate, held sufficient to sustain a finding that notices of certain assessments were not mailed at such a time as to justify a forfeiture prior to the time insured actually tendered such assessments, three days before her death.—*State Division, Lone Star Ins. Union v. Blasengame*, 162 S. W. 6. See 28 Cent. Dig. Insurance, §§ 2006-2007.

449. In an action on a mutual benefit certificate, evidence held sufficient to show the loss of the certificate and its contents.—*Sovereign Camp Woodmen of the World v. Ruedrich*, 158 S. W. 170.

450. Evidence in an action on a life policy, containing the provision that the insurer should not be liable if insured was not in good health when he received the policy, considered, and held sufficient to show that insured was in good health when he received the policy, so as to sustain a judgment for plaintiff.—*Woodmen of the World v. Locklin*, 67 S. W. 331, 28 Tex. Civ. App. 486.

to whether deceased was in arrears or had been legally suspended the issue was properly left to the jury.⁴⁵⁰ It was a question of fact for the jury where the insured, after notice of a by-law amounting to a repudiation of the contract by the company, paid his premiums, as to whether he had elected to treat the contract as still in force.⁴⁵⁶ Where a husband had agreed with his wife that if she would pay the dues the proceeds of the certificate should be hers at his death and she did so, until his sickness made the payments impossible, it was a question of fact for the jury as to whether her inability to pay the assessments was due to the necessary care of her husband.⁴⁵¹

(B) **Misrepresentations.**—A denial by an applicant that he had ever had a certain disease was held not as a matter of law a misrepresentation under the laws of the order.⁴⁵⁴ The materiality of a misrepresentation may depend on surrounding circumstances.⁴⁵³ Under the old law which made mutual benefit certificates incontestible for misrepresentation unless material to the risk, the question of materiality was left to the court.⁴⁵⁷

325.—Trial—Question for the Jury.
(See 28 Cent. Dig. Insurance, § 2009.)

451. A husband holding a mutual benefit certificate agreed with his wife that if she would pay the assessments the money due on the certificate on his death should belong to her. She paid the assessments for a time but then quit because from the husband's illness she could not work but had to care for him all the time. The local lodge paid the assessments. Held that the issue of whether her inability to pay the assessments was due to her necessary care for her husband and that but for her marital duty to do so, she would have kept up the payments, so that as between herself and husband she made no default was for the jury.—*Eatman v. Eatman*, 135 S. W. 1200.

452. Evidence held to make a question for the jury whether insured was the aggressor in the difficulty in which he lost his life, as regards the condition of the life certificate that it should be void if he should die in consequence of the violation or attempted violation of the laws.—*Sovereign Camp of W. O. W. v. Jackson*, 138 S. W. 1137.

453. A misstatement in an application for insurance concerning proper medical attendance and treatment of the applicant was not material to the risk as a matter of law, but its materiality depended on the surrounding circumstances.—*Modern Order of Praetorians v. Hollmig*, 103 S. W. 474, judgment reversed on rehearing, 105 S. W. 846. See 28 Cent. Dig. Insurance, § 2009.

454. A denial by an applicant for

membership in a fraternal insurance order that he ever had inflammatory or acute rheumatism held not as a matter of law a misrepresentation under the laws of the order.—*National Council of the Knights and Ladies of Security v. Sealey*, 162 S. W. 455. See 28 Cent. Dig. Insurance, § 2009.

455. Where laws of a beneficial association provided that relief should be given if the beneficiary became totally and permanently disabled "to perform or direct" any and all kinds of labor or business, the court did not err in submitting the issue whether or not plaintiff had become totally disabled "to perform and direct," since, if plaintiff had become totally and permanently disabled to both perform and direct, it follows that he was totally disabled to either perform or direct any business.—*Supreme Tent of Knights of Maccabees of the World v. Cox*, 60 S. W. 971.

456. Whether the payment of premiums by a member of a beneficial association, after notice of a by-law amounting to a repudiation of the contract on the part of the association, showed an election on the member's part to treat the contract as still in force, was a question of fact.—*Supreme Council A. L. H. v. Batte*, 79 S. W. 629, 34 Tex. Civ. App. 456.

457. Rev. Civ. St. 1911, Art. 4834, making mutual benefit certificates incontestable for misrepresentation, unless material to the risk, leaves to the court the question of materiality.—*Supreme Ruling of Fraternal Mystic Circle v. Hansen*, 153 S. W. 351. See 28 Cent. Dig. Insurance, § 2009.

(C) Violation of Law.—It may be a question for the jury whether the insured was the aggressor in the difficulty in which he lost his life, as regards the condition in the certificate that the certificate should be void if he should die in consequence of the violation or attempted violation of the law.^{452 461}

(D) Good Health of Insured at Time of Delivery of Policy.—Where the evidence is conflicting on this point it should be submitted to the jury.⁴⁶⁰

(E) Total Disability.—Whether plaintiff had become totally disabled to perform and direct any labor or business was properly submitted to the jury.⁴⁵⁵

(F) Certainty as to Policy.—Where it was a question of fact whether the policy in the record was the policy issued, it was for the jury.⁴⁵⁸

(G) As to Reinstatement.—As to whether a member signed the regular form for reinstatement and delivered it to the local lodge so as to make his reinstatement binding was for the jury.^{461a}

Instructions—(A) In General.—The trial judge has discretion to refuse to submit a case on special issues.⁴⁵⁵ It has been held necessary to request a special instruction to supply an alleged omission in a charge.⁴⁵⁶ Submission of an issue not supported by the evidence is improper.⁴⁶⁷ In general where the actual issuance of a policy is not controverted the court may properly assume it to be a fact.⁴⁸⁷

(B) As to Burden of Proof.—An instruction that the burden of proof is on the defendant to show that notices of assessments were mailed at a particular time is not objectionable where there was no contention by the defendant that such notices could have been mailed at any other time.⁴⁶¹

(C) As to Rules and By-Laws.—A request that the insured's

^{458.} In an action on a life policy, where it was a question of fact whether the policy in the record was the one issued, the question was for the jury.—*International Order of Twelve Knights & Daughters of Tabor v. Denman*, 160 S. W. 980. See 28 Cent. Dig. Insurance, §§ 1556, 1732.

^{459.} Where the evidence in an action on a benefit certificate was conflicting as to whether deceased was in arrears or had been legally suspended at the time of his death, the issue was properly left to the jury.—*Grand Lodge, F. & A. M. of Texas, v. Dillard*, 162 S. W. 1173. See 28 Cent. Dig. Insurance, § 2009.

^{460.} Evidence that insured was road overseer and was on the road, attending to his duties on the day on which he received his policy, but that he was not very well, with the testimony of a doctor, who prescribed for him on that day that he had only an ordinary bilious attack, authorized the submission

to the jury of the question whether insured was sick on such day, though defendants' evidence considered alone would be sufficient to establish the insured's sickness.—*Woodmen of the World v. Locklin*, 67 S. W. 331, 28 Tex. Civ. App. 486.

^{461.} In an action against a mutual benefit insurance association evidence on the question whether insured met his death while in violation of law held sufficient to go to the jury.—*Sovereign Camp Woodmen of the World v. Bailey*, 163 S. W. 683. See 28 Cent. Dig. Insurance, § 2009.

^{461a.} Evidence held to warrant submission to jury of issue whether member of fraternal benefit association signed regular form for reinstatement and delivered it to the local lodge, so as to make his reinstatement binding.—*Grand Lodge of Brotherhood of Railroad Trainmen v. Kennedy*, 188 S. W. 447.

application together with the constitution, charter and by-laws of the society should be considered in connection with the certificate sued on was properly refused where several provisions of the insurer's charter and by-laws were read in evidence and the principal issues were submitted in the main charge.⁴⁶⁸ Where the court states the legal effect of a contract of insurance and submits to the jury only issues of fact, a charge that the contract is contained in the policy and application, no mention being made of the rules and by-laws, is harmless error.⁴⁶²

(D) As to Estoppel and Waiver.—Where it is contended that defendant is estopped by the knowledge of its agent from relying on false representations of insured in the application, it is not error to refuse instructions, based on the theory that the representations were warranties, which exclude the issue of estoppel, since the doctrine of waiver applies to warranties as well as mere false representations.⁴⁶⁰ An instruction that if the application stated that the applicant was in good health, and the certificate was issued in reliance thereon, and the statement was false, the plaintiff could not recover, was properly refused, as it ignored the issue of waiver which was in the case.⁴⁶⁴

(E) As to Forgery of Signatures.—Where a charge with reference to forgery of the signature of one of the officers of the insurer left the jury to determine what constituted forgery, and the signatures of what officers were requisite to the validity of the policy, it was properly refused.⁴⁶⁸

(F) As to Payment of Dues.—In an action defended on the ground that the certificate was void for non-payment of dues, a charge that if the member or some one for him did not pay dues the verdict should be for the defendant was not open to the objection that it restricted the defense based on non-payment of dues within the time fixed by the certificate.⁴⁷⁶ It was further held that where the defendant, after receiving notice of the death of the member, tendered a return of the dues received for the month in which the member died but elected to retain the dues for the three preceding months, and the court charged that the receipt of payments by defendant and held by it awaiting the forwarding of health certificate was not sufficient to constitute a waiver of the rules requiring a health certificate and the payment of dues within the time prescribed, a charge that if the member did not pay the dues within the time prescribed as required by the rules, but paid the dues for each of the months after the last day of any or all of the months, and defendant accepted or retained the same as the dues of the member, the verdict should be for plaintiff, was not erroneous as authorizing a verdict if the dues were paid after the time required by the rules, and were received and retained by defendant though it retained them while awaiting a

health certificate and in ignorance of the fact that they had been paid after the time prescribed.⁴⁷⁷ In a case where there was evidence to justify a finding that the condition requiring payment of the first premium before the taking effect of the policy, had been waived, and that defendant was estopped to deny that the certificate was void, a requested charge that the payment of such first premium by check was conditional only, was properly refused.⁴⁷¹ Neither in such case was an instruction objectionable that if the secretary of defendant's local lodge agreed to accept the check of insured's employer in payment of the first premium of insured, and gave a receipt for the same, the jury should find for plaintiff, as assuming that the acceptance of the check was unconditional.⁴⁶⁵ It was not error for the court to refuse to give an instruction based on the theory that the insured was misled by the company into the belief that the advance premium had been remitted and his first payment applied as an advance on the bi-monthly calls, and the company ought to have known that he so understood it, where the insured was repeatedly notified as to the true status of the matter.⁴⁷⁹

(G) As to Violation of Law.—As a charge is to be construed as a whole, the part requiring that insured shall have complied with all the conditions and requirements of his certificate, is a sufficient reference to the defense that insured was killed in a violation, or attempted violation of law, which would make the certificate void; the charge immediately thereafter directing the jury to find for defendant if they believed insured unlawfully and without justification and in violation of law, made an assault to murder on another party and that in said difficulty the other party shot insured while so violating the law, and he died from the wounds so received.⁴⁶² Further, in such a case the plaintiff was entitled to a charge that the burden was on the defendant to prove that the insured was shot in a violation or attempted violation of law and such a charge could not be complained of as giving undue prominence to the necessity of defendant making such a showing by a preponderance of the evidence.⁴⁶⁶ An instruction is proper also that if from the acts or words of the party who shot insured

326—Trial—Instructions. (See 23 Cent. Dig. Insurance, § 2010.)

462. As a charge is to be construed as a whole, the part requiring that insured shall have complied with all the conditions and requirements of his certificate, is a sufficient reference to the defense that insured was killed in a violation, or attempted violation, of law, which would make the certificate void; the charge immediately thereafter directing the jury to find for defendant if they believed insured, unlawfully and without justification and

in violation of law, made an assault to murder on K., and that in said difficulty K. shot insured while so violating the law, and he died from the wound so received.—*Woodmen of the World v. McCoslin*, 126 S. W. 894.

463. The charge that, unless you find M., acted illegally in making the assault or if you believe that M. was acting in his necessary self-defense, etc., does not assume that K. had done some act indicating to M. that K. was making an unlawful assault on him.—*Woodmen of the World v. McCoslin*, 126 S. W. 894. Digitized by Google

a reasonable apprehension of danger to insured from such other party insured had a right to act.^{464 465 472}

(H) As to Good Health of Insured at the Time of Delivery of Policy.—An instruction must be requested in the trial court.⁴⁷⁰ The giving of an instruction, in an action on a life policy which provides that the insurer shall not be liable if insured is not in good health when the policy is delivered, that there may be a recovery if insured was in good health when the policy was delivered, and that good health means that insured did not have any disease of a serious nature, will not be held erroneous on appeal because of failure to define a "disease of a serious nature," when no request for an instruction defining such term was made in the trial court.⁴⁷⁰ So, an instruction that the insured was in good

464. The instruction that, if from the acts or words of K. a reasonable apprehension of danger to insured from K. arose, insured had a right to act, etc., does not assume the character of K.'s acts or words, but leaves them to the jury, and this, whatever may be the apparent preponderance of the evidence.—Id.

465. An instruction that if the secretary of defendant's local lodge agreed to accept the check of insured's employer in payment of the first assessment of insured, and gave a receipt for the same, the jury should find for plaintiff, was not objectionable as assuming that the acceptance of the check was unconditional.—Supreme Lodge United Benevolent Ass'n v. Lawson, 133 S. W. 907.

466. The court not having told the jury on whom the burden of proof rested to prove whether insured met his death in a violation or attempted violation of law, but only that to find for defendant they must believe that insured, without justification and in violation of law, made an assault to murder K. and in the course of the difficulty was shot, plaintiff was entitled to a charge that such burden was on defendant; so that giving plaintiff's charge that the burden was on defendant to show that insured met his death in a violation, or an attempted violation of law, could not be complained of as giving undue prominence to the necessity of defendant making such showing by a preponderance of the evidence.—Woodmen of the World v. McCoslin, 126 S. W. 894.

467. Submission of an issue not supported by the evidence is improper.—Milwaukee Mechanics' Ins. Co. v. Frosch, 130 S. W. 600.

468. Where several provisions of the charter and by-laws of defendant insurance society were introduced in evidence, some of them bearing on the issues, only remotely, if at all, and the principal issues in the case were

submitted to the jury in the charge, a request that insured's application and the constitution, charter, and laws of the society should be read together and considered in connection with the certificate sued on, and as a part thereof, was properly refused.—Supreme Lodge United Benevolent Ass'n. v. Lawson, 133 S. W. 907.

469. In an action against a beneficial association for injuries alleged to have been received during plaintiff's initiation, where defendant pleaded a general denial, and that the injury was caused by the act of some third person in a spirit of play, held that, on evidence that the injury was so caused, defendant's affirmative charge covering that theory of its case should have been given.—Grand Temple and Tabernacle, etc., v. Johnson, 156 S. W. 532.

470. The giving of an instruction, in an action on a life policy which provides that the insurer shall not be liable if insured is not in good health when the policy is delivered, that there may be a recovery if insured was in good health when the policy was delivered, and that good health means that insured did not have any disease of a serious nature, will not be held erroneous on appeal because of failure to define a "disease of a serious nature," when no request for an instruction defining such term was made in the trial court.—Woodmen of the World v. Locklin, 67 S. W. 331, 28 Tex. Civ. App. 486.

471. Where, in an action on a benefit certificate, there was evidence to justify a finding that the condition requiring payment of the first premium before the taking effect of the policy had been waived, and that defendant was estopped to deny that the certificate was void, a requested charge that the payment of such first premium by check was conditional only was properly refused.—Supreme Lodge United Benevolent Ass'n v. Lawson, 133 S. W. 907.

health within the meaning of the policy, even if he was unwell when he received it, if the illness was not of a serious nature, and did not affect the risk or probable duration of his life, contained a sufficient definition of serious illness.⁴⁷⁵ The words "serious disease" have been held to have practically the same meaning as "serious illness" when used in an instruction to a jury.⁴⁷⁸

(I) **As to a Diseased Condition of a Member.**—Where a certificate provided for payment of benefits in case of the loss of a foot, the giving of an instruction authorizing a recovery if plaintiff's foot "is" paralyzed so that he cannot "use" the same, was error as authorizing a recovery for a temporary loss of use, though another clause of the charge instructed that the paralysis must be total.⁴⁷³ Further, in such case an instruction in effect precluding a recovery if there was a partial use of the foot by reason of plaintiff's being able to work his toes was properly refused, since there must be some substantial recovery of a partial use of the foot to bring the recovery within the meaning of the contract.⁴⁷⁴

472. Where, under plaintiff's evidence in an action on a life certificate, condition to be void if insured die in consequence of the violation, or attempted violation, of the law, the actual danger to insured was preceded by appearances of danger to him, it was not error to instruct on defense by insured of his person against what "appeared" to him to be an unlawful assault by K. on him, on the theory that any danger to insured was actual, and not apparent in the sense of being imaginary danger to him, as a justification of his assault on K.—*Woodmen of the World v. McCoslin*, 126 S. W. 894.

473. In an action on benefit certificate providing for payment of benefits in case of the loss of a foot, the giving of an instruction authorizing a recovery if plaintiff's foot "is" paralyzed so that he cannot "use" the same, was error as authorizing a recovery for a temporary loss of use, though another clause of the charge instructed that the paralysis must be total.—*Modern Order of Praetorians v. Taylor*, 127 S. W. 260.

474. In an action on a benefit certificate providing for the payment of benefits in case of the loss of a foot, an instruction in effect precluding a recovery if there was a partial use of the foot by reason of plaintiff's being able to work his toes was properly refused, since there must be some substantial recovery of a partial use of the foot to bring the recovery within the meaning of the contract.—*Id.*

475. An instruction that the insured was in good health within the meaning of the policy, even if he was unwell when he received it, if the illness was not of a serious nature, and did not

affect the risk or probable duration of his life, contained a sufficient definition of serious illness.—*Woodmen of the World v. Locklin*, 67 S. W. 331, 28 Tex. Civ. App. 486.

476. In an action on a benefit certificate defended on the ground that the certificate was void for nonpayment of dues, a charge that if the member, or some one for him, did not pay dues the verdict should be for defendant, was not open to the objection that it restricted the defense based on nonpayment of dues within the time fixed by the certificate; especially, where the court charged that if the dues were not paid on or before the last day of the month as required by the certificate the verdict must be for defendant unless it subsequently received and accepted the dues.—*Grand Fraternity v. Mulkey*, 130 S. W. 242.

477. Where, in an action on a benefit certificate, defended on the ground that the certificate was void for nonpayment of dues, the evidence showed that after receiving notice of the death of the member defendant tendered a return of dues received for the month in which the member died but elected to retain the dues for three preceding months, and the court charged that the receipt of payments by defendant and held by it awaiting the forwarding of a health certificate was not sufficient to constitute a waiver of the rules requiring a health certificate and the payment of dues within the time prescribed, a charge that if the member did not pay the dues during each of the months as required by the rules, but paid the dues for each of the months after the last day of any or all of the months, and defendant accepted and retained the same as the

Verdict and Findings.—As a general rule where special findings by the jury as to whether the insured had paid his lodge assessments might be construed as conflicting, but the undisputed evidence and other findings support the finding that the payments were not made, the jury will be held to have intended such finding.⁴⁸⁸ Again, findings that a benefit order had no notice that a member's statements in his application as to his use of intoxicants were not true, and that it had notice as to his drinking, are not contradictory, where the evidence shows that the applicant had been

dues of the member, the verdict should be for plaintiff, was not erroneous as authorizing a verdict if the dues were paid after the time required by the rules, and were received and retained by defendant though it retained them while awaiting a health certificate and in ignorance of the fact that they had been paid after the time prescribed.—Id.

478. In an action on an insurance certificate, an instruction using the words "serious disease," instead of "serious illness," was not objectionable as misleading, both expressions having practically the same meaning.—*Modern Order of Praetorians v. Hollmig*, 103 S. W. 474, judgment reversed on rehearing, 105 S. W. 846.

479. Where it clearly appears that the words "advance premium," as used in a policy, relate to the membership fee, and not to an advance payment of bimonthly premiums, and the insured was requested by the company to read the policy, and had been notified that his first payment had been applied as such advance premium, and not on the bimonthly premiums to become due, the refusal to give an instruction based on the theory that the insured was misled by the company into the belief that the advance premium had been remitted, and his first payment applied as an advance on the bimonthly calls, and that the company ought to have known that he so understood it, is not error.—*Smith v. Covenant Mut. Ben. Ass'n*, 43 S. W. 819, 16 Tex. Civ. App. 593.

480. Where it is contended in an action on a life certificate that defendant is estopped by the knowledge of its agent from relying on false representations of insured in the application, it is not error to refuse instructions, based on the theory that the representations were warranties, which exclude the issue of estoppel, since the doctrine of waiver applies to warranties as well as mere false representations.—*National Fraternity v. Karnes*, 60 S. W. 576.

481. Where there was no contention that notices of assessments were or could have been mailed at any other time than that claimed by defendant, an instruction that the burden of

proof was upon defendant to show that notices were mailed at that time held not objectionable.—*State Division, Lone Star Ins. Union v. Blassengame*, 162 S. W. 6.

482. Where the court states the legal effect of a contract of insurance by a mutual insurance company, and submits to the jury only issues of fact, a charge that the contract is contained in the policy and application, no mention being made of the rules and by-laws, is harmless error.—*Smith v. Covenant Mut. Ben. Ass'n*, 43 S. W. 819, 16 Tex. Civ. App. 593.

483. Where a charge with reference to forgery of the signature of one of the officers of an insurance company to a policy left the jury to determine what constituted forgery, and the signatures of what officers were requisite to the validity of the policy, it was properly refused.—*International Order of Twelve of the Knights and Daughters of Tabor v. Boswell*, 48 S. W. 1108.

484. In an action on a life insurance certificate, an instruction that if the application stated that the applicant was in good health, and the certificate was issued in reliance thereon, and the statement was false, the plaintiff could not recover, was properly refused, as it ignored the issue of waiver, which was in the case.—*Home Circle Soc., No. 2, v. Shelton*, 85 S. W. 320.

485. Under the express provisions of Gen. Laws 1899, p. 190, the trial judge in an action on a life policy has discretion to refuse to submit the case on special issues.—*Woodmen of the World v. Locklin*, 67 S. W. 331, 23 Tex. Civ. App. 486.

486. Notwithstanding Acts 33d Leg. ch. 59, requiring all objections to the court's charge to be presented in writing to the opposing counsel and the court before the jury is instructed, it is still necessary to request a special instruction to supply an alleged omission in a charge.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

487. In an action on an insurance policy, where the actual issuance of a policy was not controverted, the court properly assumed it as a fact.—*International Order of Twelve Knights and Daughters of Tabor v. Denman*, 160 S. W. 980.

intemperate, which was generally known, and that previous to his application he had taken the liquor cure, which was generally believed to be effectual.⁴⁹⁰ Where defaulting payments suspended a member and avoided the policy by its terms it was held that findings that there was a custom of the order generally to carry sick and indigent members, and that such custom prevailed in the local camp, did not, as a matter of law, require a judgment for the plaintiff.⁴⁸⁹

Judgment.—A judgment will be reversed where the certificate sued on was not introduced in evidence.⁴⁹² A judgment which includes previous interest is erroneous where plaintiff was only entitled to the amount named in the certificate with interest from the date of the judgment.⁴⁹¹ Where a policy provides that the insurer may retain a small portion of each one thousand dollars to be paid for the purpose of constituting a special fund, a judgment for the full amount of the policy need not be reversed but will be reformed so as to allow the reduction.⁴⁹³

327—Verdict and Findings. (See 23 Cent. Dig. Insurance, §2011.)

488. Where special findings by the jury as to whether the insured had paid his lodge assessments might be construed as conflicting, but the undisputed evidence and other findings support the finding that the payments were not made, the jury will be held to have intended such finding.—*Sovereign Camp Woodmen of the World v. Wagon*, 164 S. W. 1082. See 23 Cent. Dig. Insurance, § 2011.

489. In an action on a policy providing for fixed assessments, and that defaulted payments should suspend the member and avoid the policy, held, that findings that there was a custom of the order generally to carry sick and indigent members, and that such custom prevailed in the local camp, did not, as a matter of law, require a judgment for the plaintiff.—*Bennett v. Sovereign Camp, Woodmen of the World*, 168 S. W. 1023.

490. Findings that a benefit order had no notice that a member's statements in his application as to his use of intoxicants were not true, and that it had notice as to his drinking, are not contradictory, where the evidence shows that the applicant had been intemperate, which was generally known, and that previous to his application he had taken the liquor cure, which was generally believed to be effectual.—*Brown v. Sovereign Camp, Woodmen of the World*, 49 S. W. 893, 20 Tex. Civ. App. 373.

491. Where in an action on a benefit certificate the court's conclusion of law disclosed that plaintiff was only entitled to judgment for \$1,000, with interest thereon from the date of the

judgment, a judgment including previous interest was erroneous.—*Endowment Rank Supreme Lodge K. P. v. Townsend*, 83 S. W. 220, 36 Tex. Civ. App. 651.

492. In an action on a mutual benefit certificate, made part of the petition, when defendant pleads a general denial, and the benefit certificate is not introduced in evidence, a judgment for plaintiff will be reversed for want of evidence.—*Knights of Honor v. Fortson*, 14 S. W. 922.

493. In an action on a fraternal insurance policy for \$1,000, which expressly provided that the insurer might retain \$50 out of each \$1,000 for the purpose of constituting a special fund, a judgment for the full amount of the policy need not be reversed, but will be reformed so as to allow the reduction.—*National Council of the Knights and Ladies of Security v. Sealey*, 162 S. W. 455.

Appeal and Error.

494. In an action for breach of a mutual benefit certificate, defendant held not prejudiced by the alleged erroneous admission in evidence of a certificate issued by defendant's predecessor.—*Supreme Lodge K. P. v. Mims*, 167 S. W. 835.

495. Determination of the jury on conflicting evidence as to whether a member of a beneficial association was sick all the time that she was in arrears for dues, so that under her contract she could not be suspended, is conclusive on appeal.—*Grand Temple & Tabernacle in the State of Texas of the Knights & Daughters of Tabor of the International Order of Twelve v. Counts*, 157 S. W. 1180. by Google

Appeal and Error—(A) New Trial.—The sufficiency of the evidence to support the verdict cannot be raised upon appeal, unless it has been presented to the court below in a motion for a new trial.^{501 498 500}

(B) Action of Jury.—The determination of the jury on conflicting evidence as to whether a member was sick all the time she was in arrears for dues so that under her contract she could not be suspended, is conclusive on appeal.⁴⁹⁵ In a suit on a policy defended on the ground of non-liability by reason of failure to pay assessments, the credibility of the witnesses and the weight to be given their conflicting testimony was for the jury and its verdict could not be disturbed.⁵⁰³

(C) The Certificate.—In an action for breach of a certificate the defendant was held not prejudiced by the alleged erroneous admission in evidence of a certificate issued by its predecessor.⁴⁹⁴ Where no objection was made at the trial as to the manner of proving the loss of a certificate and its contents, no question could be raised relative thereto on appeal.⁴⁹⁸

(D) Insufficiency of Evidence.—A general assignment of insufficiency of the evidence without particularizing is too general to require consideration.⁵⁰⁵ Further, such an assignment would

496. Assignment in motion for new trial held wholly inadequate to raise the issue of the insufficiency of the evidence upon the whole case to support the verdict for plaintiff.—Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of International Order of Twelve v. Johnson, 156 S. W. 532.

497. Plaintiff's request for the filing of conclusions of law and fact, not made until after the overruling of her motion for new trial, held waived.—Overton v. Colored Knights of Pythias, 173 S. W. 472.

498. In an action on a benefit insurance certificate, where no objection was made at the trial to the manner of proving the loss of the certificate and its contents, no question could be raised relative thereto on appeal.—Sovereign Camp Woodmen of the World v. Ruedrich, 158 S. W. 170.

499. Where defendant insurer admitted liability, paying the amount of the certificate into court, it could not on appeal assert that the beneficiary was not entitled to the full amount so paid.—Wright v. Grand Lodge K. P., Colored, 173 S. W. 270.

500. Where a statement under an assignment of error did not show that the alleged errors complained of were made grounds of a motion for new trial, and contained no part of the evidence relating to, or bearing on, the propositions advanced thereunder, the assignment could not be considered.—

Supreme Lodge K. P. v. Mims, 167 S. W. 835.

501. The sufficiency of the evidence to support the verdict cannot be raised upon appeal, unless it has been presented to the court below in a motion for a new trial.—Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of International Order of Twelve v. Johnson, 156 S. W. 532.

502. Where counsel for defendant insurer consented to the appellate court's determination of their counsel fees, the court will allow a fee, though there be no evidence before it, instead of remanding the cause.—Wright v. Grand Lodge K. P., Colored, 173 S. W. 270.

503. In a suit on policy defended on the ground of nonliability by reason of failure to pay assessments, the credibility of the witnesses and the weight to be given their conflicting testimony was for the jury, and its verdict could not be disturbed.—Modern Woodmen of America v. Yanowsky, 187 S. W. 728.

504. Under rule 62a for Court of Civil Appeals (149 S. W.) and where policy showed that parties intended that it should be a severable contract, judgment for plaintiff would be reversed in so far as it affected interest claimed as an heir and by assignment of other heirs of deceased joint beneficiary.—Modern Woodmen of America v. Yanowsky, 187 S. W. 728.

not be considered where no exception was taken to the trial court's charge submitting the issue.⁵⁰⁷

(E) Tender in Lower Court.—Where the insurer admitted liability, paying the amount of the certificate into court, it could not on appeal assert that the beneficiary was not entitled to the full amount so paid.⁴⁹⁹

(F) Request for Filing of Conclusions of Law and Fact.—Such a request is held waived when made after the overruling of the motion for a new trial.⁴⁹⁷

(G) Judgment on a Severable Contract.—Such a judgment for plaintiff would be reversed in so far as it affected interest claimed as an heir and by assignment of other heirs of deceased joint beneficiary.⁵⁰⁴

505. An assignment of error in that "the verdict was not sustained by the evidence, the facts proven being insufficient on which to base a verdict for the plaintiff," was too general to require consideration.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

506. Assignment of error complaining of material omissions from court's general charge, not containing charge objected to, or any reference to page

of record where charge might be found, presented nothing for consideration.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

507. Under Acts 33rd Leg. ch. 59, the complaint as to the sufficiency of the evidence to support a verdict would not be considered where no exception was taken to the trial court's charge submitting the issue.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

STATUTORY LAW

FRATERNAL BENEFIT INSURANCE

Caption to Act to Define, Regulate and Control Fraternal Benefit Societies.

1. An act to define, regulate and control fraternal benefit societies; defining a lodge system and a representative form of government; providing for the issuance of certificates and the investment and distribution of funds; limiting membership and beneficiaries in said societies; naming the duties and authority of the Commissioner of Insurance and Banking; fixing an annual license and way to cancel same; providing for the valuation of policies and how to ascertain the solvency of said societies; regulating foreign and certain domestic societies; providing that beneficiary associations heretofore organized shall be subject to the provisions of this law; repealing Chapter 36, Acts of the First Called Session of the Thirty-first Legislature, and Chapter 22, Acts of the Second Called Session of the Thirty-first Legislature, and Chapter 92, Acts of the Regular Session of the Thirty-second Legislature, and all other laws in conflict therewith, and declaring an emergency. (Acts 33rd Leg., Chap. 113, Caption.)

Fraternal Benefit Societies Defined.

2. Any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with Section 5 hereof, is hereby declared to be a fraternal benefit society. (33rd Leg., Chap. 113, Sec. 1.)

Lodge System Defined.

3. Any society having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated and admitted in accordance with the constitution, laws, rules, regulations and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once in each month, shall be deemed to be operating and (on) the lodge system. (Id., Sec. 2.)

Representative Form of Government Defined.

4. Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and

laws for a supreme legislative or governing body, composed of representatives, elected either by the members or by delegates elected, directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws; provided, that the elective members shall constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws; provided further, that the meetings of the supreme or governing body, and the election of officers, representatives or delegates, shall be held as often as once in four years. The members, officers, representatives or delegates of a fraternal benefit society shall not vote by proxy. (Id., Sec. 3.)

—Note.—A fraternal beneficiary association organized under the laws of another State, and doing business under a license in Texas prior to the date, when the laws of Texas, governing such associations, became effective (July 12, 1909), and continuously since that date, is not required, as a prerequisite to renewal of its Texas license, to hold meetings of its supreme governing body as often as once every four years unless the laws of its home State so prescribe. (Opinion of Attorney General, May 23, 1913.)

Exemptions.

5. Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein. (Id., Sec. 4.)

Benefits.

6. Every society transacting business under this act shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident or old age; provided, the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years and may provide for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all or such portion of the face value of his certificate as the laws of the society may provide; provided, that nothing in this act contained shall be so construed as to prevent the issuing of benefit certificates for a term of years, less than the whole of life which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical con-

tributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four per cent per annum; provided, that this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contribution, and to contracts affected by such readjustment.

Any society which shall show by the annual valuation hereinafter provided for, that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American Experience Table and five per cent interest may grant to its members extended and paid-up protection, or such withdrawal equities as its constitution and laws may provide; provided, that such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. (Id., Sec. 5.)

Whole Family Protection for Members of Fraternal Benefit Societies.

6a. An act to provide whole family protection for members of fraternal benefit societies, and declaring an emergency. (Caption.)

Section 1. Any fraternal benefit society authorized to do business in this State and operating on the lodge plan, may provide in its constitution and by-laws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of two and eighteen years at next birthday, for whose support and maintenance a member of such society is responsible. Any such society may at its option organize and operate branches for such children and membership in local lodges and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society. The total benefits payable as above provided shall in no case exceed the following amounts at ages at next birthday at time of death, respectively as follows:

Between the ages of	Amount	Between the ages of	Amount
2 and 3	\$34	8 and 9	\$200.00
2 and 4	40	9 and 10	240.00
4 and 5	48	10 and 11	300.00
5 and 6	58	11 and 12	380.00
6 and 7	140	12 and 13	460.00
7 and 8	160	13 and 16	520.00
		16 and 18	600.00

Section 2. No benefit certificates as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the laws of the society, nor shall

any such benefit certificate be issued unless the society shall simultaneously put in force or have in force at time of issue of said certificate at least five hundred such certificates, on each of which at least one assessment has been paid, nor where the number of lives represented by like certificates falls below five hundred. The death benefit contributions to be made upon such certificate shall be based upon the "Standard Industrial Mortality Table" or the "English Life Number Six" and a rate of interest not greater than 4 per cent per annum, or upon a higher standard; provided that contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the by-laws, and provided further that extra contributions shall be made if the reserves hereafter provided for become impaired.

Section 3. Any society entering into such insurance agreement shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions, as provided in Section 2, and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society, and shall not be liable for nor used for the payment of the debts and obligations of the society other than the benefits herein authorized; provided, that a society may provide that when a child reaches the minimum age for initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society, provided that such surrender will not reduce the number of lives insured in the branch below five hundred, and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificate, nor the person who paid the contribution, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership.

Section 4. An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the Commissioner of Insurance and Banking by any society availing itself of the provisions hereof. The separation of assets, funds and liabilities required hereby shall not be terminated, rescinded or modified, nor shall the funds be diverted for any use other than as specified in Section 3, as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in any liquidation, reinsurance, merger, or other change in the condition of the status of the society.

Section 5. Any society shall have the right to provide in its laws and the certificate issued hereunder for specified payments on ac-

count of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society as its constitution and by-laws may provide.

Section 6. In the event of the termination of membership in the society by the person responsible for the support of any child, on whose account a certificate may have been issued, as provided herein, the certificate may be continued for the benefit of the estate of the child, provided, the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child, who shall assume the payment of the required contributions. (Approved April 4, 1917. Takes effect 90 days after adjournment.)

Beneficiaries.

7. The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member; provided, that if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and from time to time have the same changed in accordance with the laws, rules or regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member; provided, that any society may, by its laws, limit the scope of beneficiaries within the above classes. (Id., Sec. 6.)

Note.—A fraternal beneficiary association, whose laws provide that the affianced husband or wife of a member may be a beneficiary in its certificate, and whose laws fail to provide for the levy of special assessments when necessary to meet its obligations, cannot be licensed to do business in Texas. (Opinion of Attorney General, January 1, 1913.)

Authorizing Certain Organizations to Be Beneficiaries of Fraternal Benefit Certificates.

7a. An act to authorize fraternal benefit societies to issue certificates to their members in which eleemosynary, religious, or educational societies, associations or corporations may be named as beneficiaries, and declaring an emergency. (Caption.)

Section 1. That fraternal benefit societies, heretofore or hereafter incorporated by the State of Texas or licensed to do business therein, shall be authorized to provide in their constitutions, by-laws or fundamental laws for the issuance of benefit certificates to their members, wherein any association, society or corporation, organized

and operated for religious, eleemosynary or educational purposes may be named as beneficiary. (Approved March 30, 1917. Takes effect 90 days after adjournment.)

Qualifications for Membership.

8. Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society, provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. (Id., Sec. 7.)

Certificate.

9. Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation (or, if a voluntary association, the articles of association), the constitution and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same, certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to said charter, or articles of incorporation, or articles of association, if a voluntary association, a constitution or laws duly made or enacted subsequent to the issuance of the benefit certificates shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership. (Id., Sec. 8.)

Funds.

10. Any society may create, maintain, invest, disburse and apply an emergency surplus or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in Section 5 of this act. The funds from which benefits shall be paid, and the funds from which the expenses of the society shall be defrayed shall be derived from periodical or other payments by the members of the society and accretions of said funds; provided, that no society, domestic or foreign, shall hereafter be incorporated or ad-

mitted to transact business in this State which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, with interest assumption not more than four per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent per annum.

Deferred payments or installments of claims shall be considered as fixed liabilities on the happenings of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. (Id., Sec. 9.)

Note.—A fraternal beneficiary association which provides, in its charter, or constitution and by-laws, for different benefits, beneficiaries, or disbursements of its funds to that provided by the laws of Texas, cannot be licensed to do business in Texas. (Opinion of Attorney General, April 15, 1913.)

Investments.

11. Every society shall invest its funds only in securities permitted by the laws of this State for the investment of the assets of life insurance companies; provided, that any foreign society permitted or seeking to do business in this State which invests funds in accordance with the laws of the State in which it is incorporated shall be held to meet the requirements of this act for the investment of funds; provided, that in case the constitution and by-laws of the grand lodge or governing body of any such association provides that all or any part of the beneficiary or mortuary or insurance fund of such association that is paid in by or collected from the members of such subordinate or local lodge may be retained in the custody of and controlled and managed by such subordinate or local lodge, and designate what officers of such subordinate or local lodge shall have the custody and control of such fund and authorize such local officers to loan or invest the same, and such local officer shall have executed and filed, and shall from time to time when required by the Commissioner of Insurance and Banking, file with the Commissioner of Insurance and Banking such bond or other written instrument to be prescribed and approved in terms and amount by the Commissioner of Insurance and Banking as will indemnify such fund against waste, depletion or loss through loans, investments or otherwise, then such fund so secured shall be exempt from the provisions of this act. (Id., Sec. 10.)

Note.—The bond referred to in above section should be made payable to the Commissioner of Insurance and Banking and all persons legally interested in the fund. Form recommended by Attorney General. (Opinion of Attorney General, December 14, 1911.)

Distribution of Funds.

12. Every provision of the laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes, or the net accretions of either or any of said funds shall be used for expenses. (Id., Sec. 11.)

Organization.

13. Seven or more persons, citizens of the United States, and a majority of whom are citizens of this State, who desire to form a fraternal benefit society, as defined by this act, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

First. The proposed corporate name of the society, which shall (not) so closely resemble the name of any society or insurance company already transacting business in this State as to mislead the public or to lead to confusion.

Second. The purpose for which it is formed, which shall not include more liberal powers than are granted by this act; provided, that any lawful, social, intellectual, educational, charitable, benevolent, moral or religious advantages may be set forth among the purposes of the society, and the mode in which its corporate powers are to be exercised.

Third. The names, residences and official titles of all the officers, trustees, directors or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year, or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

Fourth. Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the Commissioner of Insurance and Banking, conditioned upon the return of the advance payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the Commissioner of Insurance and Banking, who may require such further information as he deems necessary, and if the purposes of the society conform to the requirements of this act, and all pro-

visions of law have been complied with, the Commissioner of Insurance and Banking shall so certify and retain and record (or file) the articles of incorporation, and furnish the incorporators a preliminary certificate authorizing said society to solicit members as hereinafter provided.

Upon receipt of said certificate from the Commissioner of Insurance and Banking said society may solicit members for the purpose of completing its organization and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its Table of Rates as provided by its constitution and laws, and shall issue to each such applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, and all such applications for death benefits shall have been regularly examined by legally qualified practicing physicians and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established ten subordinate lodges or branches into which said five hundred applicants have been initiated; nor until there has been submitted to the Commissioner of Insurance and Banking, under oath of the president and secretary or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation contracted, when valued for death benefits upon the basis of the National Fraternal Congress Table of Mortality, as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, at the option of the society, and for disability benefits by tables based upon reliable experience, and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent per annum; nor until it shall be shown to the Commissioner of Insurance and Banking by the sworn statement of the treasurer or corresponding officer of such society that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars; all of which shall be credited to the mortuary or disability fund on account of such applicants and no part of which may be used for expenses.

Said advanced payments shall, during the period of organization, be held in trust, and if the organization is not completed within one year as hereinafter provided, returned to said applicants.

The Commissioner of Insurance and Banking may make such examination and require such further information as he deems advisable, and upon presentation of satisfactory evidence that the society has complied (complied) with all the provisions of law, he shall issue to such society a certificate to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate. The Commissioner of Insurance and Banking shall cause a record of such certificate to be made and a certified copy of such record may be given in evidence with like effect as the original certificate.

No preliminary certificate granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the Commissioner of Banking and Insurance upon cause shown; unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided; and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of said preliminary certificate, or at the expiration of said extended period, unless such society shall have completed its organization and commenced business as herein provided. When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void. Every such society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs and the fixing and readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to, or amend such constitution and by-laws and shall have such other powers as are necessary and incidental to carrying into effect the object and purposes of the society. (Id., Sec. 12.)

Note.—(1) The organizers of a fraternal beneficiary association and to whom a preliminary certificate authorizing them to solicit members, but not to issue certificates or policies, cannot assign their rights under such preliminary certificate to other parties, nor can any other parties than those named in the preliminary certificate perfect the organization and obtain a charter. (Opinion of Attorney General, July 25, 1913.)

(2) The bond mentioned in above section should be signed and acknowledged by the incorporators of the association as principal and should be made payable to the Commissioner of Insurance and Banking. (Opinion of Attorney General, December 21, 1909.)

Powers Retained—Reincorporation—Amendments.

14. Any society now engaged in transacting business in this State may exercise, after the passage of this act, all of the rights conferred thereby, and all of the rights, powers and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this act, if incorporated; or if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided therein or in its constitution and laws, and all such amendments shall be filed with the Commissioner of Insurance and Banking and shall become operative upon such filing, unless a later time be provided in such amendments or in its articles of incorporation, constitution or laws. (Id., Sec. 13.)

Mergers and Transfers.

15. No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer and filed with the Commissioner of Insurance and Banking of this State, together with a sworn statement of the financial condition of each of said societies by its president and secretary, or corresponding officers, and a certificate of such officers, duly verified under oath of said officers of each of the contracting societies, that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of said societies.

Upon the submission of said contract, financial statements and certificates, the Commissioner of Insurance and Banking shall examine the same, and if he shall find such financial statements to be correct and the said contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of said societies, he shall approve said merger or transfer, issue his certificate to that effect, and thereupon the said contract or merger or transfer shall be of full force and effect. In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the Commissioner of Insurance and Banking. (Id., Sec. 14.)

Annual License.

16. Societies which are now authorized to transact business in this State may continue such business until the first day of April next succeeding the passage of this act, and the authority of such societies may thereafter be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, the license shall continue in full force and effect until the

new license be issued or specifically refused. For each such license or renewal the society shall pay the Commissioner of Insurance and Banking ten dollars. A duly certified copy or duplicate of such license shall be prima facie evidence that the license (licensee) is a fraternal benefit society within the meaning of this act. (Id., Sec. 15.)

Admission of Foreign Society.

17. No foreign society now transacting business, organized prior to the passage of this act, which is not now authorized to transact business in this State, shall transact any business herein without a license from the Commissioner of Insurance and Banking. Any such society shall be entitled to a license to transact business within this State upon filing with the Commissioner of Insurance and Banking a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officer; a power of attorney to the Commissioner of Insurance and Banking as hereinafter provided; a statement of its business under oath of its president and secretary or corresponding officer in the form required by the Commissioner of Insurance and Banking, duly verified by an examination made by the supervising insurance official of its home State or other State satisfactory to the Commissioner of Insurance and Banking of this State; a certificate from the proper official in its home State, province or country that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical or other payments by persons holding similar contracts; and upon furnishing the Commissioner of Insurance and Banking such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the State, Territory, district, province or country where it is organized, he shall issue a license to such society to do business in this State until the first day of the succeeding April, and such license shall, upon compliance with the provisions of this act, be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, that license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign society desiring admission to this State shall have the qualifications required of domestic societies organized under this act and have its assets invested as required by the laws of the State, Territory, district, country or province where it is organized. For each such license or renewal the society shall pay the Commissioner of Insurance and Banking ten dollars. When the Commissioner of Insurance and Banking refuses to license any society or revokes its authority to do business in this State, he shall reduce his ruling, order or decision to

writing and file the same in his office, and shall furnish a copy thereof, together with a statement of his reasons, to the officers of the society, upon request, and the action of the Commissioner of Insurance and Banking shall be reviewable by proper proceedings in any court of competent jurisdiction within the State; provided, however, that nothing contained in this or the preceding section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this State during the time such society was legally authorized to transact business herein. (Id., Sec. 16.)

Note.—All the provisions of above section must be complied with before a foreign association can be lawfully licensed, and if the Commissioner of Insurance and Banking desires further information, he may also make, or have an examination made, of the association before issuing a license to do business in Texas. (Opinion of Attorney General, March 18, 1910.)

Power of Attorney and Service of Process.

18. Every society, whether domestic or foreign, now transacting business in this State shall, within thirty days after the passage of this act, any (and) every such society hereafter applying for admission, shall before being licensed, appoint in writing the Commissioner of Insurance and Banking, and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society and that the authority shall continue in force so long as any liability remains outstanding in this State.

Copies of such appointment certified by said Commissioner of Insurance and Banking shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall only be made upon such attorney, must be made in duplicate upon the Commissioner of Insurance and Banking, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such society; provided, however, that no such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading (pleading) or defense in less than thirty days from the date of mailing the copy of such service to such society. When legal process against any such society is served upon said Commissioner of Insurance and Banking he shall forthwith forward by registered mail one of the duplicate copies prepaid and directed to its secretary or corresponding officer. Legal process shall not be served upon any such society except in the manner provided herein. (Id., Sec. 17.)

Place of Meeting—Location of Office.

19. Any domestic society may provide that the meetings of its legislative or governing body may be held in any State, district, province or Territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this State; but its principal office shall be located in this State. (Id., Sec. 18.)

No Personal Liability.

20. Officers and members of the supreme, grand or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society; but the same shall be payable only out of the funds of such society and in the manner provided by its laws. (Id., Sec. 19.)

Waiver of the Provisions of the Laws.

21. The constitution and laws of the society may provide that no subordinate body nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members.

All grand lodges, by whatever name known, whether incorporated or not, holding charters from any supreme governing body, which were conducting business in this State upon the passage of this act, as a fraternal beneficiary association, upon what is known as the separate jurisdiction plan, shall be treated as single State organizations, and all reports required by the provisions of this act shall be made and furnished by the officers of such supreme State governing body and shall embrace and contain the transactions, liabilities and assets of such State organization. (Id., Sec. 20.)

Benefit Not Attachable.

22. No money or other benefit, charity or relief or aid to be paid, provided or rendered by any such society shall be liable to attachment, garnishment or other process, or be seized, taken, or appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary or any other person who may have a right thereunder, either before or after payment. (Id., Sec. 21.)

Constitution and Laws—Amendments.

23. Every society transacting business under this act shall file with the Commissioner of Insurance and Banking a duly certified copy of all amendments of, or additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws, as amended, changed, or added

to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof. (Id., Sec. 22.)

Annual Reports.

24. Every society transacting business in this State shall annually, on or before the 1st day of March, file with the Commissioner of Insurance and Banking in such form as he may require, a statement under oath of its president and secretary or corresponding officers, of its condition and standing on the 31st day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the Commissioner of Insurance and Banking may deem necessary to a proper exhibit of its business and plan of working. The Commissioner of Insurance and Banking may at other times require any further statement he may deem necessary to be made relating to such society.

In addition to the annual report herein required, each society shall annually report to the Commissioner of Insurance and Banking a valuation of its certificates in force on December 31st last preceding, excluding those issued within the year for which the report is filed, in cases where the contribution for the first year in whole or in part are used for current mortality and expenses; provided, the first report of valuation shall be made as of December 31, 1913, such report of valuation shall show, as contingent liabilities the present mid-year value of the promised benefits provided in the constitution and laws of such society, under certificates then subject to valuation; and, as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and said net value, when computed in case of monthly contributions, may be the means of the terminal values for the end of the preceding and of the current insurance years.

Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the Department of Insurance of the home State of the society, and shall be filed with the Commissioner of Insurance and Banking within ninety days after the submission of the last preceding annual (annual) report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the National Fraternal Congress Table of Mortality, as adopted by the National Congress, August 23, 1899; or, at the option of the society, any higher table; or, at its option, it may use a table based upon the society's own experience of at least twenty years, and covering not less than one hundred thousand lives with in

terest assumption not more than four per centum per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society; provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experiences, and in such cases a separation of the funds shall not be required.

The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent (solvent) so long as the funds (funds) in its possession are equal to or in excess of its matured liabilities.

Beginning with the year 1914, a report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed, shall be printed and mailed to each beneficiary member of the society not later than June 1st of each year; or, in lieu thereof such report of valuation and showing of the society's condition as thereby disclosed, may be published in the society's official paper, and the issue containing the same mailed to each beneficiary member of the society. The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws additional, increased or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per centum per annum. (Id., Sec. 23.)

Provisions to Insure Future Security.

25. If the valuation of the certificates, as hereinbefore provided, on December 31, 1917, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of deficiency as shown in the valuation as of December 31, 1917. If at any succeeding triennial valuation such society does not show at least the same condition, the Commissioner of Insurance and Banking shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to

maintain the condition required herein, the Commissioner of Insurance and Banking may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of Section 24 of this act, or in the case of a foreign society, its license may be canceled in the manner provided in this act.

Any such society, shown by any triennial valuation, subsequent to December 31, 1917, not to have maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December 31, 1917, or thereafter, as to all new members, admitted be subject, so far as stated rates of contributions are concerned, to the provisions of Section 12 of this act, applicable in the organization of new societies; provided, that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the said new members may be placed in a separate class and their certificates valued as an independent society in respect of contributions and funds. (Id., Sec. 23a.)

Same.

26. In lieu of the requirements of Sections 23 and 23a, any society accepting in its laws the provisions of this section may value its certificates on a basis herein designated, "accumulation basis," by crediting each member with the net amount contributed for each year and with interest at approximately the next (net) rate earned and by charging him with his share of the losses for each year, herein designated "cost of insurance," and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this State, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death less the credit to the member, except as specifically provided in its articles of laws or contracts no charge shall be carried forward from the first valuation hereunder against any member for any past share of losses exceeding the contributions and credit. If, after the first valuation, any member's share of losses for any year exceeds his credit, including the contribution for the year, the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contribution especially created or required for such purpose.

Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificates issued, rerated or readjusted on a basis provided for adequate rates with adequate reserves to mature such certificates upon assumption for mortality and interest recognized by the law of this State shall be valued on such basis, herein designated the "Tabular Basis"; provided, that if on the first valuation under this Section a deficiency in reserve shall be shown for any such certificate, the same shall be valued on the accumulation basis.

Whenever in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve or from increased contributions or by an increase in the number of assessments applied to the society, as a whole or to classes of members as may be specified in its laws, savings from a lower amount of death losses may be returned in like manner as may be specified in its laws. If the laws of the society so provide, the assets representing the reserves of any separate class of members may be carried separately for such class as if in an independent society, and the required reserve accumulation (accumulation) of such class, so set apart shall not thereafter be mingled with the assets of other classes of the society.

A table showing the credits to individual members for each age and year of entry and showing opposite each credit the tabular reserve required on the whole life or other plan of insurance specified in the contract, according to assumptions for mortality and interest recognized by the law of this State and adopted by the society, shall be filed by the society with each annual report and also be furnished to each member before July 1st of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the credit for such member and giving the tabular reserve and level rate required for a transfer carrying out the plan of insurance specified in the contract. No table or statement need be made or furnished where the reserves are maintained on the tabular basis. For this purpose individual bookkeeping accounts for each member shall not be required and all calculations may be made by actuarial methods.

Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis, and the reserves on the tabular basis pursuant to its laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society. (Id., Sec. 23c.)

Examination of Domestic Societies.

27. The Commissioner of Insurance and Banking, or any person he may appoint, shall have the power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all the books, papers and documents that relate to the business of the society, and may summon and qualify as witnesses under oath and examine its officers, agents and employes or other person in relation to the affairs, transactions and conditions of the society.

The expense of such examination shall be paid by the society examined upon statement furnished by the Commissioner of Insurance and Banking and the examination shall be made at least once in three years.

Whenever after examination the Commissioner of Insurance and Banking is satisfied that any domestic society has failed to comply with any provisions of this act, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently; or whenever any domestic society, after the existence of one year or more, shall have a membership of less than four hundred (or shall determine to discontinue business) the Commissioner of Insurance and Banking may present the facts relating thereto to the Attorney General, who shall, if he deem the circumstance warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, said society shall be enjoined from carrying on any further business and some person shall be appointed receiver of such society and shall proceed at once to take possession of the books, papers, moneys and other assets of the society, and shall forthwith, under the direction of the court, proceed to close the affairs of the society, and to distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the Attorney General against any such society until after notice has been duly served on the chief executive officers of the society and a reasonable opportunity given to it, on a date to be named in said notice, to show cause why such proceeding should not be commenced. (Id., Sec. 24.)

Application for Receiver, Etc.

28. No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in the State unless the same is made by the Attorney General. (Id., Sec. 25.)

Examination of Foreign Societies.

29. The Commissioner of Insurance and Banking, or any person whom he may appoint, may examine any foreign society transacting or applying for admission to transact business in this State. The said Commissioner of Insurance and Banking may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers and documents that relate to the business of the society, and may summon and qualify as witnesses under oath and examine its officers, agents and employes and other persons in relation to the affairs, transactions and conditions of the society. He may, in his discretion, accept, in lieu of such examination, (an examination) of the Insurance Department of the State, Territory, district, province or country where such society is organized. The actual expense of examiners making any such examination shall be paid by the society, upon statements furnished by the Commissioner of Insurance and Banking. If any such society or its officers refuse to submit (to) such examination or to comply with the provisions of the Section relative thereto, the authority of such society to write new business in this State shall be suspended, or license refused until satisfactory evidence is furnished by the Commissioner of Insurance and Banking relating to the condition and affairs of the society, and during such suspension the society shall not write any new business in this State. (Id., Sec. 26.)

Note.—See note under Section 17.

No Adverse Publications.

30. Pending, during or after an examination or investigation of any such society, either domestic or foreign, the Commissioner of Insurance and Banking shall make public no financial statement, report or finding, nor shall he permit to become public any financial statement, report or finding affecting the status, standing or rights of any such society, at its home office, nor until such society shall have been afforded a reasonable opportunity to answer any such financial statement, report of (or) finding, and to make such showing in connection therewith as it may desire. (Id., Sec. 27.)

Revocation of License.

31. When the Commissioner of Insurance and Banking on investigation is satisfied that any foreign society transacting business under this act has exceeded its powers, or has failed to comply with any provisions of this act, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require said society, on a date named, to show cause why its license should not be revoked. If, on the date named in said notice, such objections

have not been removed to the satisfaction of said Commissioner of Insurance and Banking, or the society does not present good and sufficient reasons why its authority to transact business in this State should not at that time be revoked, he may revoke the authority of the society to continue business in this State. All decisions and findings of the Commissioner of Insurance and Banking made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in Section 16 of this act. (Id., Sec. 28.)

Exemption of Certain Societies.

32. Nothing contained in this act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias (exclusive of the insurance department of the supreme lodge Knights of Pythias) and the Junior Order of the United American Mechanics (exclusive of the beneficiary or insurance branch of the National Council Junior Order United States American Mechanics) or societies which limit their membership to any one hazardous occupation nor to similar societies which do not issue insurance certificates nor to an association of local lodges of a society now doing business in this State which provides death benefits not exceeding five hundred dollars to any one person or disability benefits not exceeding three hundred dollars in any one year to pay one person or both, nor to any contracts of reinsurance business on such plan in this State, nor to domestic societies which limit their membership to the employes of a particular city or town, designated firm, business house or corporation, nor to domestic lodges, orders or associations of a purely religious, charitable and benevolent description which do not provide for a death benefit of more than one hundred dollars or for disability benefits of more than one hundred and fifty dollars to any person in one year.

The Commissioner of Insurance and Banking may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this act.

Any fraternal benefit society heretofore organized and incorporated and operating within the definition set forth in Sections 1, 2 and 3 of this act, providing for the benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this act and shall have all the privileges and shall be subject to all the provisions and regulations of this act, except that the provisions of this act requiring medical examinations, valuations of benefit certificates and that the certificates shall specify the amount of benefits, shall not apply to such society. (Id., Sec. 29.)

Note.—(1) A fraternal benefit society chartered and operating under a license of the Commissioner of Insurance and Banking prior to the

enactment of the statute of 1913, governing such societies, cannot be exempted from complying with the requirements of the last mentioned statute by merely reducing the amount of its benefits below \$300 for death benefits or \$500 for disability benefits in one year, but is nevertheless subject to said statute regardless of the amount of its benefits. The exemption of certain associations under Section 29 of said act if the benefits are not in excess of the above amounts, refers only to a voluntary unincorporated association and not to a corporation already operating under a charter and a license. (Opinion of Attorney General, June 27, 1913.)

(2) A fraternal benefit society issuing certificates, which are in effect insurance policies, is thereby doing an insurance business, and must comply with the laws governing fraternal benefit societies, including the provision requiring such organizations to obtain a certificate of authority to do such business. (Opinion of Attorney General, July 8, 1913.)

Taxation.

33. Every fraternal benefit society organized or licensed under this act is hereby declared to be a charitable and benevolent institution, and all of its funds and property shall be exempt from all and every State, county, district, municipal and school tax, other than taxes on real estate and office equipment, when same is used for other than lodge purposes. (Id., Sec. 30.)

Exemption of Certain Associations—Mutual Aid Association.

34. The provisions of this act shall not apply to incorporated or unincorporated mutual relief or benefit or burial associations, operating upon the assessment plan, whose business is confined to not more than one county in the State, or to a territory in two or more adjacent counties included within a radius of not more than twenty-five miles surrounding the city or town in which its principal office is to be located, which is designated in its charter, which are hereby denominated local mutual aid associations; providing that such associations are in no manner directly or indirectly connected, federated or associated with any such association, and do not directly or indirectly contribute to the expense or support of any other such association or to the officers, promoters or managers thereof. And, provided, that no person or officer shall receive from said association any payment on account of organization or other expenses or salaries not a bona fide resident of such county, in which such association is domiciled. The association above mentioned shall annually on or before March 1st file a statement with the Commissioner of Insurance and Banking, which shall be signed and sworn to by the president, secretary and treasurer or the officers holding positions corresponding thereto. Such statement shall show whether the association has during the preceding year done any business outside of the county in which it is domiciled, and shall state whether or not said association is associated, federated or directly or indirectly connected with any other, and shall show what, if anything, has been contributed during the preceding year

by said association, or the members to any person or officer or director thereof for salaries, commissions or promotion expenses and the name and residence of the party or parties receiving the same. Should any person in such affidavit herein provided for make any false statement he shall be deemed guilty of false swearing, and punished as provided by law. The Commissioner of Insurance and Banking may, at his option, and it shall be his duty, if not satisfied with said statement, to demand other additional statements, and examine the books, papers and records of said association, either himself or by some other suitable person, authorized by him. Should it appear to the Commissioner of Insurance and Banking that any such local mutual aid association is not carrying on business as set forth in this section, and is not entitled to the exemption therein set forth, such association shall be subject to and comply with all provisions of this act as a fraternal beneficiary association. Every such local association claiming to be entitled to the benefit of the exemption created by this section shall plainly state upon its certificates, applications and all advertising matter, in a conspicuous manner, that said association is a local mutual aid association, or same shall be deemed subject to all provisions of this act. (Id., Sec. 31.)

Note.—Every corporation which issues policies of insurance must comply with the insurance laws governing insurance corporations. If it assumes, as a fraternal benefit society, to issue indemnity against death, accident or bad health, for a stipulated or periodical premium or assessment, it thereby undertakes to do an insurance business and is not a charitable organization. Such a concern must comply with all the laws regulating fraternal benefit societies, including the obtaining and holding a certificate of the Commissioner of Insurance and Banking, authorizing it to engage in that business. (Opinion of Attorney General, March 7, 1913.)

Penalties.

35. Any person, officer, member or examining physician of any society authorized to do business under this act who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days, nor more than one year, or both, in the discretion of the court; any person who shall willfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a certificate holder in any such society, for the purpose of procuring payment of a benefit named in the certificate of such holder and any person who shall willfully make any false state-

ment in any verified report or declaration under oath required or authorized by this act, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statutes of this State in relation to the crime of perjury.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this State, or who shall solicit membership for, or in any manner assist in procuring membership in such society, not authorized as herein provided to do business as herein defined in this State, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any person who solicits for or organizes lodges of such association as are described in the first section of this act without first obtaining from the Commissioner of Insurance and Banking a certificate of authority showing that the association has complied with the provisions of this act, and is entitled to do business in this State, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than two hundred and fifty dollars, or by imprisonment in the county jail for not less than three nor more than six months, or by both such fine and imprisonment; provided, the provisions of this section shall not be so construed as to prohibit any member or members of a local or subordinate lodge from soliciting any person or persons to become a member of any local or subordinate lodge already in existence; and providing, further, the provisions of this section shall not apply to any member or members of any local or subordinate lodge who participate in, supervise, or directs or conducts the organization or establishment of any local or subordinate lodge within the limits of the county of his or their residence or lodge district. All certificates of authority for agents or solicitors shall be issued by the Commissioner upon application made therefor by any of the general officers of the association, or by any agent whom the properly authorized governing body of the association has, by resolution filed with the Commissioner of Insurance and Banking, duly empowered to make such application, and all such certificates shall be revoked by the Commissioner upon the request of the association, and may be revoked for cause upon like ground, and in like manner as the certificates of authority of agents for life insurance companies under the laws of this State. All such certificates shall be renewed annually and shall expire on the first day of April of each year, and a fee of \$1.00 shall be paid for the use of the State for the issuance of said such certificate.

Any society or any officer, agent or employe thereof neglecting or refusing to comply with or violating any of the provisions of this act, the penalty for which neglect, refusal or violation is not speci-

fied in this section, shall be fined not exceeding two hundred dollars upon conviction thereof. (Id., Sec. 32.)

Repeal of Former Acts.

36. Chapter 36, Acts of the First Called Session of the Thirty-first Legislature and Chapter 22, Acts of the Second Called Session of the Thirty-first Legislature, and Chapter 92, Acts of the Regular Session of the Thirty-second Legislature, and all other laws in conflict with this act are hereby repealed. (Id., Sec. 33.)

Emergency Clause.

37. The fact that a large class of the citizens of Texas carry life insurance policies in the numerous fraternal beneficiary societies of the State, making many families dependent on said organization for life insurance, and the further fact that the present law governing said societies is neither clear nor adequate to properly regulate and control said organizations, creates an imperative public necessity and emergency, requiring that the rule that all bills be read on three several days in each house be suspended, and the same is hereby suspended, and this act shall take effect and be in force as set forth in its provision from and after its passage, and it is so enacted. (Id., Sec. 34.)

STATUTORY LAW

FIDELITY, GUARANTY AND SURETY COMPANIES

	Page
Commissioner of Insurance and Banking.....	195
Duties of the Commissioner.....	196
Incorporation of Insurance Companies (Home).....	207
General Provisions	211-228

Home Companies May Be Incorporated.

1. Private corporations may be created by the voluntary association of three or more persons for the purposes and in the manner hereinafter mentioned. (R. S., Art. 1120.)

For What Purposes Corporations May Be Created.

2. The purposes for which private corporations may be formed are * * *. (R. S., Art. 1121.)

Caption to Act Providing That Corporate Surety Companies May Become Sureties on Bond of State and County Officials.

3. An act to amend Chapter 13, Title 71, of the Revised Civil Statutes of Texas, 1911, providing that corporate surety companies may become sureties on bonds of county and State officials, and district and municipal officials, and declaring an emergency. (Acts 33rd Leg., Chap. 66, Caption.)

To Act as Surety or Guarantor, Trustee, Assignee, Executor, Administrator, Etc.

Be it enacted by the Legislature of the State of Texas: That Articles 4928 and 4929, Chapter 13, Title 71, of the Revised Civil Statutes of Texas, 1911, be and the same are hereby amended so that hereafter they shall read as follows:

4. Private corporations may be created to act as trustee, assignee, executor, administrator, guardian, and receiver, when designated by any person, corporation or court to do so, and to do a general fiduciary and depository business; to act as surety and grantor of the fidelity of employees, trustees, executors, administrators, guardians or others appointed to, or assuming the performance of any trust, public or private, under appointment of any court or tribunal, or under contract between private individuals or corporations; also upon any bond or bonds that may be required to be filed in any judiciary proceedings; also to guarantee any contract or undertaking between individuals or private corporations and the State and municipal corporations or counties, or between

corporations and individuals; to act as executor and testamentary guardian when designated by such decedents; or to act as administrator or guardian when appointed by any court having jurisdiction; also, on any bond or bonds that may be required of any State official, district official, county or official of any school district or of any municipality; provided, that the commissioners' courts of each county shall have the right to reject any or all official bonds made by surety companies and in their discretion may require any or all officials to make their official bonds by personal sureties; provided, also, that any such bond may be accepted and approved by the officer charged by law with the duty of accepting and approving the same without being signed by other securities than such corporation, and provided further, that when any such bond shall exceed fifty thousand dollars in penal sum, the officer or officers charged by law with the duty of approving and accepting such bond may require that such bond be signed by two or more surety companies, or by one surety company and two or more good and sufficient personal sureties, in the discretion of the principal or official of whom the bond is required, and any statute or law to the contrary, or requiring any such bond to be signed by two or more good and sufficient sureties, shall be governed and controlled by the provisions of this article—provided, also, that each corporation, making or offering to make any bond under this article, shall publish in some newspaper of general circulation in the county where such company is organized or has its principal office on the first day of February of each year, a statement of its condition on the previous thirty-first day of December, showing under oath its assets and liabilities that a copy of said statement be filed with the Commissioner of Insurance and Banking before the first of March of the year following, and a fee of \$25 be paid to that officer for filing the same, and that an examination of its affairs may be made at any time by the Commissioner of Insurance and Banking; such examination to be at the expense of the company; provided, that said corporation organized under the provisions of this article shall have a paid-up capital stock of not less than \$100,000, and shall keep on deposit with the State Treasurer money, bonds or other securities in an amount not less than \$50,000; and said securities be approved by the Commissioner of Insurance and Banking, and that this amount be kept intact at all times. And further providing that all foreign corporations transacting the business of a guaranty and fidelity company in this State file with the Commissioner of Insurance and Banking an affidavit showing that such foreign company has on deposit with the State Treasurer of its home State \$100,000 or more, in money, bonds or other securities for the protection of its policyholders. (R. S., 4928, as amended by Sec. 1, Chap. 66, Gen. Laws 33rd Leg.)

Note.—(1) A corporation organized for the purpose of erection or repair of any building or improvement, accumulation and loaning of money for said purposes, for the purchase, sale and subdivision of real property; to act as a trustee, assignee, executor, administrator, guardian or receiver, to do a general fiduciary and depository business, to act as surety and guarantor of the fidelity of employees, go on bonds required in any judicial proceedings, to act as executor and testamentary guardian, to act as administrator or guardian when appointed by court. Held, that a deposit of \$50,000 must be made. (Attorney General's opinion, June 9, 1898.)

(2) The deposit by a company under above law may be made by depositing its own bonds secured by mortgage on its own property. (Attorney General's opinion, October 24, 1901.)

(3) A company for the purpose of acting "as trustee, assignee, executor, administrator, guardian or receiver, when designated by any person, corporation or court so to do and to do a general fiduciary and depository business," must make and publish annual statement as prescribed in above section and pay the fee for filing same; but such a company is not a guaranty and fidelity company, and is not required to make the deposit mentioned. Any company, however, before doing a guaranty, fidelity or surety business must make such deposit in order to obtain a certificate of authority to do such business. (Attorney General's opinion, November 11, 1905.)

(4) A company organized for the purpose of doing business as prescribed in above section, may lawfully be licensed if it has a paid-up capital of \$100,000, notwithstanding its charter authorizes it to have a capital in excess of that amount. (Opinion of Attorney General, August 29, 1910.)

(5) A company organized under the laws of another State, whose charter authorizes it to do the kinds of business mentioned in above section as well as other kinds of insurance, may be licensed to do the business mentioned in said section if it has a paid-up capital of \$100,000, although it has a larger authorized capital; but if it does any other class of business, its entire authorized capital must be first paid up. (Opinion of Attorney General, August 29, 1910.)

(6) A company organized under the above section, before doing a fidelity or surety business, must deposit the securities as therein mentioned; but it may do the other kinds of insurance business as provided in its charter, except fidelity and surety, without being required to make the deposit. (Opinion of Attorney General, December 30, 1910.)

(7) A corporation organized under the laws of the State of Texas in Section 37, Chapter 130, General Laws Twenty-fifth Legislature as amended by Section 1, Chapter 127, General Laws of Twenty-eighth Legislature, R. S., Art. 4928, and whose charter authorizes it to do a general surety business and make fidelity bonds, should obtain a license from the Commissioner of Insurance and Banking, and comply with all the laws governing fidelity, surety and guaranty companies doing business in Texas. (Opinion of Attorney General, December 2, 1912.)

(8) A certificate of deposit is "Securities" within the meaning of the law, and may be deposited by a bonding and surety company in the State Treasury. (Opinion of Attorney General, April 19, 1913.)

(9) Corporate surety companies may become sureties on bonds of all State and county officers, including tax collectors. (Opinion of Attorney General, June 12, 1914.)

Bonds, Undertakings, Obligations, Recognizances or Guaranties May Be Executed by Surety Companies.

5. Whenever any bond, undertaking, recognizance or other obligation is, by law or charter, ordinances, rules and regulations of a municipality, board, body, organization, court, judge or public officer, required or permitted to be made, given, tendered or filed, and whenever the performance of any act, duty or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guarantee may be executed by a surety company, qualified as hereinbefore provided; and such execution by such company of such bond, undertaking, obligation, recognizance or guaranty shall be in all respects a full and complete compliance with every law, charter, rule or regulation that such bond, undertaking, obligation, recognizance or guaranty shall be executed by one surety or by one or more sureties, or that such sureties shall be residents, or householders, or freeholders, or either, or both, or possess any other qualification and all courts, judges, heads of departments, boards, bodies, municipalities, and public officers of every character, shall accept and treat such bond, undertaking, obligation, recognizance or guaranty, when so executed by such company as conforming to, and fully and completely complying with, every requirement of every such law, charter, ordinance, rule and regulation; and provided any suit on any bond issued under Articles 4928 and 4929, shall be brought at the place provided by Article 4934, Revised Statutes, 1911, and if the corporation issuing the bond sued on has no agent in the county where said bond was issued then the Commissioner of Insurance and Banking of this State is made, by consent of the said company, its agents on whom service of process may be held. (R. S., Art. 4929, as amended by Sec. 1, Chap. 66, 33rd Leg.)

Emergency Clause.

6. The fact that there are recurring vacancies in county offices caused by deaths, removals and resignations and that there is now no provision for corporate surety bonds for such officials creates an emergency and an imperative public necessity, requiring a suspension of the constitutional rule which requires that bills be read on three several days, and the same is so suspended, and this act shall take effect and be in force from and after its passage, and it is so enacted. (Acts 33rd Leg., Chap. 66, Sec. 2.)

Must Comply With Requirements of Every Law—Capital Stock of \$100,000—Must Deposit Securities of \$50,000 and \$25,000.

7. Such company to be so qualified to so act as surety or guarantor, must comply with the requirements of every law of this State applicable to such company doing business therein; must be authorized under the laws of the State where incorporated, and under its charter to become surety upon such bond, undertaking, obliga-

tion, recognizance or guaranty; must have a fully paid up and safely invested and unimpaired capital of at least \$100,000; must have good available assets exceeding its liabilities, which liabilities for the purpose of this chapter shall be taken to be its capital stock, its outstanding debts and a premium reserve at the rate of fifty per centum of the current annual premiums on each outstanding bond, undertaking, recognizance and obligation of like character in force; must file with the Commissioner of Insurance and Banking a certified copy of its certificate of incorporation, a written application to be authorized to do business under this chapter and also, with such application, and in each year thereafter a statement verified under oath made up to December 31st preceding, stating the amount of its paid-up cash capital, particularizing each item of investment, the amount of premiums upon existing bonds, undertakings, recognizances and obligations of like character in force upon which it is surety; the amount of liability for unearned portion thereof estimated at the rate of fifty per centum of the current annual premiums on each such bond, undertaking, recognizance and obligation in force, stating also the amount of its outstanding debts of all kinds, and such further facts as may be by the laws of this State required of such company in transacting business therein; and if such company be organized under the laws of any other State than this State it must also have on deposit with a State officer of one of the States of the United States not less than \$100,000 in good securities, deposited with and held by such officer for the benefit of the holders of its obligations; must also appoint an attorney in this State upon whom process of law can be served, which appointment shall continue until revoked by another attorney substituted, and must file with the Commissioner of Insurance and Banking written evidence of such appointment, which shall state the residence and office of such attorney; and such service of process may also be made upon the Commissioner of Insurance of this State, by virtue of his office, and shall be as effective as if made upon said attorney; and must also have on deposit with the Treasurer of this State at least \$50,000 in good securities, worth at par and market value at least that sum, of the value of which securities the Commissioner of Insurance shall judge, held for the benefit of the holders of the obligations of such company; said securities so deposited with said Treasurer to remain with him in trust to answer any default of said company as surety upon any such bond, undertaking, recognizance or other obligation, established by final judgment upon which execution may lawfully be issued against said company; said Treasurer and his successors in office being hereby directed to so receive and hereafter retain such deposit under this act in trust, for the purposes hereof; such company, however, at all times to have the right to collect the interest, dividends and

profits upon such securities, and from time to time withdraw such securities or portions thereof, substituting therefor others of equally good character and value, to the satisfaction of said Treasurer, and such securities and substitutes therefor shall be at all times exempt from and not subject to levy under writ or process of attachment; and, further, shall not be sold under any process against such company until after thirty days notice to said company, specifying the time, place and manner of such sale, and the process under which the purpose for which it is to be made, accompanied by a copy of such process; provided, however, that whenever any such company, domestic or foreign, has been engaged in this State in the business contemplated by this act, has made deposit in this State in trust or otherwise, of securities, to answer any default of such company upon any such bond, undertaking, recognizance, guaranty or stipulation, such securities so deposited shall be by the trustee or custodian thereof transferred and delivered to said Treasurer of this State in trust for the same purposes under and subject to all the rights and equities of all parties interested, and to the terms and provisions of this act, and thereupon such deposit shall remain in trust under and subject to the terms and provisions of this act, and whenever such deposit has been made with a trustee by order of any court or other authority, by order or otherwise, to direct such transfer to said Treasurer; and in case such deposit is less than the sum of \$50,000, then said company must deposit with said Treasurer securities sufficient to increase said deposit to said sum of \$50,000, as required by this chapter; provided, domestic corporations chartered for the purpose of doing business under this chapter within this State alone shall be required to deposit securities as hereinbefore provided for to the amount of \$25,000. (R. S. Art. 4930.)

Note.—(1) Guaranty and fidelity companies chartered to do business in Texas alone required to deposit \$25,000 with Treasurer, which amount may be a part of the \$100,000 capital stock. (Attorney General's opinion, December 18, 1901.)

(2) A company cannot make bonds for officers of national banks in Texas, unless it is licensed to do business under the laws of this State. (Opinion of Attorney General, November 13, 1903.)

(3) The statutes relating to the incorporation of other insurance companies govern also in case of a company organized to do business under the provisions of above section, and the charter should be filed with the Commissioner of Insurance and not with the Secretary of State; the amount of the deposit is \$25,000 by a company organized in Texas. (Opinion of Attorney General, July 20, 1906.)

(4) A company chartered and operating under above section may invest its capital in the capital stock of national banks, but not in the capital stock of any other corporation; but it may invest its surplus funds in the capital stock of other dividend-paying corporations. (Opinion of Attorney General, July 25, 1906.)

(5) Fidelity, guaranty and surety companies are insurance companies

and are subject to the laws under which insurance companies obtain and hold certificates of authority to do business, and under which they are forbidden to remove suits to Federal courts. (Opinion of Attorney General, April 15, 1909.)

(6) Bonds or notes secured by first liens on real estate may be deposited by a surety company. (Opinion of Attorney General, October 1, 1910.)

(7) A surety company, organized in another State or Territory, but having no deposit anywhere, may deposit \$100,000 in Texas, and in order to be authorized to do business in Texas, would be required to make an additional deposit with the Treasurer of this State, of \$50,000; but it would not meet the requirements of the law if it deposited only \$100,000 in Texas, and \$50,000 in some other State or Territory. (Opinion of Attorney General, April 3, 1911.)

(8) The deposit of securities required by law to be made by fidelity and security companies with the Treasurer of the State of Texas, is a general, and not a special deposit, and is made for the protection of all the holders of the obligations of the company wherever they may reside, and is not merely for the benefit of Texas policyholders. (Opinion of Attorney General, August 27, 1913.)

(9) "Outstanding debts" in above statute refers to ascertained and liquidated demands and not to suits or claims pending on policies unadjusted and reduced to judgment. Securities deposited by a surety insurance company in Louisiana, under the laws of that State, are available assets. Pendency of litigation among stockholders of such a company is no ground for refusing to license it. Ordinarily a corporation's stock is not reckoned as a liability in determining its solvency. (Opinion of Attorney General, March 3, 1915.)

Commissioner Shall Issue Certificate, When.

8. That the Commissioner of Insurance and Banking, upon due proof by any such company of its possessing the qualifications in this act specified, shall issue to such company a certificate setting forth that such company has qualified, and is authorized for the ensuing year to do business under this chapter, which said certificate shall be evidence of such qualification of such company, and of its authorization to become and to be accepted as sole surety on all bonds, undertakings, recognizances and obligations required or permitted by law or the charter, ordinances, rules or regulations of any municipality, board, body, organization or public officer, and the solvency or credit of such company for all purposes, and its sufficiency as such surety. (R. S., Art. 4931.)

May Surrender Certificate of Qualification But Must File With State Treasurer Bond to Cover Liabilities, Before Withdrawing Securities.

9. That any such company, domestic or foreign, may at any time surrender to the Commissioner of Insurance and Banking its said certificate or qualification, and shall thereupon cease to engage in said business of suretyship; and such company shall thereupon be entitled to the release and return of its said deposit as aforesaid, in manner following: Said company shall file with said Commissioner of Insurance and Banking a statement in writing, under oath, giving the date, name and amount of all its then existing obligations

of suretyship in this State, briefly stating the facts of each case to said Commissioner of Insurance and Banking, who, after examination of the facts, shall require said company to file with the Treasurer of this State a bond, payable to the State, in a sum equal to the whole amount of its liability in this State, under its contracts, conditioned for the faithful performance and fulfillment of all its outstanding obligations, or it may, at its option, reinsure its risks in some surety company authorized to do business in this State, or cancel all bonds on which it is liable, and return a pro rata of the premium received thereon, whenever such cancellation and return can be done without impairing its obligations to third parties. (R. S., Art. 4932.)

Note.—(1) Securities may be withdrawn when the company makes proper statement under oath showing compliance with requirements of the law. Such showing is incomplete unless full amount of each outstanding obligation be given; where obligations or bonds are or have been in litigation, full and final discharge by the court must be shown to obtain release or liability; certified copy of resolution by board of directors authorizing surrender of qualification certificate and withdrawal of securities, together with authenticated showing as to number of directors, number present, and votes for and against the resolution, should also be furnished; and the list of outstanding obligations should show the date, character, full amount, and name of principal signing each. (Opinion of Attorney General, February 25, 1911.)

(2) The bond required to be filed before securities are withdrawn cannot be made to cover judgments already rendered and appealed, but a sufficient amount of securities to pay off such judgments, should they become final, must be retained in the State Treasury. An examination of the company's affairs should be made to ascertain its outstanding liabilities and fix amount of bond required. (Opinion of Attorney General, November 16, 1911.)

(3) A surety company desiring to withdraw from the State and be permitted to withdraw its deposit in the State Treasury, as a ground for such withdrawal files with the Commissioner of Insurance and Banking a reinsurance contract by which its business is reinsured in a company authorized to do business in Texas, a provision in such reinsurance contract that the reinsuring company shall not admit or deny a liability on any bond of the reinsured company unless by consent of the latter, vitiates the contracts to the extent that withdrawal of the securities should not be permitted, the reinsurance not being absolute but merely tentative. (Opinion of Attorney General, December 26, 1912.)

Company May Withdraw From Bond.

10. Any surety company may withdraw from the bond of any trustee, guardian, assignee, receiver, executor, administrator or other fiduciary, in like manner and by like proceedings as is now provided by law in the case of individual sureties. (R. S., Art. 4933.)

May Be Sued in County Where Bond is Filed.

11. If any suit be instituted upon any bond or obligation of any surety company, the proper court of the county wherein said

bond is filed shall have jurisdiction of said cause, and services therein shall be made, either upon the attorney for said company, by this act required to be appointed, or upon the Commissioner of Insurance and Banking and such service shall be to all intents valid and effectual as service upon said company. And such guaranty, fidelity and surety companies shall be deemed resident of the counties wherever they may do business, and the doing or performing of any business in any county shall be deemed an acceptance of the provisions of this act. (R. S., Art. 4934.)

State Treasurer to Pay Claims When Company Has Defaulted.

12. Should any company of the character named or enumerated in this chapter fail or refuse to pay any loss by it incurred in this State within sixty days after its liability thereupon shall have been by suit finally determined, upon satisfactory proof, to the Treasurer of this State, of such liability and of its non-payment, said Treasurer shall, out of the deposits so made with him, as by this act provided, pay said loss, and when he shall have done so he shall at once certify to the Commissioner of Insurance and Banking the fact of such default on the part of said company, whereupon said Commissioner shall forthwith cancel and annul the certificate of authority of such company to do business in this State; provided, that such payment shall not operate to release the company from payment of any balance which it still may owe after such payment by the Treasurer of this State has been made. (R. S., Art. 4935.)

Shall Be Held to Be the Agent.

13. Any person who solicits business for or on behalf of such corporation, or makes or transmits for any person other than himself, any application for guaranty or security, or who advertises or otherwise gives notice that he will receive or transmit same, or who shall receive or transmit same, or who shall receive or deliver a contract of guaranty or security, or who shall examine or investigate the character of any applicant for guaranty or security than himself, or who shall refer any applicant for guaranty or security to such corporation, whether any of said acts shall be done at the instance and request, or by the employment of such corporation, or other corporation or person, or any person who shall issue indemnifying bonds or contracts, whose solvency and compliance with his said bonds or obligations is guaranteed directly or indirectly by any corporation, shall be held to be the agent of such corporation, so far as relates to all the liabilities and penalties prescribed by this act. (R. S., Art. 4936.)

Five Hundred Dollar Penalty for Accepting Corporation Which Has Not Complied With the Law.

14. Any person, association of persons or corporations, who shall accept any corporation created for the purpose, or either of them, mentioned in Article 4928, Sec. 257, without such corporation having previously complied with the provisions and requirements of this chapter, and having received from the Commissioner of Insurance and Banking the certificate of authority provided for in this chapter, shall forfeit as a penalty the sum of five hundred dollars, to be recovered by suit in the name of the State in any court of competent jurisdiction. (R. S., Art. 4937.)

When Bond Has Been Canceled, Statement for Cause Must Be Made in Writing.

15. When any corporation shall cancel a bond of guaranty or indemnity, or shall notify the employer of the person whose fidelity is guaranteed, that said corporation will no longer guarantee or be security for the fidelity of said person, or when said corporation has once guaranteed the fidelity of any person, or acted as security therefor, and on application refuses to do so again, it shall furnish to such person a full statement in writing of the facts on which the action of the corporation is based, and if such action be based in whole or in part on information, all such information: and any such corporation failing or refusing to furnish any such written statement within thirty days after a request therefor shall be liable to such person injured in the sum of five hundred dollars in addition to all other damages caused thereby, which may be sued for and recovered in any court of competent jurisdiction. (R. S., Art. 4938.)

Commissioner Shall Revoke Certificate of Authority, When.

16. If any such corporation shall fail or refuse to comply with the provisions of this chapter, the Commissioner of Insurance and Banking shall revoke the certificate of authority issued said corporation. (R. S., Art. 4939.)

Charged With Public Use.

17. Corporations created for the purposes mentioned in Article 4928, Sec. 257, are hereby declared to be charged with a public use. (R. S., Art. 4940.)

NOTES ON FIDELITY, GUARANTY AND SURETY COMPANIES

Surety Companies—Application of Statute 1, 2

Contract of Surety Company—Nature and Extent of Liability of Surety 3

(a) *Building Bonds 4*

(b) *Federal Bonds—Default or Other Misconduct of Officer or Employee 5*

(c) *Indemnity Bonds 6*

Requisites of Bonds 7

Sufficiency of Bond 8, 9

Alterations in Contract 10, 11

Bonds of Foreign Insurance Companies

(a) *Compliance with Statute 12*

(b) *Contract of Agency 13*

(c) *Inures to Benefit of Policyholders 14*

(d) *Presentment of Claim to Receiver 15*

(e) *Ruling Not Prejudicial to Surety 16*

(f) *Bond Cannot Be Proven By Certified Copy 17*

(g) *Same 18*

(h) *Cancellation of Bond and Notification to Insured 19*

Attachment of Contract to Bond 20

Agents 21, 22

Life Insurance Agent's Bonds 23

False Representations in Application for Bond 24

Compliance with Warranties 25

Amount of Liability 26

Solvency of Surety 27

Reinsurance

(a) *Construction and Operation of Contract 28*

(b) *Extent of Liability of Reinsurer 29*

(c) *Actions on Contracts of Reinsurance 30*

(SEE 19 OTC. 516 and 32 OTC. 303.)

Surety Companies—Application of Statute.

1. (a) Under Const. Art. 3, par. 35, Acts 31st Leg., c. 108, section 55 (Rev. St. 1911, Art. 4955), held not germane to title of act, and hence ineffectual as to a surety company issuing fidelity or guaranty bonds.—*National Surety Co. v. Murphy-Walker Co.*, 174 S. W. 997.

2. (b) Rev. St. 1911, Final Title, Par. 16, under Const. Art. 3, Paragraphs 35, 36, 43, held not to enact or re-enact Acts 31st Leg., c. 108, Par. 55 (Rev. St. 1911, Art. 4955), so as to

make it effectual as to all insurance companies.—*National Surety Co. v. Murphy-Walker Co.*, 174 S. W. 997.

Contract of Surety Company—Nature and Extent of Liability of Surety.

3. (a) The bond of a surety company by which it becomes responsible for the performance of a building contract is in its nature a contract to indemnify the owner against defaults of the contractor, and as such must be construed like any other contract of insurance, and, if it is susceptible of two constructions, one favorable and the other unfavorable to the surety company, the latter, if consistent with

the object for which the contract was made, must be adopted.—*American Surety Co. v. San Antonio Loan & Trust Co.*, 98 S. W. 387.

4. (a) **Building Bonds:**—Surety bonds on building contracts are not to be construed as contracts of insurance, but as the obligation of a surety, and are to be strictly construed.—*General Bonding & Casualty Ins. Co. v. Waples Lumber Co.*, 176 S. W. 651.

430—(b) **Federal Bonds—Default or Other Misconduct of Officer or Employee.**

5. (c) Since a postmaster would be liable under the federal laws for misconduct in his official capacity, an insurance contract to indemnify the sureties of a postmaster for loss caused by his embezzlement of money order funds, etc., should be construed with reference to the federal laws imposing a liability upon postmasters in such cases, in determining what constitutes an embezzlement within the contract, and not under the state statutes defining the offense.—*Griffin v. Zuber*, 113 S. W. 961.

(c) **Indemnity Bonds.**

6. (d) Contracts of surety company indemnifying employer against dishonesty of employee held to be construed by the same rules as apply to other insurance contracts.—*National Surety Co. v. Murphy-Walker Co.*, 174 S. W. 997.

Requisites of Bonds.

7. It is not necessary to state in the bond that the company is authorized to do business in Texas. Such lack of authority may be proved.—*Clopton v. Goodbar*, 55 S. W. 972.

Sufficiency of Bond.

8. A sequestration bond signed by a surety company as one surety is sufficient.—*Clopton v. Goodbar*, 55 S. W. 972.

9. A bail bond executed by a bonding company should be accepted.—*Ex Parte Cook*, 136 S. W. 67.

Alterations in Contract.

10. (a) A material alteration of the contract by building contractor and building owner will release the contractor's bondsman.—*General Bonding & Casualty Ins. Co. v. McCurdy*, 183 S. W. 796.

11. (b) The owner of a building, on default of the contractor, cannot, except as authorized by the contract or the contractor's bond, make contracts, and so render the bondsmen liable.—*General Bonding & Casualty Ins. Co. v. McCurdy*, 183 S. W. 796.

45—Ins.

BONDS OF FOREIGN INSURANCE COMPANIES. (SEE 28 CHET. DIG. INSURANCE, § 23.)

(a) **Compliance with Statute.**

12. A bond given by a foreign insurance company in strict compliance with Act March 20, 1909 (Acts 31st Leg., c. 102) § 1, being limited by section 3 to obligations arising out of contracts of insurance, was a valid statutory bond, though it did not contain such limitation in express terms.—*Ross v. Southern Surety Co.*, 169 S. W. 1056.

(b) **Contract of Agency.**

13. A judgment against a foreign insurance company on a contract of agency, and not on a contract of insurance, gives no right of action on a bond given pursuant to Act March 20, 1909 (Acts 31st Leg. c. 102), §§ 1, 3.—*Id.*

(c) **Inures to Benefit of Policyholders.**

14. A bond executed by defendant to indemnify a surety on the bond of a foreign insurance company to enable it to obtain a license to do business in Texas held to inure to the benefit of policyholders of the insurance company.—*Southwestern Surety Ins. Co. v. Anderson*, 155 S. W. 1176. Reversed 152 S. W. 816.

(d) **Presentment of Claim to Receiver.**

15. Under the terms of a bond executed on behalf of a foreign insurance company, conditioned for paying all of its lawful obligations to any citizen, a policyholder was not required to present his claim to the receiver of the insurance company before suing on the bond, on the company's failure to pay according to the policy.—*Southwestern Surety Ins. Co. v. Anderson*, 152 S. W. 816. Reversed 155 S. W. 1176.

(e) **Ruling not Prejudicial to Surety.**

16. Where a foreign insurance company, sued with its surety, had been dissolved, a ruling by the reviewing court that a peremptory instruction to find for the insurance company and against plaintiff operated as a dismissal as to the insurance company held not prejudicial to the surety.—*Southwestern Surety Ins. Co. v. Anderson*, 152 S. W. 816. Reversed 155 S. W. 1176.

(f) **Bond Cannot Be Proven by Certified Copy.**

17. Only such documents as are required or permitted by law to be filed in a public office, so as to constitute them archives or records, can be proved.

658 FIDELITY, GUARANTY AND SURETY CO'S.

ed by certified copy.—*Southwestern Surety Ins. Co. v. Anderson*, 155 S. W. 1176.

(g) Same.

18. A bond of defendant, insuring the risk of a surety on the bond of a foreign insurance company, filed in the insurance department to enable such insurance company to do business in Texas, held a mere common-law obligation not required by law to be filed in that department, and hence could not be proved by a certified copy thereof.—Id.

(h) Cancellation of Bond and Notification to Insured.

19. Rev. St. 1895, Art. 742, providing that when any corporation cancels a bond of guaranty or indemnity executed by it, or notifies the employer of the person whose fidelity is guaranteed that it will no longer be security for him, it shall furnish such person a full statement in writing of the facts on which its action is based, with the name and residence of the informant, and prescribing a penalty of \$500 for refusal to furnish the statement, does not apply to a foreign corporation not doing business within the state, which receives the application for such statement in the state of its incorporation. *McBride v. Fidelity & Casualty Co. of New York*, 37 S. W. 1091.

Attachment of Contract to Bond.

20. Where the seller of oil agreed to give a bond to secure the performance of the contract, and the surety company knew that the contract was to be attached to the bond, by delivering the bond to the seller without the contract attached it empowered the seller to attach the contract to the bond before it was delivered to the buyer.—*San Antonio Brewing Ass'n v. J. M. Abbott Oil Co.*, 129 S. W. 373.

Agents.

21. (a) Under Rev. St. 1895, Art. 740, providing that one who solicits business for a guaranty and fidelity corporation, or makes for any person other than himself any application for guaranty or security, or gives notice that he will receive or transmit the same, etc., shall be held to be the agent of the corporation so far as relates to all liabilities and penalties, where a guaranty company intrusted a bond to the seller of oil to deliver it to the buyer, it not only made the seller its agent for the delivery of the bond, but the seller became the agent under the statute, where it was not only empowered to deliver the bond, but to attach to it the contract referred to in it; provision being made

for its attachment, and the contract being made a part "as fully as if recited in detail herein."—*San Antonio Brewing Ass'n v. J. M. Abbott Oil Co.*, 129 S. W. 373.

22. (b) Where an indemnity bond, given to secure the performance of a contract to sell oil, with the contract attached, was delivered by the seller, acting as agent for the guaranty company to the buyer, who refused to accept it and sent it back to the agent, and the bond was returned with the desired correction made, the refusal to accept the bond and its return to the agent did not destroy the agency and make him the agent of the buyer, he having had no dealings with the guaranty company except through the seller, and when the bond was returned to him it was to all intents and purposes returned to the guaranty company, and upon the redelivery of the bond the buyer could assume that change was made with the knowledge and consent of the guaranty company.—Id.

Life Insurance Agents' Bonds.

23. Bond of sureties of life insurance company's agent held to bind a surety to extent of \$1,000 and for reasonable attorney's fees if suit was necessary to enforce collection.—*Shaw v. Southland Life Ins. Co.*, 185 S. W. 915.

False Representations in Application for Bond. (See 28 Cent. Dig. Insurance, § 657.)

24. Under Rev. St. 1911, § 4948, false representations in application for surety bond held no defense, unless insurer, within 90 days after notice thereof, notified the insured that it refused to be bound thereby.—*National Surety Co. v. Murphy-Walker Co.*, 174 S. W. 997.

Rev. St. 1911, Arts. 4741, 4947, 4948, 4951, 4954, held to apply to surety or fidelity bonds.—Id.

Compliance With Warranties.

25. Evidence, in a bank's action on the fidelity bond of its cashier, held to show that the bank had complied with its warranties as to when his accounts were last examined, that there was then no shortage, and as to monthly examinations and reports as to his accounts.—*Southern Surety Co. v. First State Bank of Montgomery*, 167 S. W. 833.

Amount of Liability.

26. An account prepared by the principal, showing his liability and being admissible against him, may be received to establish *prima facie* the

surety's liability.—Commonwealth Bonding & Casualty Ins. Co. v. Harper, 180 S. W. 1156.

Solvency of Surety.

27. Evidence held sufficient to show that a bonding company was solvent, so as to be a proper surety on a bail bond.—Ex Parte Cook, 136 S. W. 67, 62 Tex. Cr. R. 22.

REINSURANCE. (SEE 28 CHMT. DEG. INSURANCE, §§ 1810-1819.)

679—(a) Construction and Operation of Contract.

28. A contract between two insurance companies held a contract of reinsurance creating no privity between reinsurer and insured.—Southwestern Surety Ins. Co. v. Stein Double Cushion Tire Co., 180 S. W. 1165.

684—(b) Extent of Liability of Reinsurer.

29. A contract of reinsurance is one by which an insurer agrees to protect the first insurer from the risk he has already assumed, and creates no privity between reinsurer and insured, although the reinsurer can, by the contract, assume direct liability to the insured.—Southwestern Surety Ins. Co. v. Stein Double Cushion Tire Co., 180 S. W. 1165.

686—(c) Actions on Contracts of Insurance.

30. A reinsurer under a strict reinsurance contract is not liable for a loss directly to the insured, who cannot maintain his action against the reinsurer.—Southwestern Surety Ins. Co. v. Stein Double Cushion Tire Co., 180 S. W. 1165.

STATUTORY LAW

CASUALTY INSURANCE COMPANIES

Commissioner of Insurance and Banking.....	195
Duties of the Commissioner.....	196
Incorporation of Insurance Companies (Home).....	207
General Provisions	211-228

Caption of Casualty Insurance Companies Act.

1. An act to authorize the incorporation of casualty insurance companies and other kinds of insurance companies except life, fire and marine insurance companies, and to regulate their organization and their method of doing business in this State, prescribing the powers and duties of the Commissioner of Insurance and Banking with reference to such companies; providing penalties for the violation of this act, and declaring an emergency. (Acts 32nd Leg., Chap. 117, Caption.)

Who May Incorporate a Casualty Insurance Company—Kinds of Insurance It May Do.

2. Any three (3) or more persons, a majority of whom shall be residents of the State of Texas, may associate in accordance with the provisions of this act, and form an incorporated company for any one or more of the following purposes:

(a) To insure any person against bodily injury, disablement or death resulting from accident and against disablement resulting from disease.

(b) To insure against loss or damage resulting from accident to, or injury sustained by, an employe or other person for which accident or injury the assured is liable.

(c) To insure against loss or damage by burglary, theft or house breaking.

(d) To insure glass against breakage.

(e) To insure against loss from injury to person or property which results accidentally from steam boilers, elevators, electrical devices, engines and all machinery and appliances used in connection therewith or operated thereby; and to boilers, elevators, electrical devices, engines, machinery and appliances.

(f) To insure against loss or damage by water to any goods or premises arising from the breakage or leakage of sprinklers and water pipes.

(g) To insure against loss resulting from accidental damage to automobiles, or caused accidentally by automobiles.

(h) To insure against loss or damage resulting from accident to, or injury suffered by any person, for which loss and damage

the insured is liable; excepting employers liability insurance as authorized under subdivision (b) of this section.

(i) To insure persons, associations or corporations against loss or damage by reason of giving or extending of credit.

(j) To insure against loss or damage on account of incumbrances upon or defects in the title to real estate and against loss by reason of the non-payment of the principal or interest of bonds, mortgages or other evidences of indebtedness.

(k) To insure against any other casualty or insurance risk specified in the article of incorporation which may be lawfully made the subject of insurance; and the formation of a corporation for issuing (insuring) against which is not otherwise provided for by this act, excepting fire and life insurance. (Acts 32nd Leg., Chap. 117, Sec. 1.)

Note.—(1) A mutual casualty insurance company cannot lawfully be organized in Texas, and a foreign mutual casualty company cannot be permitted or licensed to do business in Texas, because the laws of this State have made no provision for such license. (Opinion of Attorney General, March 12, 1914.)

(2) A title insurance company, in its policies insuring titles, must specify the time during which such policies are to run, and cannot issue such a policy without fixing a date therein when the risk assumed shall cease. (Opinion of Attorney General, February 18, 1915.)

(3) A title insurance company which owns an abstract plant for facilitating its business may likewise sell abstracts to the public. (Opinion of Attorney General, February 18, 1915.)

Requisites of Charter.

3. Such persons shall associate themselves together by articles of incorporation in writing, for the purpose of forming an accident or casualty insurance company, which articles shall specify the name by which the company shall be known, the place in which its principal office will be established or located, the amount of its capital stock, the general object of the company and the proposed duration of the same. Any name not previously in use by any existing company may be adopted. The Commissioner of Insurance and Banking shall reject any name or title, when in his judgment it too closely resembles that of any existing company or is likely to mislead the public. (Acts 32nd Leg., Chap. 117, Sec. 2.)

Manner of Filing Charter, Calling First Meeting of Stockholders and Electing Board of Directors.

4. When such articles of incorporation are filed with the Commissioner of Insurance and Banking, together with an affidavit made by two or more of its incorporators that all the stock has been subscribed in good faith and fully paid for, together with a charter fee of \$20.00, it shall be the duty of the Commissioner to submit such articles of incorporation to the Attorney General for examination, and if he approves the same as conforming with the

law, he shall (so) certify and deliver such articles of incorporation, together with his certificate of approval attached thereto, to the Commissioner of Insurance and Banking, who shall, upon receipt thereof, record the same in a book kept for that purpose, and upon receipt of a fee of \$1.00 he shall furnish a certified copy of the same to the incorporators, upon which they shall be a body politic and corporate, and may proceed to complete the organization of the company, for which purpose they shall forthwith call a meeting of the stockholders, who shall adopt by-laws for the government of the company, and elect a board of directors not less than three composed of stockholders, which board shall have full control and management of the affairs of the corporation, subject to the by-laws thereof as adopted or amended from time to time by the stockholders or directors, and to the laws of this State. (Acts 32nd Leg., Chap. 117, Sec. 3.)

Corporators Shall Elect Officers and Directors, and Open Books of Subscription for Stock.

5. The subscribers to said articles of incorporation shall choose from their number a president, a secretary, a treasurer, and such number of directors, not less than three (3) who shall continue in office for the period of one year from the date of filing articles of incorporation and until their successors shall be duly chosen and qualified, as hereinafter provided. They shall open books for the subscription of stock in the company at such times and places as they shall deem convenient and proper, and shall keep them open until the full amount specified in the certificate (charter) is subscribed. (Acts 32nd Leg., Chap. 117, Sec. 4.)

Capital Stock—Amount Required—Must Be Fully Paid Up Before Obtaining Certificate of Authority to Do Business—Cannot Be Loaned to Company's Officer—Company Must Also Deposit With State Treasurer \$50,000 in Securities, and More if Required, in Order to Do Business in Another State—How Deposit May Be Withdrawn.

6. Any company organized under the provisions of this act shall have not less than one hundred thousand dollars (\$100,000.00) of capital stock subscribed, and fully paid in, in cash, with an additional fifty thousand dollars (\$50,000.00) of capital stock subscribed and fully paid in, in cash, for every kind of insurance, more than one of which it is authorized to transact as specified in any of the subdivisions; provided, that such companies with two hundred thousand dollars (\$200,000.00) of capital stock subscribed and fully paid in, in cash, shall be authorized to transact all and every kind of insurance specified in any and all of the subdivisions of Section 1 of this act; all of which said capital stock shall be paid up or invested in bonds of the United States or of this State or of any county or of any municipality of this State or in bonds or first liens upon unincumbered real estate in this State or in any other State

in which such company may previously have been duly licensed to conduct an insurance business; and provided in either instance such real estate shall be worth at least twice the amount loaned thereon. The value of such real estate shall be determined by a valuation made under oath by two freeholders of the county where the real estate is located, and if buildings are considered as a part of the value of such real estate they must be insured for the benefit of the mortgagee. Upon such company furnishing evidence satisfactory to the Commissioner of Insurance and Banking that the capital stock as herein prescribed has been all subscribed and paid up in cash in good faith and that such capital stock has been invested as herein prescribed, and upon the deposit of the sum of fifty thousand dollars (\$50,000.00) of such securities or in cash with the State Treasurer, then the Commissioner of Insurance and Banking shall issue to said company a certificate authorizing it to do business. No part of the capital paid in shall be loaned to any officer of said company. In the event any such company shall be required by law of any other State, county or province as requirement prior to doing an insurance business therein, to deposit with the duly appointed officer of such other State, county or province, or with the State Treasurer of this State, any securities or cash in excess of the said deposit of fifty thousand dollars (\$50,000.00) hereinbefore mentioned, such company at its discretion may deposit with the State Treasurer securities of the character authorized by this act, or cash, sufficient to enable it to meet such requirements. The State Treasurer is hereby authorized and directed to receive such deposit and to hold it exclusively for the protection of all policyholders of the company. Any deposit so made to meet the requirements of any such other State, county or province shall not be withdrawn by the company, except upon filing with the Commissioner of Insurance and Banking evidence satisfactory to him that the company has withdrawn from business, and has no unsecured liabilities outstanding in any such other State, county or province by which such additional deposit was required, and upon the filing of such evidence the company may withdraw additional deposit at any time. (Acts 32nd Leg., Chap. 117, Sec. 5.)

Corporate Powers of the Company.

7. A corporation organized or doing business under the provisions of this act shall, by the name adopted by such corporation, in law, be capable of suing or being sued, and may have the power to make or enforce contracts in relation to the business of such corporation; may have and use a common seal, and may change and alter the same at pleasure, and in the name of the corporation or by a trustee chosen by the Board of Directors, shall, in law, be capable of taking, purchasing, holding and disposing of real and personal property for carrying into effect the purposes of their

organization; and may by their Board of Directors, trustees or managers, make by-laws and amendments thereto, not inconsistent with the laws or the Constitution of the State, or of the United States, which by-laws shall define the manner of electing directors, trustees or managers and officers of such corporations, together with the qualifications and duties of the same and fixing the term of office. (Acts 32nd Leg., Chap. 117, Sec. 6.)

Annual Statement Required to Be Filed.

8. The president, vice-president and secretary, or a majority of directors or trustees of such company organized under the provisions of this act shall annually, on the first day of January, or within sixty days thereafter, prepare and deposit in the office of the Commissioner of Insurance and Banking a verified statement of the condition of such company on the 31st day of December of the preceding year, showing:

First. Name and where located. (a) Names of officers. (b) The amount of capital stock. (c) The amount of capital stock paid in.

Second. Assets. (a) The value of real estate owned by said company. (b) The amount of cash on hand. (c) The amount of cash deposited in bank or trust company. (d) The amount of bonds of the United States, and all other bonds, giving names and amounts, with par and market values of each kind. (e) The amount of loans secured by first mortgage on real estate. (f) The amount of all other bonds, loans and how secured, with rate of interest. (g) The amount of notes given for unpaid stock and how secured. (h) The amount of interest due and unpaid. (i) All other credits or assets.

Third. Liabilities. (a) The amount of losses due and unpaid. (b) The amount of claims for losses unadjusted. (c) The amount of claims for losses resisted.

Fourth. Income during the year. (a) The amount of fees received during the year. (b) The amount of interest received from all sources. (c) The amount of receipts from all other sources.

Fifth. Expenditures during the year. (a) The amount paid for losses. (b) The amount of dividends paid to stockholders. (c) The amount of commissions and salaries paid to agents. (d) The amount paid to officers for salaries. (e) The amount paid for taxes. (f) The amount of all other payments or expenditures.

Sixth. Miscellaneous. (a) The amount paid in fees during the year. (b) The amount paid for losses during the year. (c) The whole amount of insurance issued and in force on the 31st day of December of the previous year. (Acts 32nd Leg., Chap. 117, Sec. 7.)

Commissioner May Amend Annual Statement Form.

9. The Commissioner of Insurance and Banking is authorized to amend the form of statement and to exact such additional informa-

tion as he may think necessary in order that a full exhibit of the standing of the companies organized and doing business under this act may be shown. (Acts 32nd Leg., Chap. 117, Sec. 8.)

Company Cannot Issue Policy Until Deposit Is Made and Annual Statement Filed.

10. Upon the failure of any company organized or doing business under this act to make the deposit or to file the statement in time as stated in the preceding section, the Commissioner of Insurance and Banking shall notify such company to issue no new insurance until there should have been a compliance with said requirements, and it shall be unlawful for any such company to thereafter issue any policy of insurance until such requirements shall be complied with. (Acts 32nd Leg., Chap. 117, Sec. 9.)

Commissioner May Examine Company.

11. The Commissioner of Insurance and Banking may at any time make a personal examination of the books, papers and securities of any company organized and doing business under the provisions of this act, or may authorize or empower any other suitable person to make such examinations, and for the purpose of securing a full and true exhibit of its affairs, he or the person selected by him shall have power to examine under oath any officer of said company relative to its business management. (Acts 32nd Leg., Chap. 117, Sec. 10.)

Commissioner Must Revoke Certificate of Authority for Failure to Comply With the Law, and Refer Facts to Attorney General.

12. If the Commissioner of Insurance and Banking shall at any time (find) from the report or examination that the company has not complied with the provisions of this act, he shall revoke its certificate of authority to do business in this State and shall refer the facts to the Attorney General, who shall proceed to ask the proper court to appoint a receiver for said company, who shall under the direction of the court wind up the affairs of said company. But in no other way can the Commissioner of Insurance and Banking, or any other person, restrain or interfere with the prosecution of business of any company doing business under the provisions of this act, except in actions by judgment creditor or in proceedings supplementary to execution. (Acts 32nd Leg., Chap. 117, Sec. 11.)

Securities on Deposit May Be Withdrawn By Substituting Others.

13. Companies organized under the provisions of this act shall have the right at any time to change their securities on deposit with the State Treasurer, by substituting for those withdrawn a like amount in other securities of the character provided for in this act. (Acts 32nd Leg., Chap. 117, Sec. 12.)

How Capital Stock May Be Increased.

14. Any company organized under the provisions of this act may increase the capital stock of the same at any time after the intention to so increase the capital stock shall have been ratified by a two-thirds vote of the stockholders and after notice of the purpose to so increase the capital stock has been given by publication in some newspaper of general circulation for the period of four consecutive weeks; but no increase of capital stock in less amount than fifty thousand dollars (\$50,000.00) is hereby authorized. (Acts 32nd Leg., Chap. 117, Sec. 13.)

Dividends May Be Declared From Surplus Profits Only, and at End of Year.

15. The directors of any company organized under this act shall not make any dividends except from the surplus profit arising from their business. No dividends shall be declared except at the close of the year and at the time when, by law, the company is required to file its annual statement with the Commissioner of Insurance and Banking. (Acts 32nd Leg., Chap. 117, Sec. 14.)

State Treasurer May Permit Collections of Interest on Deposited Securities.

16. The State Treasurer shall permit companies having securities on deposit with him under the provisions of this act to collect the interest as the same may become due and shall deliver to such companies respectively the coupons or other evidences of interest pertaining to such deposits; provided, however, that upon failure of any company to deposit additional security as called for by the Commissioner of Insurance and Banking, or pending any proceedings to close up or enjoin it, the State Treasurer shall collect the interest as it becomes due, and hold the same as additional security in his hands belonging to such company. (Acts 32nd Leg., Chap. 117, Sec. 15.)

Forfeit for Writing New Business Without Certificate.

17. Any company organized or doing business under this act without a certificate, as provided for in this act, shall forfeit one hundred dollars (\$100.00) for every day it continues to write new business in this State without such certificate. (Acts 32nd Leg., Chap. 117, Sec. 16.)

Venue for Penalty Suits.

18. Suit brought to recover any of the penalties provided for in this act shall be instituted in the name of the State of Texas, by the Attorney General or by a district or county attorney under his direction, either in the county where the principal office is situated or in the county of Travis. Such penalties, when recovered, shall be paid into the State Treasury for the use of the school fund. (Acts 32nd Leg., Chap. 117, Sec. 17.)

Securities in Which Company's Surplus Funds Must Be Invested.

19. No company organized under the provisions of this act shall invest his funds over and above its paid-up capital stock in any other manner than as follows:

(a) In bonds of the United States, or of any of the States of the United States which are at or above par.

(b) In bonds or first liens on unincumbered real estate in this State or in any other State, county or province, in which such company may be duly licensed to conduct an insurance business, and providing in each instance such real estate shall be worth at least twice the amount loaned thereon. The value of such real estate shall be determined by a valuation made under oath by two freeholders of the county where the real estate is located, and if buildings are considered as a part of the value of such real estate they must be insured for the benefit of the mortgagee.

(c) In bonds or other interest-bearing evidences of indebtedness of any county, incorporated city, town or school or sanitary district within this State, or in any other State, county or province in which said company may be duly licensed to conduct an insurance business, and provided that such bonds or other evidences of indebtedness are issued by authority of law and that interest upon them has never been defaulted.

(d) In the stocks or bonds or other evidences of indebtedness of any solvent dividend-paying corporation incorporated under the laws of this State, or of the United States or of any State, county or province in which such company may be duly licensed to conduct an insurance business.

(e) In loans upon the pledge of any mortgage, stock or bonds, or other evidence of indebtedness, acceptable as investments under the terms of this act, if the current value of such mortgage, stock, bond, or other evidence of indebtedness is at least twenty-five per cent (25%) more than the amount loaned thereon. (Acts 32nd Leg., Chap. 117, Sec. 18:

Purposes for Which Company May Purchase, Hold or Convey Real Estate.

20. No company organized under this act shall be permitted to purchase, hold or convey real estate, except for the purpose and in the manner herein set forth:

First. For the erection and maintenance of buildings at least ample and adequate for the transaction of its own business.

Second. Such as shall have been mortgaged to it in good faith for money due.

Third. Such as shall have been conveyed to it in the satisfaction of debts previously contracted in the course of its dealings, and which must be taken in by the company on account of the debts secured by such mortgage.

Fourth. Such as shall have been purchased at sales upon judg-

ments, decrees or mortgages obtained or made for such debts. And no company incorporated as aforesaid shall purchase, hold or convey real estate in any other cases or for any other purpose. (Acts 32nd Leg., Chap. 117, Sec. 19.)

Real Estate Must Be Disposed of in Ten Years, Unless for Special Reason Time Is Extended by Commissioner.

21. All real estate acquired as aforesaid, except such as is occupied by buildings used in whole or in part for the accommodation of such companies in the transaction of its business, shall, except as hereinafter provided, be sold and disposed of within ten years after such company shall have acquired title to the same. No such company shall have such real estate for a longer period than that above mentioned unless the said company shall procure a certificate from the Commissioner of Insurance and Banking that the interests of the company will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such time as the Commissioner of Insurance and Banking shall direct in said certificate. (Acts 32nd Leg., Chap. 117, Sec. 20.)

Commissioner Shall Issue Certificate of Authority to Do Business.

22. The Commissioner of Insurance and Banking, upon due proof by a company organized under the provisions of this act, of its possessing the qualifications required, shall issue a certificate setting forth that it has qualified and is authorized for the ensuing year to do business under these statutes, which certificate, or a copy thereof, shall be evidence of such qualification and of the company's authority to transact business authorized by this act, mentioned in the preceding sections, and of its solvency and credit. (Acts 32nd Leg., Chap. 117, Sec. 21.)

This Act Applies Only to Companies Organized Under It.

23. Only companies organized and doing business under the provisions of this act shall be subject to its provisions. (Acts 32nd Leg., Chap. 117, Sec. 22.)

Fees Charged Under This Act.

24. The Commissioner of Insurance and Banking shall charge for filing the preliminary statement or for filing the annual statement required by the provisions of this act, a fee of ten dollars; and for each certificate and seal he shall charge a fee of one dollar. (Acts 32nd Leg., Chap. 117, Sec. 23.)

Legal Process—How Served.

25. Proceed (process) in any civil suit against any casualty company organized under the laws of this State may be served only on the president, or any active vice-president, or secretary, or general counsel, residing at the city of the home office of the company, or

by leaving a copy of same at the home office of such company during business hours. (Acts 32nd Leg., Chap. 117, Sec. 24.)

Company May Decrease Capital Stock.

26. Any company organized under the provisions of this act may decrease the capital stock of same at any time after the intention to so decrease the capital stock shall have been ratified by a majority vote of the stockholders and after notice of the purpose to so decrease the capital stock has been given by publication in some newspaper of general circulation for a period of four consecutive weeks. (Acts 32nd Leg., Chap. 117, Sec. 25.)

This Act Cumulative and Repeals No Other Law.

27. This act is cumulative as to insurance legislation in this State, and as to the mode and manner of organizing and doing insurance business in this State, and shall not be construed to repeal any law now in force in this State. (Acts 32nd Leg., Chap. 117, Sec. 26.)

Emergency Clause.

28. The fact that there is no adequate law in Texas regulating the creation and incorporation of general casualty companies, and regulating their powers and duties, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read three several days be suspended, and (that) this act take effect and be in force from and after its passage, and it is so enacted. (Acts 32nd Leg., Chap. 117, Sec. 27.)

NOTES ON CASUALTY INSURANCE

*Capital and Stock 1**Notes for Stock 2**Liability Incurred for Personal Injury or Loss of Life 3**Expenditures 4**Same 5**Release or Discharge from Liability 6**Subrogation of Insurer on Payment of Loss 7***CASUALTY INSURANCE. (SEE 6 C. J. 867 AND 1 C. J. 397.)****32—Capital and Stock.**

1. Rev. Statutes of 1911, Art. 1146, relating to issue of corporate stock, is superseded by Acts 31st Leg., ch. 108, authorizing the incorporation of insurance companies.—General Bonding & Casualty Ins. Co. v. Mosley, 174 S. W. 1031.

Under Const. Art. 12, § 6, and Acts 31st Leg. c. 108, giving of notes secured by a deed of trust for stock in an insurance company subsequently issued is not payment for the stock.—Id.

99—Notes for Stock.

2. Where notes for corporate stock were received and then renewed, held that, the stock issued being invalid under Const. Art. 12, § 6, the notes should be canceled.—Commonwealth Bonding & Casualty Ins. Co. v. Hollifield, 184 S. W. 776.

435—Liability Incurred for Personal Injury or Loss of Life. (See 28 Cent. Dig. Insurance, § 1144.)

3. An automobile policy exempting loss incurred in operating it in violation of law would have excepted a death caused while the car was driven by the insured's 16 year old son, contrary to ordinance, had the ordinance been valid.—Royal Indemnity Co. v. Schwartz, 172 S. W. 581.

513—Expenditures.

4. An indemnity company held liable under an automobile accident policy for attorney fees incurred by the in-

sured, but not paid, for services in defending an accident suit, which the insurer had declined to defend.—Royal Indemnity Co. v. Schwartz, 172 S. W. 581.

513—Same.

5. An indemnity company, having refused to defend, held estopped to claim that it was not liable for attorney fees incurred by insured because the insurer's written consent to incur the fee was not first had.—Id.

603—Release or Discharge from Liability. (See 28 Cent. Dig. Insurance, § 1499.)

6. Where one procuring insurance on his automobile against damage by collision settled with wrongdoer, he could not recover on the policy stipulating that insurer on payment of the loss should be subrogated to all right of recovery by insured for the loss.—Maryland Motor Car Ins. Co. v. Haggard, 168, S. W. 1011.

606—Subrogation of Insurer on Payment of Loss. (See 28 Cent. Dig. Insurance, §§ 1504-1516.)

7. Where one insured against damages to his automobile offered to assign his claim against the wrongdoer to an attorney for insurer, who refused for want of authority to act and because reasonable time had not elapsed to make investigations, and immediately afterwards insured filed a claim with the wrongdoer and settled, insurer did not waive his right to subrogation stipulated for in the policy.—Maryland Motor Car Ins. Co. v. Haggard, 168 S. W. 1011.

STATUTORY LAW

MUTUAL PLAN OF INSURANCE AGAINST LOSS OR DAMAGE RESULTING FROM BURGLARY, ROBBERY, AND LOSS OF MONEY AND SECURITIES IN TRANSPORTATION

Commissioner of Insurance and Banking.....	195
Duties of the Commissioner.....	196
Incorporation of Insurance Companies (Home).....	207
General Provisions	211-228

Shall Be Authorized.

1. Any insurance company organized and incorporated on the mutual plan, under the laws of this State or any other State, for the purpose of insuring against loss or damage resulting from burglary and robbery, or any attempt thereat, and securing against the loss of money and securities in course of transportation, when shipped by registered mail, shall be authorized, admitted and licensed to do business in this State, as provided in this chapter. (R. S., Art. 4922.)

Certain Conditions—Premium Contracts to Constitute Part of the Assets.

2. Before any such company shall be authorized to transact business in this State, except to solicit and receive applications for insurance and portions of premiums thereon, as hereinafter provided, it shall have in force five hundred (500) or more policies on which the premiums shall have been paid in cash, or shall be evidenced by the written contracts of the policyholders, on which not less than one-fifth of the amount shall have been paid in cash, and the cash and contracts for premiums shall amount in the aggregate to a sum of not less than one hundred thousand (\$100,000.00) dollars. The premium contracts so held shall constitute a part of the assets of the company. (R. S., Art. 4923.)

Must File Copy of Charter, Articles of Incorporation, Statement Which Must Show Assets, Liabilities, Receipts and Disbursements, Etc.—Impaired Reserve.

3. And every such company, association or partnership shall also file a certified copy of its charter, articles of incorporation or deed of settlement, together with a statement under the oath of the president or vice-president and secretary of the company for which he or they may act, stating the name of the company and the place where located, a detailed statement of its assets, showing the number of policyholders, aggregate amount of premium contracts, the amount of cash on hand, in bank, or in the hands of agents, the amount of real estate, and how the same is encumbered by mortgage, the number of shares of stock of every kind owned by the

company, the par and market value of the same, amount loaned on bond and mortgage, the amount loaned on other securities, stating the kind and the amount loaned on each, and the estimated value of the whole amount of such securities and other assets or property of the company, also stating the indebtedness of the company, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by the company as illegal and fraudulent, and all other claims existing against the company; and for a company organized under the laws of any other State, a copy of the last annual report, if any, made under any law of the State by which such company was incorporated; and no agent shall be allowed to transact business for any such company whose reinsurance reserve, as required in this Act, is impaired to the extent of twenty per cent thereof, while such deficiency shall continue. Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this Act, directly or indirectly, in taking risks or transacting the business of burglary and robbery insurance, or the insuring of the safe shipping of money and securities by registered mail in this State, without procuring from the Insurance Commissioner a certificate of authority, stating that such company has complied with all the requirements of this chapter which apply to such companies, and as to companies organized under the laws of any other State there shall be added the name of the attorney appointed to act for the company. (R. S., Art. 4924.)

Line of Business Must Be Confined—Must Set Aside a Reinsurance Reserve of 50 Per Cent.

4. Any company organized, admitted and licensed to transact business in this State under this chapter, shall confine its line of business to that stated in the first section of this chapter, and shall confine its business in this State to banks, bankers, loan companies and county treasurers, and shall not issue any policy or policies to any person, firm or corporation in this State other than banks, bankers, loan companies and county treasurers. Every such company shall set aside a reinsurance reserve of fifty per cent of its premiums, whether collected in cash or represented by obligations of the policyholders, as written in its policies. (R. S., Art. 4924.)

Policyholders.

5. Policyholders of any company organized and admitted to transact business in this State under this chapter, shall be held liable to pay the membership fee and premium on their insurance as paid or contracted to be paid at the time the policy is taken out, and shall not be held liable for any further or other assessments or claims on the part of the company or its policyholders. The membership fees and premiums agreed upon may be collected in cash at the time the policy is issued or evidenced by a written obligation

of the policyholder as may be agreed upon by the company and the policyholder. Such payment or obligation shall be the limit of the liability of the policyholder to the company for premium on their insurance. (R. S., Art. 4925.)

Must Appoint Insurance Commissioner on Whom Process of Law Can Be Served.

6. It shall not be lawful for any insurance company, association or partnership incorporated by or organized under the laws of any other State of the United States for any of the purposes specified in this Act, directly or indirectly, to take risks or transact any business of insurance in this State by any agent or agents in this State, until it shall first appoint an attorney in this State, who shall be the Commissioner of Insurance and Banking, on whom process of law can be served, and file in the office of the Commissioner of Insurance and Banking a written instrument duly signed and sealed, certifying such appointment, and any process issued by any court of record in this State, and served upon such attorney by the proper officer of the county in which such attorney may reside or be found, shall be deemed a sufficient service of the process upon said company, but service of process upon such company may also be made in any other manner provided by law. (R. S., Art. 4926.)

Statement to Be Submitted and License Issued Annually.

7. The statement and evidence of new membership, assets and investments required by Article 4924 (Sec. 419), of this chapter shall be renewed from year to year in such manner and form as may be required by said Insurance Commissioner, with an additional statement of the amount of premiums received in this State during the preceding year, so long as such agency continues, and the said Insurance Commissioner, on being satisfied that the membership, assets, securities and investments remain secure, as hereinbefore mentioned, shall furnish a renewal of the certificate as aforesaid. Any violation of any of the provisions of this Act shall subject the party violating the same to a penalty of not more than five hundred dollars. (R. S., Art. 4927.)

Must Pay an Annual Occupation Tax of \$50, and 2 Per Cent on Cash Collected on Premiums.

8. All companies organized, authorized, admitted and licensed under this Act shall pay an annual occupation tax of fifty dollars on filing their annual statement, and a tax of two per cent on the cash collected as premiums during the preceding year from policyholders residing in Texas, which shall be in lieu of all other taxes or fees; provided, this shall not exempt from the payment of charter or permit fees or ad valorem taxes. (Sec. 8. Chap. 72, General Laws 26th Leg.)

Note.—The above section (8) has probably been repealed by Section 2, Chapter 108, Acts Thirty-second Legislature, which is Section 79, page 214, of this book.

NOTES ON BURGLARY INSURANCE

*Effect of Misrepresentations 1**Precautions Against Loss 2**Participating in Adjustment of Loss 3**Theft, 4, 5, 6**Damages for Refusal of Payment 7**Weight and Sufficiency of Evidence 8**Questions for Jury 9***BURGLARY INSURANCE. (SEE 38 CYC. 274.)****256—Effect of Misrepresentations. (See 28 Cent. Dig. Insurance, §§ 540, 549.)**

1. Misstatements made in good faith after issuance and delivery of a policy of burglary insurance held not to affect the insured's rights.—*Aetna Accident & Liability Co. v. White*, 177 S. W. 162.

287—Precautions Against Loss. (See 28 Cent. Dig. Insurance, §§ 658, 659.)

2. Under *Vernon's Sayles' Ann. Civ. St. 1914, Art. 4947*, held, that false statements as to the ownership of a safe and the price paid for it were no defense to an action on a burglary policy, in the absence of proof that they contributed to the loss or were material to the risk.—*Aetna Accident & Liability Co. v. White*, 177 S. W. 162.

397—Participating in Adjustment of Loss. (See 28 Cent. Dig. Insurance, §§ 1078-1082.)

3. Inspection of safe, promise to pay loss, and an announcement that the loss had been adjusted held to constitute a waiver of any breach of warranty by the insured.—*Aetna Accident & Liability Co. v. White*, 177 S. W. 162.

425—Theft. (See 28 Cent. Dig. Insurance, §§ 1129, 1135, 1143.)

4. (a) Provisions in a burglary insurance policy requiring visible marks of actual violence held to determine an evidentiary fact, and not to provide that it should be the sole proof.—*National Surety Co. v. Silberberg Bros.*, 176 S. W. 97.

5. In action on a burglary insurance policy, slipping back of bolt in door, locked the night before, which was seen through a narrow space, held visible evidence and visible marks of forceable entry.—*Id.*

6. (b) Proof of loss held sufficient within a policy against theft, declaring "mere disappearance" insufficient evidence of theft.—*Great Eastern Casualty Co. v. Boli*, 187 S. W. 686.

602—Damages for Refusal of Payment. (See 28 Cent. Dig. Insurance, § 1498.)

7. Rev. St. 1911, Art. 4746, authorizing a recovery of 12 per cent. as damages and attorneys' fees, held not to apply to an action on a burglary insurance policy.—*Aetna Accident & Liability Co. v. White*, 177 S. W. 162.

665—Weight and Sufficiency of Evidence. (See 28 Cent. Dig. Insurance, §§ 1555, 1707.)

8. In an action on a burglary insurance policy, evidence held sufficient to support finding that the insured had accurately determined his loss from his books with reasonable certainty as required by the policy.—*National Surety Co. v. Silberberg Bros.*, 176 S. W. 97.

668—Questions for Jury. (See 28 Cent. Dig. Insurance, §§ 1556, 1732, 1770.)

9. In an action on a burglary insurance policy, question whether marks of visible entry on the premises, made a prerequisite to recovery by the policy, were inflicted by the insured as a blind, held for the jury.—*National Surety Co. v. Silberberg Bros.*, 176 S. W. 97.

STATUTORY LAW

LIVE STOCK INSURANCE

Commissioner of Insurance and Banking.....	195
- Duties of the Commissioner.....	196
Incorporation of Insurance Companies (Home).....	207
General Provisions	211-228

Must Have Capital Stock Not Less Than \$10,000 Paid In and Comply With Laws Governing Insurance.

1. The purposes for which private corporations may be formed are: * * * The organization of fire, marine, life and live stock insurance companies; provided, that such live stock insurance companies may be organized with an authorized and paid-up capital stock of not less than ten thousand dollars (\$10,000.00); and provided further, that all insurance companies mentioned in this subdivision shall be in all other respects subject to and shall comply with all of the provisions of Title 71 of the Revised Statutes of Texas. (R. S., Art. 1121.)

Note.—(1) Live stock insurance companies must be chartered as other insurance companies, by filing charter in Department of Insurance and Banking and not with Secretary of State. (Opinion of Attorney General, June 13, 1906.)

(2) A foreign live stock insurance company must have a paid-up capital stock of at least \$100,000, in order to obtain authority to do business in Texas. (Opinion of Attorney General, October 8, 1909.)

NOTES ON LIVE STOCK INSURANCE

*Actions 1**Incorporation, Organization and Existence 2**Capital Stock 3**Mutual Companies—Incorporation, Organization and Existence 4**Papers Accompanying Policy 5**Renewal 6**Application of General Rules of Construction 7, 8**Construing Together Policy and Accompanying Papers 9, 10**Amount or Value 11**Injury to or Death of Animals 12**Persons to Whom Notice or Proof May Be Given 13**Time for Notice and Proof 14**Damages for Refusal of Payment 15**Petition—Title or Interest of Insured 16**Admissibility of Evidence—Performance of Warranty 17**Verdict and Findings 18*

(SEE 25 CYC. 1516.)

25—Actions. (See 28 Cent. Dig. Insurance, § 33.)

1. Under Rev. St. 1895, Art. 1194, subd. 25, and article 3070, contained in title 58, Art. 3096a, and article 642, subd. 46, as amended by Acts 30th Leg. ch. 150, held that a foreign live stock insurance company could not be sued on a policy in the county of plaintiff's residence.—*Indiana & Ohio Live Stock Ins. Co. v. Krenek*, 144 S. W. 1181. See 28 Cent. Dig. Insurance, § 33.

32—Incorporation, Organization and Existence. (See 28 Cent. Dig. Insurance, § 37.)

2. Rev. St. 1895, Art. 3028, providing that any number of persons desiring to form a company to transact insurance business shall adopt and sign articles of incorporation and submit the same to the attorney general, who, on finding them to be in accordance with the law of the state, shall attach his certificate thereto, etc., when considered in connection with the history of the legislation showing that it is formed from the act of 1875, containing provisions for the filing of the certificate of articles of incorporation of fire and marine insurance companies, and the act of 1876 containing a like provision applicable to all insurance companies, and when considered in connection with other provisions of the title entitled "Incorporation of Insurance Companies," is a general provision applicable to all insurance companies except such as may be excluded by section 3096, providing

that nothing in the title shall be construed to apply to mutual relief associations. Judgment, 107 S. W. 366, reversed.—*State v. Burgess*, 109 S. W. 922, 101 Tex. 524. See 28 Cent. Dig. Insurance, § 37.

33—Capital and Stock. (See 28 Cent. Dig. Insurance, § 38.)

3. Rev. St. 1895, Art. 3029, providing that the articles of incorporation of insurance companies shall contain the amount of the capital stock, which shall in no case be less than \$100,000, taken from the provisions of the preceding statutes relating to stock companies, means that stock companies shall not have less than \$100,000 capital stock, and does not limit the general provisions of the article 3028 providing for the incorporation of companies for the purpose of transacting insurance business to stock companies, or to any other class of companies. Judgment, 107 S. W. 366, reversed.—*State v. Burgess*, 109 S. W. 922, 101 Tex. 524. See 28 Cent. Dig. Insurance, § 38.

52—Mutual Companies—Incorporation, Organization and Existence. (See 28 Cent. Dig. Insurance, §§ 49, 64, 65.)

4. A "livestock insurance company" incorporated under Rev. St. 1895, Art. 642, subd. 46, authorizing the incorporation of fire, marine, life and livestock insurance companies, to conduct a livestock insurance company on a mutual or co-operative plan without capital stock, and to issue policies of

indemnity on live stock to its members, is a livestock insurance company conducted on a mutual or co-operative plan, and is not a "mutual relief association" within article 3096, providing that nothing in the title—title 58 entitled "Incorporation of Insurance Companies," shall apply to mutual relief associations. Judgment, 107 S. W. 366, reversed.—*State v. Burgess*, 109 S. W. 922, 101 Tex. 524. See 28 Cent. Dig. Insurance, §§ 49, 64, 65.

134—Papers Accompanying Policy—Statutory Provisions. (See 28 Cent. Dig. Insurance, §§ 214-217.)

5. (a) Acts 28th Leg., c. 69, held not to contravene Const. Art. 3, Par. 35, requiring expression of subject in title of a bill, as to that provision subsequently incorporated in Rev. St. 1911, Art. 4951, requiring insurance policies to be accompanied by a copy of the application.—*National Live Stock Ins. Co. v. Gomillion*, 178 S. W. 1050.

(b) Under Rev. St. 1911, Art. 4972, declaring the statutes to be conditions on which foreign insurance companies might do business in the state, such a company could not question the validity of Art. 4951, requiring application to accompany policy.—*National Live Stock Ins. Co. v. Gomillion*, 178 S. W. 1050.

145—Renewal. (See 28 Cent. Dig. Insurance, § 276-291.)

6. Where live stock insurance policies did not provide that the policy was in force only while the horse was in a certain town, and insured requested a similar renewal policy, insured could assume that the policy issued did not contain a provision so limiting the company's liability.—*Indiana & O. Live Stock Ins. Co. v. Keiningham*, 161 S. W. 384.

146—Application of General Rules of Construction. (See 28 Cent. Dig. Insurance, §§ 292, 294.)

7. Insured is ordinarily bound by the terms of the policy, whether he reads it or not.—*Indiana & O. Live Stock Ins. Co. v. Keiningham*, 161 S. W. 384. See 28 Cent. Dig. Insurance, § 292.

8. Every doubt must be resolved against the company in case of inconsistent provisions in an insurance policy.—*Id.*

151—Construing Together Policy and Accompanying Papers. (See 28 Cent. Dig. Insurance, §§ 308-311.)

9. (a) Where a live stock policy made the application a part of it, the application would control if the policy provided that the horse should be insured only while it remained in a cer-

tain county and the application did not so limit the liability.—*Indiana & O. Live Stock Ins. Co. v. Keiningham*, 161 S. W. 384.

10. (b) Under Rev. St. 1911, Arts. 4951, 4953, the effect of failure to attach application and questions and answers to a policy is to exclude them from the contract.—*National Live Stock Ins. Co. v. Gomillion*, 178 S. W. 1050.

231—Amount or Value. (See 28 Cent. Dig. Insurance, §§ 597-600.)

11. Where an owner of a horse procuring a policy on it made representations as to its value and the purchase price and whether it was mortgaged, and the insurance company, relying on the misrepresentations, issued the policy, the misrepresentations were material to the risk within Rev. Civ. St. 1911, Art. 4947, providing that misrepresentations not material to the risk shall not invalidate the policy.—*Indiana & Ohio Live Stock Ins. Co. v. Smith*, 157 S. W. 755. See 28 Cent. Dig. Insurance, § 570.

426—Injury to or Death of Animals.

12. A live stock insurance policy held to prohibit recovery, where the animal died without the county named in the policy.—*Indiana & Ohio Live Stock Ins. Co. v. Krenek*, 144 S. W. 1181. See 28 Cent. Dig. Insurance, § 1130.

533—Persons to Whom Notice or Proof May Be Given. (See 28 Cent. Dig. Insurance, § 1327.)

13. A notice of illness of an insured animal given to the insurer's agent held sufficient compliance with the contract provision that notice be given the company at its home office, where the notice was immediately forwarded to and received by the insurer's home office.—*National Live Stock Ins. Co. v. Henderson*, 164 S. W. 852. 28 Cent. Dig. Insurance, § 1327.

539—Time for Notice and Proof. (See 28 Cent. Dig. Insurance, §§ 1328-1336.)

14. Where an animal insurance policy required notice of sickness or accident forthwith to the insurer with the name of the veterinarian employed, it being impossible for the assured to procure a veterinarian between the time of the serious sickness of the animal and its death, notice of death immediately thereafter was a compliance with the policy.—*National Live Stock Ins. Co. v. Henderson*, 164 S. W. 852.

602—Damages for Refusal of Payment. (See 28 Cent. Dig. Insurance, § 1498.)

15. Penalty and attorney's fees provided by Rev. St. 1911, Art. 4746, for allowance against an insurance company for failure to settle a loss, held properly allowed in a suit on a policy insuring livestock.—National Live Stock Ins. Co. v. Gomillion, 178 S. W. 1050.

633—Petition—Title or Interest of Insured. (See 28 Cent. Dig. Insurance, § 1594.)

16. A petition, in an action on a policy on life of a horse, which alleges that plaintiff was the owner of the horse when the policy was issued, that the horse died within the life of the policy, that all premiums had been paid, that plaintiff furnished proof of loss with demand of payment, and that defendant was indebted to plaintiff in the amount of the policy, sufficiently alleged as against a general demurrer that plaintiff was the owner of the

horse at the time of its death.—Indiana & Ohio Live Stock Ins. Co. v. Smith, 157 S. W. 755. 28 Cent. Dig. Insurance, § 1594.

654—Admissibility of Evidence—Performance of Warranty. (See 28 Cent. Dig. Insurance, §§ 1677-1685.)

17. In an action on a policy insuring a mule alleged to have died of overheat it was not error to permit witness to testify that he had treated the mule kindly.—National Live Stock Ins. Co. v. Gomillion, 178 S. W. 1050.

670—Verdict and Findings. (See 28 Cent. Dig. Insurance, §§ 1785-1787.)

18. In an action on a policy insuring a horse, where there was no testimony suggesting that the death of the animal was due to one of the excepted causes, the court is warranted in finding that the horse died from disease, or accidental injuries as covered by the policy.—National Live Stock Ins. Co. v. Warren, 181 S. W. 790.

STATUTORY LAW

"BLUE SKY" LAWS REGULATING THE SALE OF STOCK OF CORPORATION

Caption to An Act to Regulate and Supervise the Sale and Purchase of Stocks of Private, Foreign and Domestic Corporations Organized for Profit.

1. An Act to regulate and supervise the sale and purchase, in this State, of stocks of private, foreign and domestic corporations organized for profit, which propose to increase their capital stock; and to regulate and supervise the sale and purchase, in this State, of stocks of private, foreign and domestic corporations being organized and hereafter organized or proposed to be organized, for profit; and to regulate and supervise the offering or contracting for sale and purchase of such stock of such corporation or proposed corporation, and to fix commission and promotion fees allowed to be charged; and providing for service of process, examination fees, and exempting certain corporations from the effects of this Act; providing penalty for the violation of the provisions of this Act, and declaring an emergency. (Acts 33rd Leg., 1st Called Session, Chap. 32, Caption.)

What Companies Are Subject to the Provisions of This Act.

2. Every private corporation, foreign or domestic, organized for profit, which is now attempting or shall hereafter attempt to increase its capital stock, and every proposed corporation attempted to be organized which shall, directly or indirectly, through itself, its agents or employes, or through any person or association of persons, holding companies, sales companies or otherwise, or through any other agents, sell or contract to sell any stock of such corporation or proposed corporation, upon which sale or proposed sale or contract of sale any part of the proceeds derived or to be derived therefrom are used or to be used, directly or indirectly for the payment of any commission, promotion, organization fee or other expenses incident, directly or indirectly, to the sale of its shares of stock, except attorney's fees, charter fees, franchise tax, permit fees and stationery and supplies, shall be subject to the provisions of this Act. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 1.)

Applies to Mining, Oil or Gas and Townsite Corporations.

3. This Act shall also apply to any mining, oil or gas corporation increasing its stock or proposed mining, oil or gas corporation attempting to sell stock in which any land or mineral or thing of value is to be procured from, in or under such land that has been or is to be placed as an asset with or in the corporation or proposed

corporation, whether any promotion fee is charged or not, and to any townsite corporation or proposed townsite corporation. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 2.)

Filing of Statements With Secretary of State or Commissioner Before Offering For Sale—Filing Fees.

4. Before offering for sale or contracting to sell, directly or indirectly, any stock of such proposed corporation, or such increased stock of any existing corporation, or before selling any stock in any townsite corporation as provided in Section 2, such corporation, or those promoting or having charge of the sale of stock of any proposed corporation, shall file, under oath, in the office of the Secretary of State, where, under the law, a charter would be filed in his department, or in the office of the Commissioner of Insurance and Banking, where, under the law, a charter would be filed in his department, together with a filing fee of twenty dollars, the following documents: A statement showing in full detail the plan upon which the corporation proposes to increase its capital stock or upon which the promoters or those having charge of the sale of stock of any proposed corporation proposes to sell its stock and organize the corporation, together with a copy of all the forms of contracts, stock (or deeds, if the same shall come under Section 2 hereof) to be used by the corporation or promoters, or those having charge of the sale of stocks of any proposed corporation in connection with such stock sales. The statement shall further show the name, location and domicile of such corporation, and the names of its officers or proposed officers, if any, or promoters, and the addresses of all the parties; the amount of capital stock of any corporation already organized, the proposed increase, or the proposed capital stock of the corporation to be organized, and the price at which the stock is proposed to be sold; and the price at which the stock is proposed to be sold shall not be changed without filing with the Secretary or Commissioner, as the case may be, a statement of such change, which shall be subject to his approval. Any such corporation or promoters of such proposed corporation shall furnish the Secretary or Commissioner such other information as may be necessary or proper concerning the sale of its stock. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 3.)

Filing of Copy of Charter and Other Evidence, When—Statement of Estimated Fees and Expenses.

5. If it shall be a corporation organized under the laws of any other jurisdiction, it shall file with the Secretary or Commissioner a copy of its charter, and such other evidence of its authority as the Secretary or Commissioner may require.

Said statement shall also show the commission, promotion fee and other estimated incidental expenses proposed to be charged for the organization of such proposed corporation, or the increase in the

capital stock of any corporation already organized, and how the commissions or fees are to be paid. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 3.)

Mining, Oil, Gas and Townsite Companies—Must Give Estimate of Actual Value of Property—Employment of Experts.

6. If the corporation or proposed corporation comes under Section 2 hereof, the officers of the corporation, or the promoters of the proposed corporation, shall state the facts upon which they base their estimate of the actual value of the property which is to become an asset of the corporation, and the Secretary or Commissioner shall require such proof as he may deem proper to establish the actual value of the property.

The Secretary or Commissioner shall have the right to employ such experts as he may deem necessary, and the experts shall be employed at the expense of the corporation or promoters of a proposed corporation. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 3.)

Filing of Statements Relating to Townsite Corporations—Issue of Permit.

7. No corporation proposed to be organized for the purpose of buying or selling town sites and town lots shall hereafter be granted a charter by the Secretary of State, or if a foreign corporation shall not be granted a permit to do business in the State of Texas unless the incorporators of said proposed corporation or officer of such foreign corporation shall file with the Secretary of State each and every document, contract and all papers referred to in Section 3 of this Act, as well as a general statement of the plan of its proposed townsite, and a general statement of its methods of advertising same, together with a sample copy of its advertising literature, and no charter shall be granted any corporation unless the compliance with the provisions of this act and in the judgment of the Secretary of State, such business of any proposed townsite corporation will be honestly and fairly conducted both to the corporation and to the public. And each and every corporation in this State now existing or hereafter organized desiring to engage in the sale of townsite lots or sites shall, prior to such sale, file with the Secretary of State a general plan of said proposed lots to be sold, as well as a copy of any and all proposed contracts to be made with the public in the sale thereof, and a general statement of the literature proposed to be issued, and all matters referred to in Section 3 hereof, and if in the judgment of the Secretary of State said sale will be conducted both honestly and fairly to the corporation and to the public, a permit to conduct said sale shall be granted. This provision shall not be construed to authorize the creation of any corporation for any purpose not now authorized by the laws of this State. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 3.)

Secretary or Commissioner Shall Grant or Refuse the Permit.

8. The Secretary or Commissioner, upon the receipt of the information as provided for in Section 3, shall grant or refuse such permit.

If the Secretary or Commissioner shall decide that the sale of stock will be fairly and honestly conducted, both to the corporation and to the public, such permit shall be granted, provided that the commissions, promotion and other incidental expenses, exclusive of the exempted expenses mentioned in Section 1 of this act, shall not be more than fifteen (15) per cent of the price at which such stock is to be sold as shown by the application or amended application. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 4.)

This Act Shall Not Affect Stock Previously Sold or Subscribed; Unsold or Unsubscribed Part of It Falls Under Condition of This Act.

9. Provided, that where any proposed corporation has already sold its stock, or a part thereof, or any part thereof has been subscribed at the time this act shall take effect, this act shall not affect stock previously sold or subscribed nor any contracts made in reference to same; but, if any of the stock of said proposed corporation remains unsold or unsubscribed, said corporation shall, nevertheless, be entitled to a permit upon complying with the other conditions of this act, including the future sale or subscription of any of its stock. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 4.)

Commission or Promotion Fee Paid to Agent or Promoter, When—Kind of Payments of Stock.

10. The commission or promotion fee shall be paid to the agent or promoter as the stock is sold by him and paid by the purchaser. The stock shall be considered as paid for when paid for in cash, property or labor. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 4.)

Issue of Permit Depends on Compliance With Certain Requirements, Amongst Them the Filing of a Bond Approved by Secretary or Commissioner.

11. No permit shall be granted unless there shall appear upon the subscription lists and contracts of such corporation or proposed corporation, in bold type, the amount of the commissions, promotion fees and other estimated expenses incident to the sale of such stock, and the interest which the officer, agent, employe or promoter selling or contracting to sell such stock has in such sale; nor shall such permit be granted until the applicants therefor have entered into a bond for not less than one thousand dollars (\$1,000) nor more than one hundred thousand dollars (\$100,000), the same to be fixed by the Secretary or Commissioner at not more than ten per cent of the stock proposed to be issued. The said bond shall be payable to the Secretary or Commissioner as the case may

be, and his successor in office, conditioned that the facts set forth in the application for such permit, and the proof and statement offered to such Secretary or Commissioner, upon which the application is based, are true, and that they will comply with the provisions of this act in the sale of the stock of such corporation or proposed corporation. Said bond may be made with individual sureties or a surety company authorized to do business in the State of Texas, and the bond shall be approved by the Secretary or Commissioner. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 4.)

Appeal to the District Court of Travis County When Permit Refused.

12. If a permit shall be refused by the Secretary or Commissioner the parties applying therefor may bring suit in the district court of Travis county, Texas, to require said Secretary or Commissioner to issue such permit. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 5.)

Suit Upon the Bond—Amount Recoverable—Requisition of a New Bond—Cancellation of Permit.

13. Any person who shall be induced to purchase any stock of any corporation or proposed corporation by the officers, agents, employes, promoters or trustees, by reason of any misrepresentation of any material fact concerning such stock, such person or persons shall have the right to bring suit upon the bond above provided for, and such bond shall be subject to, and security for, such person so purchasing the stock; provided, that such person shall not be entitled to recover more than the money paid, or the actual value of the property given, or the labor performed, in exchange for such stock, with legal interest from the date of the payment or the performance of the services, or the transfer of the property.

One or more recoveries upon such bond shall not vitiate the same, but it shall remain in full force and effect, but no recoveries upon such bond shall ever exceed the full amount of same, and upon suits being filed in excess of the amount of same, the Secretary or Commissioner may require a new bond, and, if the same is not given within thirty days, he may cancel the permit herein provided for. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 6.)

List of Authorized Officers, Agents and Employes and Its Changes Filed With Secretary or Commissioner.

14. Whenever any permit has been issued, the corporation or persons receiving the same shall file a list of the names of their or its authorized officers, agents and employes, and the postoffice address of each; and, in case of the change of any of its officers, agents or employes, it shall file a list of such changes with the Secretary or Commissioner. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 6.)

All Collected Money for the Sale of Stock Shall Be Deposited with Bank.

15. All moneys or other things of value collected by such corporation or the promoters of a proposed corporation, for the sale of its stock, or contract for the sale of its stock, shall be deposited by said corporation to its credit, or by the promoters of a proposed corporation, to the credit of its proposed officers or trustees, with the exception of the amount allowed for commissions, promotion fees and other incidental expenses, with a bank, bank and trust company or trust company incorporated under the laws of this State, or of the United States. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 7.)

All Corporations or Proposed Corporations Must Keep a Set of Books Open for Inspection By the Authorities.

16. All such corporations, and the organizers or trustees of proposed corporations, shall keep a set of books, which shall show the amount of money, or other things of value received by such corporation or proposed corporation from the sale of its stock, or from contracts of sale of its stock, and such books shall show the number and amounts of stock sold or contracted to be sold, by whom sold, and to whom sold, or contracted to be sold, and the postoffice address of each. Said books shall at all times be open for inspection by the Secretary or Commissioner, or his duly authorized agent. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 8.)

Cause for Cancellation of Permit—Right to Bring Suit in the District Court of Travis County.

17. Whenever the Secretary or Commissioner shall have information that any corporation, or the promoters of the proposed corporation, its officers, agents or employes, are not complying with the terms of this act in the sale of its stock, they shall notify such corporation, or its officers, agents or employes or the promoters of the proposed corporation to appear, within twenty days, and show cause why such permit should not be canceled, and after the hearing such Secretary or Commissioner shall have the right to cancel such permit if the proof shall show that such corporation or proposed corporation, or its officers, agents or employes are not complying with the terms of this act, but the parties or corporation holding such permit shall have the right to bring suit, in the district court of Travis county, Texas, against the Secretary or Commissioner to reinstate such permit to sell stock. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 9.)

Foreign Corporations Must Show 50 Per Cent Paid-in Capital—Does Not Apply to Loan and Insurance Corporations.

18. No permit to sell stock shall ever be issued to any foreign corporation which has not at the time of making application for permit at least fifty per cent of its capital stock subscribed and paid in, providing that this shall not apply to any foreign corpora-

tion engaged exclusively in the business of lending money in this State, nor to any insurance company that is required by law to obtain a permit from the Commissioner of Insurance and Banking. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 10.)

Foreign Corporations Shall File Power of Attorney Like That Provided in Article 4773, R. S.—Duty of Secretary or Commissioner in Accepting Service.

19. Each foreign corporation or the promoters of any proposed foreign corporation desiring to sell or contract to sell its stock in this State shall first file with the Secretary or Commissioner a like power of attorney to that provided for life insurance corporations in Article 4773, Revised Civil Statutes of the State of Texas of 1911, and service may be had upon the corporation and the Secretary or Commissioner, as the case may be, as therein provided for, and the Secretary or Commissioner, as the case may be, upon receipt of such process as is therein provided for, shall proceed as is provided for him to do in Article 4774, Revised Civil Statutes of the State of Texas of 1911, and the Secretary or Commissioner's acts and conduct in regard to such power of attorney, and such process shall be the same as is provided for in said Articles 4774 and 4773, and the effect, force and result of such acts shall be the same as therein provided for. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 11.)

Violation of This Law—Misdemeanor—Imprisonment.

20. It shall hereafter be unlawful for any officer, agent or employe or trustee, or holding company, or sales agents, or person, or association of persons in this State to sell, or offer to sell, or contract to sell, directly or indirectly, for such concern, any stock of any corporation or proposed corporation, subject to this act, which has been, proposed to be, is now being, or may hereafter be organized for profit, without first complying with the provisions of this act, and any person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than two thousand dollars, and in addition thereto may be imprisoned in the county jail for any period not more than one year, or by both such fine and imprisonment. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 12.)

Subscribers Must Be Refunded at the Expiration of Two Years—Extension of Time May Be Granted.

21. At the expiration of two years from the granting of a permit under this act if the proposed corporation has failed to organize, then all subscribers must be refunded the amount paid to the promoter or trustee; provided, however, that the Secretary or Commissioner may grant an extension of time for the sale of securities. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 12a.)

Cumulative Power of This Act.

22. This act shall be construed to be cumulative of any other law or laws of this State. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 13.)

Exemptions of This Act for Certain Corporations.

23. The terms of this act shall not apply to any national bank, nor to any corporation having a charter granted under any act of the Congress of the United States, nor to any State bank and trust company or trust company organized under the laws of this State, nor to any corporation organized under the Federal Reclamation Act, approved June 17, 1902, or the regulations established by the Secretary of the Department of the Interior in pursuance thereof. Nor shall the terms of this act apply to any corporation or the promoters of any corporation organized under the laws of Texas which does not sell or contract to sell its stock to more than twenty-five bona fide purchasers; provided, it does not act as the agent or trustee, holding company or sales company in the promotion of any concern which is included under the terms of this act. Nor shall this act apply to any railroad or railway company or interurban railroad or railway company, or street railroad or railway company. Nor shall this act apply to the sale of stock of a corporation by a bona fide owner of same, who had in good faith bought the same, and who in the purchase and sale of same was and is not acting directly or indirectly as promoter or agent of such corporation. Nor shall this act apply to a bona fide stock or stock broker in the sale of stock, which stock has been by such corporation sold and issued to a bona fide purchaser prior to the offering of same for sale by such broker; provided, that such purchaser or broker was not acting, directly or indirectly, as promoter of such corporation. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 14.)

Quarterly Deposit of Collected Money—Examinations Made at the Expense of Corporations.

24. All moneys collected under the terms of this act by the Secretary or Commissioner shall be quarterly deposited by him with the State Treasurer and credited to the general fund. Whenever the Secretary or Commissioner shall deem it necessary to examine the books of any corporation or proposed corporation, subject to the provisions of this act, or investigate its financial condition, he shall do so at the expense of the corporation or proposed corporation under investigation, and the corporation or the agents of the corporation or proposed corporation being investigated shall pay to the Secretary or Commissioner, or his agent, making the investigation his actual expenses and seven dollars and fifty cents per day for such investigation, which said expenses shall be paid

at the termination of such investigation by the concern investigated. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 15.)

Definitions.

Whenever the word "Secretary" is used in this act it shall be considered to mean Secretary of the State of Texas, and whenever "Commissioner" is used in this act it shall be considered to mean Commissioner of Insurance and Banking of the State of Texas. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 16.)

Emergency Clause.

26. The fact that there is no law in this State regulating the sale of stocks of numerous corporations which are selling such stocks throughout this State, many of which are worthless, and the fact that the people of this State are being imposed upon by unscrupulous persons selling such worthless stocks, creates an emergency and an imperative public necessity that the constitutional rule requiring that bills be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted. (Acts 33rd Leg., 1st Called Session, Chap. 32, Sec. 17.)

STATUTORY LAW

ANTI-TRUST LAW

Definition of a Trust.

1. A trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

(1) To create or which may tend to create or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

(2) To fix, maintain, increase or reduce the price of merchandise, produce or commodities or the cost of insurance or of the preparation of any product for market or transportation.

(3) To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

(4) To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market transportation, shall be in any manner affected, controlled or established.

(5) To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance or the cost of the preparation of any product for market or transportation between them, or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance or the preparation of any product for market or transportation or by which they shall agree

to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

(6) To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

(7) To abstain from engaging in or continuing business or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof. (R. S., Art. 7796.)

Note.—(1) Three insurance companies may make a contract between themselves to reinsure by one of the companies in the others of a part of the business of each, respectively, provided the rates are not agreed upon and fixed between the companies, each company to keep in the business in its own name and with its own agents and in constant competition with the others, and each to be left free to reject any reinsurance risk not satisfactory to it, and provided further, that the affairs of the several companies are not brought under such common management or control as tends to fix or maintain cost of insurance, or lessen competition, or to fix or maintain any standard affecting, controlling or managing the price of insurance, and there is no agreement to pool, combine or unite any interest in connection with the sale of insurance, nor to regulate, fix, or limit the amount of insurance to be undertaken. (Opinion of Attorney General, June 27, 1905.)

(2) A joint contract of two or more insurance companies, being a policy of insurance of the combined companies, issued under the name of certain underwriters, is a violation of the anti-trust law. (Opinion of Attorney General, March 17, 1905.)

(3) A corporation organized for the purpose of conducting insurance bureau having as one of its purposes the right to "make estimates of the cost of carrying fire insurance" would be in violation of the anti-trust law. (Opinion of Attorney General, December 21, 1905.)

(4) An agreement between two surety companies that both shall hold themselves jointly and equally liable under each and every liquor dealer's bond written by either company would be unlawful. (Opinion of Attorney General, February 6, 1906.)

(5) The State Insurance Board law does not repeal, affect or modify the anti-trust laws, and, notwithstanding the powers of the State Insurance Board to regulate insurance rates, it would nevertheless be a violation of the anti-trust law for two or more companies, under the name of certain underwriters, to write an insurance contract or policy which would be the joint contract of such companies. (Opinion of Attorney General, April 6, 1911.)

(6) The anti-trust laws of this State apply only to transactions in this State, and it would not be a violation of the anti-trust laws of Texas, for two or more insurance companies, though chartered in Texas, to write and issue a joint policy in some other State. (Attorney General's opinion, April 11, 1911.)

(7) Relative to constitution and by-laws of proposed organization of
47—Ins.

local chapters or boards of local fire insurance agents in different cities and towns in Texas. (Opinion of Attorney General, April 29, 1911.)

(8) The life insurance companies cannot agree upon a uniform policy at a uniform rate, to be sold for the benefit of the students' loan fund or the assured, because it would controvert the anti-trust laws. The students' loan fund could not retain the proceeds of a policy in its favor, having no insurable interest in the life of the assured. (Opinion of Attorney General, December 11, 1914.)

Monopoly—Definition.

2. That a monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

(1) When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust, as defined in the first section of this act.

(2) Where any corporation acquires the shares of certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise. (R. S., Art. 7797.)

What Constitutes Conspiracy In Restraint of Trade.

3. That either or any of the following acts shall constitute a conspiracy in restraint of trade:

(1) Where any two or more persons, firms, corporations or associations of persons who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into any agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons any article of merchandise, produce or commodity.

(2) Where any two or more persons, firms, corporations or associations of persons shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons. (R. S., Art. 7798.)

Declared to Be Illegal.

4. Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are hereby prohibited and declared to be illegal. (R. S., Art. 7799.)

Shall Forfeit Charter.

5. Any corporation holding a charter under the laws of the State of Texas, which shall violate any of the provisions of this chapter shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine. (R. S., Art. 7800.)

Attorney General Must Institute Suit Upon His Own Motion.

6. For a violation of any of the provisions of this chapter, or any anti-trust laws of this State, by any corporation, it shall be the duty of the Attorney General upon his motion and without leave or order of any judge or court, to institute suit or quo warranto proceedings in Travis county, or at the county seat of any county in the State which the Attorney General may select, for the forfeiture of its charter, rights and franchises, and the dissolution of its corporate existence; and for such purposes, venue is hereby given to each district court in the State of Texas. (R. S., Art. 7801.)

The Corporation to Which Defaulting Corporation May Have Transferred Its Properties Shall Not Be Permitted to Transact Business in Texas.

7. When a corporation organized under the laws of this State shall have been convicted of a violation of any of the provisions of this act, and its charter and franchise has been forfeited, as provided in Section 5, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas. (R. S., Art. 7802.)

Every Foreign Corporation Violating Law Denied the Right to Transact Business—To Be Enjoined.

8. Every foreign corporation violating any of the provisions of this chapter is hereby denied the right, and is prohibited from doing any business within this State, and it shall be the duty of the Attorney General to enforce its provisions by injunction or other proceedings in the district court of Travis county, in the name of the State of Texas. (R. S., Art. 7803.)

To Control Proceedings Instituted to Forfeit Charter.

9. The provisions of Chapter 92 of the Revised Statutes of this State of 1895, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this title. (R. S., Art. 7804.)

The Corporation to Which Foreign Corporation May Have Transferred Its Properties Shall Not Be Permitted to Do Business.

10. When any foreign corporation has been convicted of a violation of any of the provisions of this chapter, and its right to do business in this State has been forfeited, as provided in Section 8 of this act, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate to do business in Texas. (R. S., Art. 7805.)

Penalties—Venue—Fees of Attorney General.

11. Each and every firm, person, corporation or association of persons, who shall in any manner violate the provisions of this

chapter, shall, for each and every day that such violation shall be committed or continued, forfeit and pay a sum of not less than fifty nor more than fifteen hundred dollars, which may be recovered in the name of the State of Texas in the district court of any county in the State of Texas, and venue is hereby given to such district courts; provided, that when any such suit shall have been filed in any county or jurisdiction thereof acquired, it shall not be transferred to any other county, except upon change of venue allowed by the court; and it shall be the duty of the Attorney General, or the district or county attorney under the direction of the Attorney General, to prosecute for the recovery of the same; and the fees of the district or county attorney for representing the State in all anti-trust proceedings, or for the collection of penalties for the violation of the anti-trust laws of this State, shall be ten per cent of the amount collected up to and including the sum of fifty thousand dollars, and five per cent on all sums in excess of the first fifty thousand dollars, to be retained by him when collected; and all such fees which he may collect shall be over and above the fees allowed under the general fee bill; provided, that the provisions of this chapter as to the fees allowed the prosecuting attorney shall not apply to any case in which judgment has heretofore been rendered in any court, nor to any moneys to be hereafter collected upon any such judgment heretofore rendered in any court, whether such judgment or judgments are pending upon appeal or otherwise; and provided, further, that the district or county attorney who joins in the institution of prosecution of any suit for the recovery of penalties for a violation of any of the anti-trust laws of this State, who shall, previous to the collection of such penalties, cease to hold office, he shall be entitled to an equal division with his successor of the fee collected in said cause; and in case of the employment of special counsel by any such district or county attorney, the contract so made shall be binding upon such prosecuting officer making such contract and thereafter retiring from office; provided, further, that in case any suit is compromised before any final judgment in the trial court is had, then the fees herein provided for shall be reduced one-half. (R. S., Art. 7806.)

Contract Void.

12. Any contract or agreement in violation of the provisions of this chapter shall be absolutely void and not enforceable either in law or equity. (R. S., Art. 7807.)

Additional Penalties and Forfeitures.

13. And in addition to the penalties and forfeitures herein provided for, every person violating this chapter may further be punished by imprisonment in the penitentiary for not less than one nor more than ten years. (P. C., Art. 1466.)

Act of Agent Regarded as That of Corporation, When.

14. In prosecutions for the violations of any of the provisions of this chapter, evidence that any person has acted as the agent of a corporation in the transaction of its business in this State shall be received as prima facie proof that his act in the name, behalf or interest of the corporation of which he was acting as the agent, was the act of the corporation. (P. C., Art. 1467.)

Duty of Justices of the Peace to Have Summoned and to Have Examined Witnesses in Relation to Violation of This Act, When.

15. Upon the application of the Attorney General, or of any district or county attorney, made to any justice of the peace in this State, and stating that he has reason to believe that a witness, who is to be found in the county of which such justice of the peace is an officer, knows of a violation of any of the provisions of the preceding chapter, it shall be the duty of the justice of the peace to whom such application is made to have summoned and to have examined such witness in relation to violations of any of the provisions of this chapter, said witness to be summoned as provided for in criminal cases. The said witness shall be duly sworn and the justice of the peace shall cause the statement of the witness to be reduced in writing and signed and sworn to before him, and such sworn statement shall be delivered to the Attorney General, district or county attorney upon whose application the witness was summoned. Should the witness summoned, as aforesaid, fail to appear, or to make statement of the facts within his knowledge under oath, or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in the county jail until he shall make a full statement of all the facts within his knowledge with reference to the matter inquired about. Any person so summoned and examined shall not be liable to prosecution for any violation of the provisions of this act about which he may testify fully and without reserve. (R. S., Art. 7810.)

Actions to Have Precedence.

16. All actions authorized and brought under this chapter shall have precedence, on motion of the prosecuting attorney or Attorney General, of all other business, civil and criminal, except criminal cases where the defendants are in jail. (R. S., Art. 7808.)

Must Not Form, Aid or Become a Party to a Trust—Applies to Trusts Outside of the State, When—Penalty.

17. If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy in restraint of trade, as these offenses are defined by this chapter, or shall form a trust, monopoly or conspiracy in restraint of trade, or shall be a party to the formation of a trust

or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of, or aid to, such trust or monopoly or conspiracy in restraint of trade, he shall be punished by imprisonment in the penitentiary for a period of not less than two years nor more than ten years. (P. C., Art. 1470.)

Person, Member, Agent, Employee, Etc., Operating in Violation of This Law—Penalty.

18. If any person shall, as a member, agent, employee, officer, director or stockholder of any business, firm, corporation or association of persons, form, in violation of the provisions of this chapter, or shall operate in violation of the provisions of this chapter any such business, firm, corporation or association formed in violation of this chapter, or shall make any sale or purchase, or any other contract, or do business for such business, firm, corporation or association, or shall do any other act which has the effect of violating or aiding in the violation of the provisions of this chapter, or shall, with the intent or purpose of driving out competition or for the purpose of financially injuring competitors, sell within the State at less than cost of manufacture or production, or sell in such a way or give away within this State products for the purpose of driving out competition or financially injuring competitors engaged in a similar business, or give secret rebates on such purchase for the purpose aforesaid, he shall be punished by confinement in the penitentiary for a period of not less than two years nor more than ten years. (P. C., Art. 1471.)

Persons Outside State Liable to Punishment, When.

19. If any person shall, outside of this State, do anything which, if done within this State, would constitute the formation of a trust or monopoly or conspiracy in the restraint of trade, as defined in this chapter, and shall cause or permit the trust or monopoly so formed by him to do business within this State, or shall cause or permit such trust, monopoly or conspiracy in restraint of trade to have any operation or effect within this State, or if such trust, monopoly or conspiracy in restraint of trade having been formed outside of this State, any person shall give effect to such trust, monopoly or conspiracy in this State, or shall do anything to help or aid it doing business in this State, or otherwise violate the anti-trust laws of this State, or if any person shall buy or sell, or otherwise make contracts for or aid any other business, firm, corporation or association of persons formed or operated in violation of the provisions of this chapter, or so formed or operated as would be in violation of the laws of this State, if it had been formed within this State, shall be punished by confinement in the penitentiary for a period of not less than two years nor more than ten years. (P. C., Art. 1472.)

Persons, Etc., Who Have Formed Trusts, Etc.—Penalty For.

20. If any person, or employe or employes, or agent or agents, stockholder or stockholders, officer or officers, of any person, firm, association of persons or corporations, now doing business in this State, who has formed a trust as defined in this chapter, or formed a monopoly as defined in this chapter, or has formed a conspiracy in restraint of trade, as defined in this chapter, or shall do or perform any act of any character to carry out such trust, monopoly or conspiracy in restraint of trade, such person, employe or employes, agent or agents, stockholder or stockholders, officer or officers, shall be punished by confinement in the penitentiary for not less than two years nor more than ten years. (P. C., Art. 1473.)

Criminal Prosecution in Travis County—Must Not Sell for Less Than Cost of Production.

21. Criminal prosecutions under this chapter may be conducted in Travis county, Texas, or in any county in this State wherein a trust, monopoly or conspiracy in restraint of trade is being carried on, a recovery or prosecution against any person for any violation of this act, shall not bar a prosecution of or recovery against any other person or persons for the same offense. (P. C., Art. 1474.)

Prosecutions in Any County—Must Notify the Attorney General.

22. Prosecutions under this chapter may be instituted and prosecuted by any county or district attorney of this State, and when any such prosecutions have been instituted by any county or district attorney, such officer shall forthwith notify the Attorney General of such fact; and it is hereby made the duty of the Attorney General, when he shall receive such notice, to join such officer in such prosecution and do all in his power to secure the enforcement of this chapter. (P. C., Art. 1475.)

For Every Conviction the State to Pay the District or County Attorney Fees Divided, When.

23. For every conviction obtained under the provisions of this chapter the State shall pay to the county or district attorney in such prosecution the sum of \$250, and if both the county and district attorney shall serve together in such prosecution, such fee shall be divided between them as follows: \$100 to the county attorney and \$150 to the district attorney. (P. C., Art. 1476.)

TABLE OF CASES CITED.

- Aetna Accident & Liability Co. v. White, 177 S. W. 162, p. 674 (1, 2, 3, 7).
- Adams v. San Antonio Life Ins. Co. 185 S. W. 610, p. 291 (77, 78), 374 (537 to 542), 396 (683).
- Aetna Fire Ins. Co. v. Brannon, 81 S. W. 560, p. 157 (981); 89 S. W. 1057, p. 160 (1010), 27 (117 to 119), 92 (537, 538), 103 (603).
- Aetna Ins. Co. v. Dancer, 181 S. W. 772, p. 36 (181, 182).
- Aetna Ins. Co. v. Eastman, 72 S. W. 431, p. 174 (1116); 80 S. W. 255, p. 95 (546).
- Aetna Ins. Co. v. Fitze, 78 S. W. 370, p. 161 (1011, 1012), 80 (442, 443, 444).
- Aetna Ins. Co. v. Hawkins, 125 S. W. 313, p. 6 (17, 18, 19, 20).
- Aetna Ins. Co. v. Holcomb, 34 S. W. 915, p. 26 (112), 58 (300, 301).
- Aetna Ins. Co. v. Shacklett, 57 S. W. 583, p. 123 (730), 145 (888).
- Aetna Ins. Co. v. Waco Co., 189 S. W. 315, p. 60 (317a, 317b, 317c), 89 (522a).
- Aetna Life Ins. Co. v. El Paso Electric Ry. Co., 184 S. W. 628, p. 480 (9), 481 (1718), 482 (26, 28).
- Aetna Life Ins. Co. v. Farrell, 154 S. W. 1164, p. 480 (7).
- Aetna Life Ins. Co. v. Griffin, 123 S. W. 432, p. 510 (107), 518 (152), 523 (198, 199).
- Aetna Life Ins. Co. v. Hanna, 17 S. W. 35, p. 280 (12), 351 (400).
- Aetna Life Ins. Co. v. Hicks, 56 S. W. 87, p. 503 (71a), 505 (82), 518 (157).
- Aetna Life Ins. Co. v. Hocker, 89 S. W. 26, p. 299 (116).
- Aetna Life Ins. Co. v. J. B. Parker & Co., 72 S. W. 168, p. 514 (130), 515 (134), 519 (160a).
- Aetna Life Ins. Co. v. Tyler Box & Lumber Co., 149 S. W. 283, p. 481 (16, 21).
- Aetna Life Ins. Co. v. Wimberly, 108 S. W. 778, 112 S. W. 1038, p. 334 (307), 349 (382), 357 (431), 304 (143, 144).
- Agricultural Ins. Co. v. Collins, 175 S. W. 1120, p. 34 (166).
- Agricultural Ins. Co. v. Owens, 132 S. W. 828, p. 175 (1132).
- Alamo Fire Ins. Co. v. Brooks, 32 S. W. 714, p. 53 (278).
- Alamo Fire Ins. Co. v. Davis, 45 S. W. 604, p. 150 (929); 60 S. W. 802, p. 140 (859), 180 (1161), 164 (1033).
- Alamo Fire Ins. Co. v. Heidemann Mfg. Co., 28 S. W. 910, p. 154 (953).
- Alamo Fire Ins. Co. v. Lancaster, 28 S. W. 126, p. 55 (288), 159 (995).

- Alamo Fire Ins. Co. v. Schmitt, 30 S. W. 833, p. 55 (289).
Alamo Fire Ins. Co. v. Shacklett, 26 S. W. 630, p. 149 (916).
Alamo Trust Co. v. Prudential Life Ins. Co., 183 S. W. 787, p. 377 (561), 394 (675, 676).
Allemania Fire Ins. Co. v. Fordtran, 128 S. W. 692, p. 175 (1127), 60 (316), 143 (882).
Allemania Fire Ins. Co. v. Fred, 32 S. W. 243, p. 77 (422).
Allen v. Royal Ins. Co., 49 S. W. 931, p. 119 (702).
Allibone v. Fidelity & Casualty Co., 32 S. W. 569, p. 511 (115), 516 (140), 519 (162).
Allred v. Hartford Fire Insurance Co., 37 S. W. 95, p. 32 (155), 79 (431).
Alvord National Bank v. Ferguson, 126 S. W. 622, p. 133 (814).
Amarillo National Life Ins. Co. v. Brown, 166 S. W. 658, p. 290 (66), 291 (76), 292 (82), 301 (127), 302 (133), 309 (167), 329 (267), 369 (517), 384 (611), 389 (645), 394 (671).
American Cent. Ins. Co. v. Bass, 38 S. W. 1119, p. 132 (798).
American Cent. Ins. Co. v. Chancey, 127 S. W. 577, p. 65 (348), 181 (1174), 95 (550).
American Cent. Ins. Co. v. Cowan, 34 S. W. 460, p. 58 (305).
American Cent. Ins. Co. v. Green, 41 S. W. 74, p. 66 (352), 66 (353), 166 (1056).
American Cent. Ins. Co. v. Hardin, 151 S. W. 1152, p. 85 (491), 104 (614), 193 (1256).
American Cent. Ins. Co. v. Heath, 69 S. W. 235, p. 25 (109), 120 (709, 710), 128 (773).
American Cent. Ins. Co. v. Murphy, 61 S. W. 956, p. 158 (984).
American Cent. Ins. Co. v. Nunn, 79 S. W. 88, 82 S. W. 497, p. 150 (923); 82 S. W. 497, p. 50 (251), 95 (545), 112 (659), 127 (765).
American Cent. Ins. Co. v. White, 73 S. W. 827, p. 151 (936), 174 (1117).
American Fire Ins. Co. v. Bell, 75 S. W. 319, p. 34 (168), 131 (797), 130 (783).
American Fire Ins. Co. v. Center, 33 S. W. 554, p. 77 (423, 424).
American Fire Ins. Co. v. First National Bank, 30 S. W. 384, p. 76 (417).
American Fire Ins. Co. v. Stuart, 38 S. W. 395, p. 130 (789, 790).
American Home Life Ins. Co. v. Melton, 144 S. W. 362, p. 301 (128, 129).
American Home Life Ins. Co. v. Compere, 159 S. W. 79, p. 282 (14), 395 (679).
American Legion of Honor v. Giesberg, 42 S. W. 785, p. 578 (253).
American National Ins. Co. v. Anderson, 179 S. W. 66, p. 324 (244), 326 (252, 253), 329 (271 to 273).
American National Ins. Co. v. Bird, 174 S. W. 939, p. 358 (439), 378 (567).

- American National Ins. Co. v. Briggs, 156 S. W. 909, p. 354 (418, 419), 397 (699).
- American National Ins. Co. v. Burnside, 175 S. W. 169, p. 350 (397), 361 (463), 376 (554), 378 (565).
- American National Ins. Co. v. Collins, 149 S. W. 554, p. 368 (510), 369 (513), 376 (558).
- American National Ins. Co. v. Fawcett, 162 S. W. 10, p. 350 (396), 380 (589).
- American National Ins. Co. v. Fulghum, 177 S. W. 1008, p. 513 (124, 125, 126), 522 (187), 524 (202).
- American National Ins. Co. v. Gallimore, 166 S. W. 17, p. 342 (349), 357 (433).
- American National Ins. Co. v. Hawkins, 189 S. W. 330, p. 354 (420a, 420b), 371 (525a), 375 (550a).
- American National Insurance Co. v. Hollingsworth, 189 S. W. 792, p. 371 (525b to 525d).
- American National Ins. Co. v. Nuckols, 187 S. W. 497, p. 510 (109 to 112), 512 (120).
- American National Ins. Co. v. Roberts, 146 S. W. 326, p. 499 (42), 502 (61).
- American National Ins. Co. v. Rodriguez, 152 S. W. 871, p. 372 (528), 375 (551).
- American National Life Ins. Co. v. Rowell, 175 S. W. 170, p. 350 (398), 357 (434), 376 (555), 376 ((557), 378 (566).
- American National Ins. Co. v. Thompson, 186 S. W. 254, p. 356 (428).
- American National Ins. Co. v. Van Dusen, 185 S. W. 634, p. 284 (22), 285 (25, 26, 27), 289 (55 to 57), 305 (145).
- American National Ins. Co. v. Wilson, 176 S. W. 623, p. 494 (24, 25).
- American Surety Co. v. San Antonio Loan & Trust Co., 98 S. W. 387, p. 656 (3).
- American Union Life Ins. Co. v. Wood, 57 S. W. 685, p. 312 (183), 320 (232).
- Amicable Life Ins. Co. v. Kenner, 166 S. W. 462, p. 283 (18), 290 (70, 71).
- Andrews v. Union Central Life Ins. Co., 44 S. W. 610, 50 S. W. 572, p. 362 (471 to 474).
- Andrews v. Union Central Life Ins. Co., 50 S. W. 572, p. 379 (581).
- Armstrong v. National Life Ins. Co., 112 S. W. 327, p. 285 (28 to 33), 288 (54).
- Arnold v. State, 168 S. W. 122, p. 274 (Notes).
- Ash v. Fidelity Mutual Life Assn., 63 S. W. 944, p. 305 (147), 341 (342, 343), 342 (346).
- Atkins v. New York Life Ins. Co., 62 S. W. 563, p. 388 (637).
- Austin Fire Ins. Co. v. Brown, 160 S. W. 973, p. 14 (38), 23 (92), 100 (587), 192 (1241, 1242).
- Austin Fire Ins. Co. v. Sayles, 157 S. W. 272, p. 29 (133), 181 (1179), 186 (1212), 192 (1246), 193 (1258).

- Bankers' & Merchants' Mutual Life v. Stapp, 14 S. W. 168, p. 299 (115b), 308 (158), 390 (649).
- Bankers' Reserve Life v. Ellison, 135 S. W. 226, p. 397 (691).
- Bankers Union of the World v. Nabors, 81 S. W. 91, p. 598 (355).
- Bennett v. Sovereign Camp W. O. W., 168 S. W. 1023, p. 536 (26, 27), 576 (242), 580 (259), 609 (441 to 444), 618 (489).
- Beville v. Merchants Ins. Co., 46 S. W. 914, p. 83 (463).
- Blackstone v. Kansas City Life Ins. Co., 174 S. W. 821, p. 330 (280, 281), 331 (283, 286).
- Blake v. Hamburg-Bremen Fire Ins. Co., 2 S. W., 368, p. 22 (89, 90), 24 (98), 35 (176), 161 (1013).
- Bollman v. Supreme Lodge K. of H., 53 S. W. 722, p. 546 (65, 66), 589 (312).
- Bonnett v. Merchants Ins. Co., 42 S. W. 316, p. 68 (364).
- British-American Assur. Co. v. Francisco, 123 S. W. 1144, p. 104 (610), 105 (620), 92 (536).
- British & Foreign Marine Ins. Co. v. G. C. & S. F. Ry. Co., 63 Tex., 475, p. 141 (867, 869, 870).
- Brock v. United Moderns, 81 S. W. 340, p. 554 (107, 108), 605 (401).
- Brotherhood of Railway Trainmen v. Dee, 108 S. W. 492, 111 S. W. 396, p. 506 (89), 111 S. W. 296, p. 572 (218 to 221), 575 (236), 579 (255), 591 (325), 601 (373).
- Brotherhood of Railroad Trainmen v. Roberts, 107 S. W. 626, p. 576 (237).
- Broussard v. South Texas Rice Co., 131 S. W. 412, p. 143 (876 to 881).
- Brown v. Sovereign Camp W. O. W., 49 S. W. 893, p. 608 (424, 425), 618 (490).
- Brown v. State, 10 S. W. 112, p. 293 (83).
- Brown v. United Moderns, 87 S. W. 357, p. 590 (316), 600 (366).
- Bryant v. Continental Casualty Co., 145 S. W. 636, 182 S. W. 673, p. 503 (70, 71), 501 (60).
- Burges v. New York Life Ins. Co., 53 S. W. 602, p. 315 (200 to 203, 205).
- Burlington Ins. Co. v. Coffman, 35 S. W. 406, p. 53 (279), 75 (410).
- Burlington Ins. Co. v. Rivers, 28 S. W. 453, p. 103 (604), 149 (917).
- Burlington Ins. Co. v. Tobey, 30 S. W. 1111, p. 148 (908), 126 (747).
- Business Men's Accident Assn. v. Webb, 163 S. W. 380, p. 490 (3, 8).
- Byrne v. Casey, 8 S. W. 38, p. 586 (295).
- Camden Fire Ins. Assn. v. Baird, 187 S. W. 699, p. 132 (804, 805), 137 (838).
- Camden Fire Ins. Assn. v. Bomar, 176 S. W. 156, p. 52 (265), 138 (850), 71 (386).
- Camden Fire Ins. Assn. v. Missouri, K. & T. Ry. Co. of Texas, 175 S. W. 816, p. 140 (857).
- Camden Fire Ins. Co. v. Puett, 164 S. W. 418, p. 51 (258), 164 (1035).

- Camden Fire Ins. Co. v. Yarbrough, 182 S. W. 66, p. 85 (492), 162 (1019).
- Cameron v. Barcus, 71 S. W. 423, p. 295 (100).
- Cameron et al. v. Fay et al., 55 Tex. 58, p. 134 (815, 816).
- Campbell v. German Ins. Co., 31 S. E., 310, p. 67 (358).
- Carr v. Grand Lodge United Brothers of Friendship, 189 S. W. 510, p. 585 (289a, 290a), 607 (417a), 608 (425a).
- Cawthorn v. Perry, 13 S. W. 304, p. 317 (210).
- Centennial Mut. Life Assn. v. Parham, 16 S. W. 316, p. 304 (141, 142).
- Cheeves v. Anders, 25 S. W. 324, p. 295 (98), 28 S. W. 274, p. 360 (450).
- Citizens Ins. Co. v. Shrader, 33 S. W. 584, p. 155 (971).
- City Drug Store v. Scottish Union & National Ins. Co., 44 S. W. 21, p. 32 (157), 150 (927), 110 (652, 653).
- Clark v. Adam, 69 S. W. 1016, p. 315 (204).
- Clark v. Southwestern Life Ins. Co., 113 S. W. 335, p. 333 (297).
- Clausen v. Jones, 45 S. W. 183, p. 361 (464), 394 (673).
- Clopton v. Goodbar, 55 S. W. 972, p. 657 (7, 8).
- Cohen v. Continental Fire Ins. Co., 3 S. W. 296, p. 29 (132), 93 (541), 109 (643, 644, 646).
- Coker v. Atlas Accident Ins. Co., 31 S. W. 703, p. 490 (7).
- Cole v. Knights of Maccabees, 188 S. W. 699, p. 572 (216a), 578 (250a), 599 (363a), 605 (398a).
- Coleman v. Anderson, 82 S. W. 1057, 86 S. W. 730, p. 544 (56), 560 (147, 148, 150 to 154), 586 (296), 594 (336).
- Coleman v. Grand Lodge Colored K. of P., 104 S. W. 909, p. 588 (306).
- Collins & Armstrong Co. v. United States Ins. Co., 27 S. W. 147, p. 18 (59).
- Commercial Union Assur. Co. v. Dunbar, 26 S. W. 628, p. 151 (932).
- Commercial Union Assur. Co. v. Hill, 167 S. W. 1095, p. 63 (331), 173 (1101).
- Commercial Union Assur. Co. v. Meyer, 29 S. W. 93, p. 124 (738), 126 (746), 114 (671, 672), 186 (1209, 1210).
- Commonwealth Bonding & Casualty Co. v. Bryant, 185 S. W. 979, p. 519 (159), 520 (171), 523 (197), 527 (230), 527 (233).
- Commonwealth Bonding & Casualty Co. v. Harper, 180 S. W. 1156, p. 659 (26).
- Commonwealth Bonding & Casualty Co. v. Hendricks, 168 S. W. 1007, p. 520 (169, 170), 521 (178, 180, 181), 525 (217, 218), 527 (227), 528 (237).
- Commonwealth Bonding & Casualty Ins. Co. v. Hollifield, 184 S. W. 776, p. 670 (2).
- Commonwealth Bonding & Casualty Co. v. Knight, 185 S. W. 1037, p. 512 (119), 513 (123), 517 (147).

- Commonwealth Bonding & Casualty Co. v. Wright, 171 S. W. 1043, p. 496 (31), 522 (186), 527 (228).
- Commonwealth Fire Ins. Co. v. Obenchain, 151 S. W. 611, p. 20 (80), 91 (532), 70 (374), 161 (1015), 181 (1181).
- Commonwealth Ins. Co. v. Finegold, 183 S. W. 833, p. 74 (403), 85 (486, 487), 181 (1183), 192 (1247).
- Connecticut Fire Ins. Co. v. Hilbrant, 73 S. W. 558, p. 131 (796), 126 (752), 160 (1009), 148 (909).
- Connecticut Mutual Ins. Co. v. Rudolph, 45 Tex. 454, p. 300 (118, 119, 120).
- Continental Casualty Co. v. Bridges, 113 S. W. 170, p. 499 (44, 45, 46).
- Continental Casualty Co. v. Deeg, 125 S. W. 353, p. 504 (76), 524 (207, 208), 525 (215).
- Continental Casualty Co. v. Jennings, 99 S. W. 423, p. 500 (49), 504 (75), 511 (114), 518 (153).
- Continental Casualty Co. v. Morris, 102 S. W. 773, p. 501 (55).
- Continental Casualty Co. v. Wade, 105 S. W. 35, p. 491 (10), 507 (95, 96), 514 (129), 518 (156).
- Continental Fire Assn. v. Bearden, 69 S. W. 982, p. 151 (934).
- Continental Fire Assn. v. Masonic Temple Co., 62 S. W. 930, p. 25 (108), 146 (894).
- Continental Fire Assn. v. Norris, 70 S. W. 769, p. 100 (585), 190 (1235).
- Continental Fire Ins. Co. v. Cummings, 78 S. W. 378, 81 S. W. 705, p. 79 (437, 438), 105 (619), 107 (630), 125 (741), 165 (1044), 172 (1092), 173 (1109).
- Continental Fire Assn. v. Wingfield, 73 S. W. 847, p. 21 (81).
- Continental Ins. Co. v. Chase, 33 S. W. 602, p. 153 (950, 951), 156 (972).
- Continental Ins. Co. v. Cummings, 95 S. W. 48, p. 161 (1014), 165 (1043); 95 S. W. 88, p. 100 (582).
- Continental Ins. Co. v. McCulloch, 39 S. W. 374, p. 153 (952), 115 (676).
- Co-operative Ins. Assn. v. Hubbs, 115 S. W. 670, p. 172 (1096).
- Co-operative Ins. Assn. v. Ray, 138 S. W. 1122, p. 32 (154), 52 (262), 95 (549), 118 (697).
- Cope v. Pitzer, 166 S. W. 447, p. 282 (16), 395 (681), 292 (79a).
- Couch & Gilliland v. Home Protection Fire Ins. Co., 73 S. W. 1077, p. 32 (156), 179 (1158).
- Cowen v. Equitable Life Assur. Soc., 84 S. W. 404, p. 298 (113), 303 (137), 335 (314), 337 (323), 338 (329), 351 (404), 391 (664).
- Crescent Ins. Co. v. Camp, et al., 9 S. W. 473, p. 54 (283), 56 (295); 64 Tex., 521, p. 151 (937), 164 (1042).
- Crescent Ins. Co. v. Griffin & Shook, 59 Tex. 509, p. 97 (558), 99 (571, 572, 574).

- Crowder v. State, 177 S. W. 501, p. 162 (1023).
Cullers v. James, 1 S. W. 314, p. 133 (813).
Curlee v. Texas Home Fire Ins. Co., 73 S. W. 831, p. 57 (298), 110 (651).
Curry v. Stone, 92 S. W. 263, p. 310 (176), 317 (214), 348 (377).
Daniel v. Modern Woodmen of America, 118 S. W. 211, p. 552 (96), 559 (140 to 142).
De Garcia v. Cherokee Life Ins. Co., 180 S. W. 153, p. 358 (437), 377 (562), 382 (606), 385 (618), 398 (702).
Delaware Ins. Co. v. Bonnett, 48 S. W. 1104, p. 69 (368).
Delaware Ins. Co. v. Harris, 64 S. W. 867, p. 45 (227), 50 (256), 57 (297), 72 (394), 100 (584), 103 (600).
Delaware Ins. Co. v. Hill, 127 S. W. 283, p. 16 (51), 28 (122), 35 (175a), 39 (199), 51 (259 to 261), 68 (361), 94 (542), 154 (961), 159 (999, 1000), 163 (1070), 169 (1077).
Delaware Ins. Co. v. Hutto, 159 S. W. 73, p. 149 (914).
Delaware Ins. Co. v. Monger & Henry, 79 S. W. 7, p. 82 (455, 457).
Delaware Ins. Co. v. Wallace, 160 S. W. 1130, p. 33 (159), 92 (535), 104 (615), 164 (1036).
Dexter v. First Guaranty State Bank, 180 S. W. 1172, p. 37 (191, 192).
Diamond v. Duncan, 177 S. W. 955, p. 19 (67 to 73).
Dickey v. Continental Casualty Co., 89 S. W. 436, p. 300 (121, 122).
Donoho v. Equitable Life Assur. Soc., 54 S. W. 645, p. 291 (75).
Dorroh-Kelly Mercantile Co. v. Orient Ins. Co., 126 S. W. 616, 135 S. W. 1165, p. 84 (476 to 480).
Drummond v. White-Swearingen Realty Co., 165 S. W. 20, p. 18 (64), 20 (75 to 78), 30 (140), 117 (693).
Duer v. Supreme Council Order of Chosen Friends, 52 S. W. 109, p. 545 (64).
G. A. Duerler Mfg. Co. v. Dullnig, 83 S. W. 899, 87 S. W. 332, p. 516 (144).
Dugger v. Mutual Life Ins. Co., 81 S. W. 335, p. 295 (105).
Dulaney v. Walsh, 37 S. W. 615, p. 359 (445).
Dumphy v. Commercial Union Assur. Co., 142 S. W. 116, 174 S. W. 814, p. 30 (139), 62 (325), 88 (517), 89 (519, 520).
Dwyer v. Continental Ins. Co., 57 Tex. 181, p. 159 (1005) 183 (1193), 63 Tex. 354, p. 166 (1049).
East Texas Fire Ins. Co. v. Blum, 13 S. W. 572, p. 16 (50), 20 (79), 86 (501, 502).
East Texas Fire Ins. Co. v. Brown, 18 S. W. 713, p. 18 (62), 54 (284), 126 (756), 178 (1148), 179 (1155), 184 (1201, 1202).
East Texas Fire Ins. Co. v. Clarke, 15 S. W. 166, p. 70 (376), 178 (1152).
East Texas Fire Ins. Co. v. Coffee, 61 Tex. 287, p. 38 (196), 40 (203, 204), 122 (724), 125 (740), 127 (763), 183 (1191).

- East Texas Fire Ins. Co. v. Crawford**, 16 S. W. 1068, p. 54 (285), 98 (565).
- East Texas Ins. Co. v. Dyches**, 56 Tex. 565, p. 49 (249), 150 (928), 152 (939), 183 (1193).
- East Texas Fire Ins. Co. v. Flippin**, 23 S. W. 550, p. 42 (215).
- East Texas Fire Ins. Co. v. Harris**, 25 S. W. 720, p. 76 (415).
- East Texas Fire Ins. Co. v. Kempner**, 34 S. W. 393, p. 62 (328), 63 (333, 336, 337), 66 (349).
- East Texas Fire Ins. Co. v. Perkey**, 35 S. W. 1050, p. 91 (531), 92 (534), 106 (621, 622).
- Eaton v. International Travelers' Assn.**, 136 S. W. 817, p. 492 (15), 515 (134).
- Eatman v. Eatman**, 135 S. W. 165, p. 587 (297, 298), 588 (307, 308), 611 (451).
- Eichlitz v. State**, 46 S. W. 643, p. 293 (84).
- Eminent Household of Columbian Woodmen v. Hancock**, 174 S. W. 657, p. 490 (6), 506 (84).
- Employers' Liability Assur. Corp. v. Rochelle**, 35 S. W. 869, p. 480 (10), 482 (25), 501 (54), 511 (118) 518 (154).
- Endowment Rank Supreme Lodge K. P. v. Townsend**, 83 S. W. 220, p. 554 (109), 618 (491).
- Equitable Life Assur. Soc. v. Cole**, 35 S. W. 720, p. 290 (68, 69), 383 (610).
- Equitable Life Assur. Soc. v. Ellis**, 137 S. W. 184, p. 339 (332), 344 (354, 357), 345 (359), 346 (363), 349 (389 to 394), 351 (402); 147 S. W. 1152, p. 332 (295), 333 (300), 384 (613), 386 (625), 387 (633 to 635).
- Equitable Life Assur. Soc. v. Evans**, 64 S. W. 74, p. 343 (350).
- Equitable Life Assur. Soc. v. Hazlewood**, 12 S. W. 621, p. 295 (103), 302 (134), 327 (258).
- Equitable Life Assur. Soc. v. Liddell**, 74 S. W. 87, p. 331 (289), 380 (590), 389 (647).
- Equitable Life Assur. Soc. v. Maverick**, 78 S. W. 560, p. 320 (226), 321 (235, 237).
- Eversberg v. Supreme Tent Knights of Maccabees of the World**, 77 S. W. 246, p. 534 (16), 547 (76).
- Ex Parte Cook**, 136 S. W. 67, p. 657 (9), 659 (27).
- Farmer v. State**, 7 S. W. 220, p. 276 (1).
- Federal Life Ins. Co. v. Hoskins**, 185 S. W. 607, p. 302 (135), 307 (155), 311 (181).
- Fidelity & Casualty Co. v. Carter**, 57 S. W. 315, p. 497 (37c).
- Fidelity & Casualty Co. v. J. W. Crowdus Drug Co.**, 166 S. W. 1186, p. 480 (11).
- Fidelity & Casualty Co. v. Getzendanner**, 53 S. W. 838, p. 506 (87), 526 (222, 223).

- Fidelity & Casualty Co. v. Joiner, 178 S. W. 806, p. 506 (85), 507 (91), 522 (182).
- Fidelity & Casualty Co. v. Jones, 62 S. W. 927, p. 525 (216).
- Fidelity & Casualty Co. v. Lone Oak Cotton Oil & Gin Co., 80 S. W. 541, p. 481 (20).
- Fidelity & Casualty Co. v. Smith, 71 S. W. 391, p. 505 (78).
- Fidelity & Casualty Co. v. Tyler Cotton Oil Co., p. 480 (12, 13).
- Fidelity Mutual Life v. Harris, 57 S. W. 635, p. 300 (117), 305 (149), 329 (269).
- Fidelity Mutual Life Ins. Co. v. Zapp, 166 S. W. 139, p. 357 (430), 365 (488).
- Fidelity-Phoenix Fire Ins. Co. v. Abilene Dry Goods Co., 159 S. W. 172, p. 131 (793), 164 (1036a).
- Fidelity-Phoenix Fire Ins. Co. v. O'Bannon, 178 S. W. 731, p. 55 (291), 70 (378), 118 (696).
- Fidelity-Phoenix Fire Ins. Co. v. Sadau, 178 S. W. 559, p. 121 (716, 717), 122 (721), 123 (732, 733), 126 (744), 127 (759), 173 (1103), 178 (1149), 187 (1216); 159 S. W. 137, p. 149 (920), 154 (958), 157 (977).
- Fire Assn. of Philadelphia v. American Cement Plaster Co., 84 S. W. 1115, p. 18 (61), 53 (276).
- Fire Assn. of Philadelphia v. Blum, 63 Tex., 282, p. 132 (802, 803).
- Fire Assn. of Philadelphia v. Brown, 33 S. W., 997, p. 114 (668).
- Fire Assn. of Philadelphia v. Bynum, 44 S. W. 579, p. 22 (87), 102 (598).
- Fire Assn. of Philadelphia v. Calhoun, 67 S. W. 153, p. 51 (257), 53 (272), 79 (436).
- Fire Assn. of Philadelphia v. Colgin, 33 S. W. 1004, p. 50 (254), 130 (786), 146 (896).
- Fire Assn. of Philadelphia v. Flournoy, 19 S. W. 793, p. 70 (373), 89 (523).
- Fire Assn. of Philadelphia v. Jones, 40 S. W. 44, p. 125 (742), 165 (1047).
- Fire Assn. of Philadelphia v. LaGrange & Lockhart Compress Co., 109 S. W. 1134, p. 98 (563, 564), 139 (856).
- Fire Assn. of Philadelphia v. Laning, 31 S. W. 681, p. 25 (106).
- Fire Assn. of Philadelphia v. Love, 108 S. W. 810, p. 1 (1, 2), 5 (15).
- Fire Assn. of Philadelphia v. Masterson, 61 S. W. 962, p. 79 (434, 435), 188 (1222); 83 S. W. 49, p. 95 (547), 157 (982), 172 (1093), 173 (1111).
- Fire Assn. of Philadelphia v. McNerney, 54 S. W. 1053, p. 180 (1164), 187 (1221),
- Fire Assn. of Philadelphia v. Perry, 185 S. W. 374, p. 72 (387, 388), 172 (1100).
- Fire Assn. of Philadelphia v. Powell, 188 S. W. 47, p. 34 (170, 164 1038), 175 (1119), 193 (1263).

- Fire Assn. of Philadelphia v. Richards, 179 S. W. 926, p. 121 (715), 123 (726), 147 (898), 175 (1123), 183 (1196).
- Fire Assn. of Philadelphia v. Strayhorn, 165 S. W. 901, p. 138 (851), 150 (921), 181 (1178).
- Fireman's Fund Ins. Co. v. Jesse French Piano & Organ Co., 187 S. W. 691, p. 116 (685), 180 (1165), 194 (1265, 1266).
- Fireman's Fund Ins. Co. v. Lyon, 171 S. W. 801, p. 105 (616), 173 (1108).
- Fireman's Fund Ins. Co. v. Shearman, 50 S. W. 598, p. 65 (345, 346), 66 (354).
- Fireman's Fund Ins. Co. v. Von Rosenberg, 132 S. W. 467, p. 5 (15).
- First National Bank v. Cleland, 82 S. W. 337, p. 81 (449) 159 (1002).
- First National Bank v. Lancashire Ins. Co., 62 Tex. 461, p. 16 (52), 71 (385).
- First National Bank v. Valenta, 75 S. W. 1087, p. 372 (531).
- First Texas State Ins. Co. v. Bell, 184 S. W. 277, p. 356 (429), 394 (674).
- First Texas State Ins. Co. v. Capers, 183 S. W. 794, p. 351 (403).
- First Texas State Ins. Co. v. Hare, 180 S. W. 282, p. 509 (105).
- First Texas State Ins. Co. v. Herndon, 184 S. W. 283, p. 509 (106).
- First State Ins. Co. v. Jiminez, 163 S. W. 656, p. 365 (491), 378 (580), 390 (650, 655).
- First Texas State Ins. Co. v. Jones, 167 S. W. 9, p. 524 (210).
- Fitzmaurice v. Mutual Life Ins. Co., 19 S. W. 301, p. 303 (140).
- Fletcher v. Supreme Lodge Knights and Ladies of Honor, 135 S. W. 201, p. 570 (206), 572 (217).
- Fletcher v. Williams, 66 S. W. 260, p. 295 (102), 359 (447).
- Flint v. Travelers' Ins. Co., 43 S. W. 1079, p. 502 (67).
- Flippen v. State Life Ins. Co., 70 S. W. 787, p. 328 (261, 262), 382 (600).
- Flowers v. Sovereign Camp W. O. W., 90 S. W. 526, p. 587 (302 to 305).
- Foster v. Franklin Life Ins. Co., 72 S. W. 91, p. 286 (34 to 39), 394 (672).
- Franklin Ins. Co. v. Villeneuve, 60 S. W. 1014, p. 354 (417), 369 (516), 370 (522), 392 (666, 667).
- Fraternal Union of America v. Hurlock, 75 S. W. 539, p. 575 (234).
- Fraternal Mystic Circle v. Crawford, 75 S. W. 844, p. 536 (23, 24), 555 (116).
- Fuos v. Dietrich, 101 S. W. 291, p. 313 (191), 314 (198).
- Galles & Bowie v. Alarcon, 145 S. W. 634, p. 308 (163), 394 (670).
- Galveston Ins. Co. v. Long, 51 Tex. 89, p. 182 (1190).
- Gassaway v. Browning, 175 S. W. 481, p. 133 (808).
- General Acc. Ins. Co. v. Hayes, 113 S. W. 990, p. 501 (52), 511 (117), 518 (155), 519 (163), 520 (168), 527 (231).

- General Accident, Fire & Life Assur. Corp. v. Lacy, 151 S. W. 1170, p. 513 (128).
- General Accident, Fire & Life Assur. Corp. v. Stedman, 153 S. W. 692, p. 508 (98), 528 (238).
- General Bonding & Casualty Co. v. McCurdy, 183 S. W. 796, p. 657 (10, 11).
- General Bonding & Casualty Ins. Co. v. Moseley, 174 S. W. 1031, p. 670 (1, 2).
- General Bonding & Casualty Ins. Co. v. Waples Lumber Co., 176 S. W. 651, p. 657 (4).
- Generes v. Security Life Ins. Co., 163 S. W. 386, p. 288 (49 to 53), 382 (604), 397 (697).
- Georgia Home Ins. Co. v. Brady, 41 S. W. 513, p. 36 (179), 55 (293), 62 (329).
- Georgia Home Ins. Co. v. City of Smithville, 49 S. W. 412, p. 17 (57), 26 (114).
- Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366, p. 31 (149 to 152), 148 (910).
- Georgia Home Ins. Co. v. Leaverton, 33 S. W. 579, p. 137 (836).
- Georgia Home Ins. Co. v. McKinley, 37 S. W. 606, p. 37 (190), 48 (245).
- Georgia Home Ins. Co. v. Moriarity, 37 S. W. 628, p. 111 (656).
- Georgia Home Ins. Co. v. O'Neal, 38 S. W. 62, p. 112 (657).
- Gerard F. & M. Ins. Co. v. Frymier, 32 S. W. 55, p. 127 (762), 145 (889).
- German-American Ins. Co. v. Evants, 62 S. W. 417, p. 65 (343), 110 (650).
- German-American Ins. Co. v. Waters, 30 S. W. 576, p. 93 (539).
- Germania Ins. Co. v. Anderson, 40 S. W. 200, p. 35 (175).
- Germania Fire Ins. Co. v. McChristy, 101 S. W. 822, p. 158 (983).
- Germania Life Ins. Co. v. Peetz, 47 S. W. 687, p. 335 (313), 336 (317).
- German Fire Ins. Co. v. Walker, 146 S. W. 606, p. 33 (162).
- German Ins. Co. v. Beville, 126 S. W. 31, p. 84 (481).
- German Ins. Co. v. Cain, 37 S. W. 657, p. 86 (498), 153 (947).
- German Ins. Co. v. Daniels, 33 S. W., 549, p. 28 (125a), 155 (970).
- German Ins. Co. v. Everett, 36 S. W. 125, p. 100 (580), 101 (594), 108 (634), 128 (768), 155 (966), 169 (1075); 46 S. W. 95, p. 177 (1141).
- German Ins. Co. v. Gibbs, 35 S. W. 679, p. 155 (967), 156 (974).
- German Ins. Co. v. Gibbs, Wilson & Co., 92 S. W. 1068, p. 16 (53), 18 (63), 26 (113), 108 (640), 127 (764), 766, 767, 137 (839, 840), 145 (892), 148 (910a, 912), 169 (1078), 171 (1090), 172 (1095).
- German Ins. Co. v. Hunter, 32 S. W. 344, p. 158 (986).
- German Ins. Co. v. Jansen, 45 S. W. 220, p. 115 (677).
- German Ins. Co. v. Luckett, 34 S. W. 173, p. 36 (184), 146 (897).

TABLE OF CASES CITED

707

- German Ins. Co. v. Norris, 32 S. W. 727, p. 126 (745), 189 (1226).
 German Ins. Co. v. Pearlstone, 45 S. W. 832, p. 83 (461, 462), 150 (922), 155 (964).
 Ginnners Mutual v. Wiley & House, 147 S. W. 629, p. 25 (103), 89 (521), 118 (698), 154 (956, 957), 190 (1232).
 Glasscock v. Liverpool, London & Globe, 188 S. W. 281, p. 41 (209), 180 (1163).
 Glenn Falls Ins. Co. v. Hawkins, 126 S. W. 1114, p. 2 (7), 4 (13), 6 (16).
 Glenn Falls Ins. Co. v. Melott, 174 S. W. 700, p. 164 (1034).
 Glenn Falls Ins. Co. v. Walker, 166 S. W. 122, p. 40 (208), 42 (218, 219); 187 S. W. 1036, p. 93 (539a), 164 (1039), 175 (1118).
 Goddard v. East Texas Fire Ins. Co., 67 Tex. 69, p. 31 (148), 46 (231, 232), 48 (240, 241), 49 (248).
 Goldbaum v. Blum, 15 S. W. 564, p. 362 (470).
 Gordon v. American Patriots, 141 S. W. 331, p. 542 (52).
 Graham v. Sparks, 121 S. W. 597, p. 12 (34, 35).
 Grand Court of Texas Independent Order of Calanthe v. Johns, 181 S. W. 869, p. 571 (212, 213), 578 (247).
 Grand Fraternity v. Green, 131 S. W. 442, p. 380 (587), 609 (439).
 Grand Fraternity v. Melton, 111 S. W. 967, 117 S. W. 788, p. 380 (586), 601 (374), 607 (418, 420).
 Grand Fraternity v. Mulkey, 130 S. W. 242, p. 577 (246), 590 (320), 609 (438), 616 (476, 477).
 Grand Lodge A. O. U. W. v. Bollman, 53 S. W. 829, p. 608 (426).
 Grand Lodge A. O. U. W. v. Cleghorn, 42 S. W. 1043, p. 585 (291), 594 (335).
 Grand Lodge A. O. U. W. v. Jones, 106 S. W. 184, p. 586 (293).
 Grand Lodge A. O. U. W. v. Stumpf, 58 S. W. 840, p. 583 (284).
 Grand Lodge of Brotherhood of Railroad Trainmen v. Kennedy, 188 S. W. 447, p. 579 (254a), 612 (461a).
 Grand Lodge Colored K. P. v. Cleo Lodge No. 222. 189 S. W. 764, p. 600 (370b).
 Grand Lodge Colored Knights of Pythias v. Mackey, 104 S. W. 907, p. 585 (290), 586 (294).
 Grand Lodge F. & A. M. of Texas v. Dillard, 162 S. W. 1173, p. 571 (210), 604 (392), 612 (459).
 Grand Lodge F. & A. M. v. Moore, 154 S. W. 362, p. 602 (382).
 Grand Lodge Order of Sons of Hermann v. Iselet, 37 S. W. 377, p. 583 (280).
 Grand Temple & Tabernacle of the Knights and Daughters of Tabor v. Counts, 157 S. W. 1180, p. 571 (211), 618 (495).
 Grand Temple & Tabernacle of Knights and Daughters of Tabor v. Johnson, 135 S. W. 173, 171 S. W. 490, p. 537 (31), 539 (37), 541 (46), 599 (364), 604 (393), 608 (423), 615 (471), 618 (496), 619 (501).
 Grant v. Buchanan, 81 S. W. 820, p. 133 (807), 190 (1234).

- Gray v. Sovereign Camp W. O. W., 106 S. W. 176, p. 551 (95), 582 (271), 587 (301).
- Grayson v. Grand Temple of Knights and Daughters of Tabor, 171 S. W. 489, p. 541 (47), 571 (214, 215).
- Great Eastern Casualty Co. v. Anderson, 183 S. W. 802, p. 516 (142).
- Great Eastern Casualty Co. v. Boli, 187 S. W. 686, p. 674 (6).
- Great Eastern Casualty Co. v. Smith, 174 S. W. 687, p. 495 (27, 28).
- Great Eastern Casualty Co. v. Thomas, 178 S. W. 603, p. 490 (5, 9), 520 (165).
- Green v. Grand United Order of Odd Fellows, 163 S. W. 1071, p. 582 (272, 273), 584 (288).
- Grell v. Sam Houston Life Ins. Co., 157 S. W. 757, p. 301 (125), 306 (151, 153).
- Griffin v. Zuber, 113 S. W. 961, p. 30 (137), 657 (5).
- Grimes v. Fidelity & Casualty Co., 76 S. W. 811, p. 508 (97).
- Guarantee Life Ins. Co. v. Evert, 178 S. W. 643, p. 324 (242), 326 (254), 350 (399), 388 (638, 639).
- Gross v. Colonial Assur. Co., 121 S. W. 517, p. 87 (507, 508).
- Guinn v. Phoenix Ins. Co. of Brooklyn, 31 S. W. (566), p. 26 (111), 59 (307), 87 (505).
- Gulf, C. & S. F. Ry. Co. v. Zimmermann, 17 S. W. 239, p. 142 (873, 874).
- Hackler v. International Travelers Assn., 165 S. W. 44, p. 487 (1, 2), 523 (200).
- Hamburg-Bremen Fire Ins. Co. v. Garlington, 18 S. W. 337, p. 113 (666, 667), 116 (682 to 684).
- Hamburg-Bremen Fire Ins. Co. v. Ruddell, 82 S. W. 826, p. 53 (275), 122 (723), 145 (890).
- Hamburg-Bremen Fire Ins. Co. v. Swift, 130 S. W. 670, p. 139 (853), 178 (1153).
- Hamilton v. Fireman's Fund Ins. Co., 177 S. W. 173, p. 71 (383), 55 (290), 109 (642).
- Hanna v. Hanna, 30 S. W. 820, p. 583 (282, 283).
- Hancock v. Wilson, 173 S. W. 1171, p. 11 (30).
- Hanover Fire Ins. Co. v. Huff, 175 S. W. 465, p. 126 (754), 127 (760), 162 (1017), 170 (1088), 175 (1120, 1121), 192 (1248, 1252, 1255).
- Hanover Fire Ins. Co. v. National Exchange Bank, 34 S. W. 333, p. 58 (304).
- Hanover Fire Ins. Co. v. Shrader, 31 S. W. 1100, p. 21 (83), 42 (217), 52 (270), 126 (751); 32 S. W. 344, p. 155 (969), 158 (985).
- Hanover Fire Ins. Co. v. Turney, 147 S. W. 625, p. 19 (74), 91 (530), 173 (1106, 1107).
- Harde v. Germania Life Ins. Co., 153 S. W. 666, p. 363 (475), 374 (543, 544), 398 (703).

- Harris v. Harris, 97 S. W. 504, p. 589 (331).
Harris v. Scrivener, 78 S. W. 705, p. 310 (174).
Harris v. Todd, 158 S. W. 1189, p. 135 (828).
Hasard v. Western Commercial Travelers' Assn., 116 S. W. 625, p. 602 (376).
Hatch v. Hatch, 80 S. W. 411, p. 296 (106, 107), 316 (206), 363 (477).
Hartford Fire Ins. Co. v. Adams, 158 S. W. 231, p. 85 (483 to 485).
Hartford Fire Ins. Co. v. Becton, 124 S. W. 474, p. 170 (1087).
Hartford Fire Ins. Co. v. Cameron, 45 S. W. 158, p. 42 (214), 191 (1237).
Hartford Fire Ins. Co. v. Cannon, 46 S. W. 851, p. 117 (689), 191 (1239), 131 (795).
Hartford Fire Ins. Co. v. City of Houston, 116 S. W. 36, p. 140 (858a).
Hartford Fire Ins. Co. v. Clayton, 43 S. W. 910, p. 97 (562).
Hartford Fire Ins. Co. v. Dorroh, 133 S. W. 465, p. 30 (142), 72 (395 to 401), 87 (510), 163 (1029), 176 (1134).
Hartford Fire Ins. Co. v. Josey, 25 S. W. 685, p. 13 (37), 108 (637), 126 (754).
Hartford Fire Ins. Co. v. Moore, 36 S. W. 146, p. 25 (107), 100 (581).
Hartford Ins. Co. v. Pires, 165 S. W. 565, p. 121 (714), 181 (1177), 172 (1098).
Hartford Fire Ins. Co. v. Post, 62 S. W. 140, p. 74 (404), 102 (597), 107 (632, 633), 144 (884), 164 (1040), 189 (1227).
Hartford Fire Ins. Co. v. Ransom, 61 S. W. 144, p. 69 (366), 102 (596).
Hartford Fire Ins. Co. v. Walker, 61 S. W. 711, p. 2 (5); 153 S. W. 398, p. 31 (145), 58 (303), 59 (314), 60 (318), 83 (467), 85 (488), 93 (540), 95 (551), 103 (601, 602); 153 S. W. 398, p. 177 (1146, 1147).
Hartford Fire Ins. Co. v. Wright, 125 S. W. 363, p. 45 (225), 59 (312), 96 (554 to 558).
Hartford Life Ins. Co. v. Benson, 187 S. W. 351, p. 306 (154).
Haupt v. James Cravens & Co., 120 S. W. 541, p. 15 (44, 45).
Hawkins v. Lone Star Ins. Union, 146 S. W. 1041, p. 572 (216), 576 (241), 578 (250), 580 (260).
Haywood v. Grand Lodge of Texas K. P., 138 S. W. 1194, p. 544 (60, 61), 559 (143), 578 (248, 249), 603 (383).
Hefner v. Fidelity & Casualty Co., 160 S. W. 330, p. 506 (86), 509 (102 to 104), 522 (185), 523 (196), 524 (209).
Henry v. Green Ins. Co., 103 S. W. 836, p. 79 (433).
Hibernia Ins. Co. v. Bills, 29 S. W. 1063, p. 55 (286).
Hibernia Ins. Co. v. Malevinsky, 24 S. W. 804, p. 101 (590), 103 (605).
Hibernia Ins. Co. v. Starr, 13 S. W. 1017, p. 121 (718), 182 (1186).
Hildebrand v. Ames, 66 S. W. 128, p. 380 (585).

- Holmes v. Thomason, 61 S. W. 504, p. 19 (65, 66), 24 (100).
Home Banking & Ins. Co. v. Lewis, 48 Tex. 622, p. 182 (1189).
Home Benefit Assn. v. Wester, 146 S. W. 1022, p. 536 (25), 538 (34, 35), 597 (349).
Home Circle Soc. No. 2 v. Shelton, 85 S. W. 320, 553 (104), 556 (127, 128), 605 (402), 606 (409, 410), 617 (484).
Home Circle Soc. of Goliad and Refugio Counties v. Hanley, 86 S. W. 641, p. 592 (331).
Home Forum Benefit Order v. Jones, 48 S. W. 219, p. 551 (93).
Home Forum Benefit Order of Illinois v. Jones, 48 S. W. 219, p. 606 (408).
Home Forum Benefit Order v. Varnado, 55 S. W. 364, p. 548 (81), 562 (156).
Home Ins. and Banking Co. v. Lewis, 48 Tex. 622, p. 26 (110), 28 (123), 34 (171, 172).
Home Ins. Co. v. Cary, 31 S. W. 321, p. 77 (421).
Home Ins. Co. of New Orleans v. Smith, 32 S. W. 240, p. 36 (183), 53 (277), 55 (287).
Home Ins. Co. v. Peterman, 165 S. W. 103, p. 65 (344), 173 (1102).
Home Ins. Co. v. Rogers, 128 S. W. 625, p. 85 (482), 175 (1126), 187 (1214).
Home Mutual Ins. Co. v. Nichols, 72 S. W. 440, p. 104 (608), 110 (648).
Homesteaders v. Briggs, 166 S. W. 95, p. 555 (114).
Home Mutual Ins. Co. v. Tomkies, 71 S. W. 812, p. 31 (144), 69 (367), 74 (405, 406, 407), 179 (1156).
Horst v. City of London Fire Ins. Co., 11 S. W. 148, p. 145 (891), 147 (906).
Houston Direct Navigation Co. v. Insurance Co., 31 S. W. 560, p. 140 (858).
Hudson v. Compere, 61 S. W. 389, p. 2 (8), 38 (194).
Huey v. Ewell, 55 S. W. 606, p. 135 (829).
Hughes v. Four States Life Ins. Co., 164 S. W. 898, p. 278 (4), 279 (11).
Hutchison v. Hartford Life & Annuity Ins. Co., 39 S. W. 325, p. 331 (284), 348 (376).
Illinois Bankers Assn. v. Dodson, 189 S. W. 992, p. 301 (123a), 307 (156a), 344 (358a), 369 (513a), 376 (556a), 378 (564a), 382 (599a), 384 (616a, 616b), 388 (639a).
Indiana & Ohio Live Stock Ins. Co. v. Keiningham, 161 S. W. 384, p. 677 (6 to 9).
Indiana & Ohio Live Stock Ins. Co. v. Krenek, 144 S. W. 1181, p. 676 (1), 677 (12).
Indiana & Ohio Live Stock Ins. Co. v. Smith, 157 S. W. 756, p. 677 (11).
Insurance Co. v. Easton, 11 S. W. 180, p. 90 (528).

- Insurance Co. v. Lacroix, 35 Tex. 249, p. 147 (904, 905).
Insurance Co. v. Levy, 33 S. W. 992, p. 114 (669).
Insurance Company of North America v. Bell, 60 S. W. 262, p. 14 (41), 106 (624).
Insurance Company of North America v. O'Bannon, 170 S. W. 1055, p. 31 (146), 70 (379, 380).
Insurance Co. of North America v. Wicker, 55 S. W. 740, p. 59 (313, 313a), 68 (362, 363), 97 (559), 160 (1007), 165 (1048).
International Fire Ins. Co. v. Black, 179 S. W. 534, p. 14 (40), 15 (42, 43).
International Order of Twelve of the Knights and Daughters of Tabor v. Boswell, 48 S. W. 1108, p. 534 (15), 584 (287), 597 (351, 353), 617 (483).
International Order of Twelve of the Knights and Daughters of Tabor v. Denman, 160 S. W. 980, p. 612 (458), 617 (487).
International Order of Twelve of the Knights and Daughters of Tabor v. Wilson, 151 S. W. 320, p. 568 (192), 598 (357), 604 (396).
International Travelers' Assn. v. Bosworth, 156 S. W. 346, p. 507 (90), 515 (138), 522 (183), 524 (204).
International Travelers' Assn. v. Branum, 169 S. W. 389, p. 492 (16, 17), 503 (68), 513 (127), 514 (132), 515 (137), 521 (179), 527 (229, 232).
International Travelers' Assn. v. Peterson, 183 S. W. 1196, p. 502 (62).
International Travelers' Assn. v. Rogers, 163 S. W. 421, p. 507 (92), 520 (174), 523 (193, 194).
Irwin v. Travelers' Ins. Co., 39 S. W. 1097, p. 313 (193, 194).

Jasper v. State, 164 S. W. 851, p. 293 (85), 294 (95).
Jefferson Fire Ins. Co. v. Greenwood, 141 S. W. 319, p. 28 (121), 164 (1041).
Jones v. Jones, 146 S. W. 265, p. 360 (460), 364 (480, 481), 385 (621), 388 (636).
Jones v. Whiteselle, 29 S. W. 177, p. 133 (810, 812), 134 (818, 819).
Johnson v. Hall, 163 S. W. 399, p. 134 (820).
Johnson v. Standard Life & Accident Ins. Co., 97 S. W. 831, p. 498 (40).
Johnson v. Travelers' Ins. Co., 39 S. W. 972, p. 505 (79).
Joy v. Citizens' Life Ins. Co., 178 S. W. 590, p. 373 (533, 534, 535).
Joy v. Liverpool, L. & G. Ins. Co., 74 S. W. 822, p. 163 (1027), 189 (1224).
Just v. Henry, 174 S. W. 1012, p. 309 (171, 172, 173), 395 (677).

Kansas City Life Ins. Co. v. Blackstone, 143 S. W. 702, p. 326 (255), 330 (279), 331 (285, 287), 345 (360), 349 (381), 365 (489).
Kansas City Life Ins. Co. v. Love, 109 S. W. 863, p. 278 (3).

- Kansas Mutual Life Ins. Co. v. Coalson, 54 S. W. 388, p. 325 (250), 332 (294), 348 (378), 378 (579).
- Kansas Mutual Life Ins. Co. v. Pinson, 63 S. W. 531, p. 330 (278, 282).
- Keller v. Liverpool, L. & G. Ins. Co., 65 S. W. 695, p. 106 (626), 163 (1032), 174 (1114).
- Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co., 28 S. W. 1027, p. 77 (419), 166 (1055).
- Kemendo v. Western Assur. Co., 57 S. W. 293, p. 180 (1160).
- Kempe v. Woodmen of the World, 44 S. W. 688, p. 568 (197), 575 (233).
- Kendall v. Morrison, 77 S. W. 31, p. 560 (149).
- Kennedy v. Aetna Life Ins. Co., 72 S. W. 602, p. 502 (65).
- Knights and Ladies of Honor v. Burke, 15 S. W. 45, p. 581 (269).
- Knights of Honor v. Fortson, 14 S. W. 922, p. 618 (492).
- Knights of Honor v. Wickser, 12 S. W. 175, p. 569 (200), 570 (207, 208, 209).
- Knights of the Maccabees of the World v. Hunter, 143 S. W. 359, p. 555 (121), 557 (129, 130), 609 (431, 436).
- Knights of the Maccabees of the World v. Johnson, 143 S. W. 718, p. 609 (431).
- Knights of the Maccabees of the World v. Parsons, 179 S. W. 78, p. 565 (174), 567 (188), 608 (422).
- Knights of Modern Maccabees v. Gillis, 125 S. W. 338, p. 604 (394, 395), 609 (432).
- Knights of the Modern Maccabees v. Mayfield, 147 S. W. 675, p. 565 (175), 596 (345).
- Knights of Pythias of the World v. Bridges, 39 S. W. 333, p. 537 (29), 559 (139).
- Knipp v. United Benevolent Assn., 101 S. W. 273, p. 591 (323).
- Knoxville Fire Ins. Co. v. Hird, 23 S. W. 393, p. 76 (416).
- Kray v. Mutual Reserve Life Ins. Co., 111 S. W. 421, p. 308 (159), 341 (340, 341).
- Kuteman v. Lacy, 144 S. W. 1184, p. 539 (36).
- Labell v. Georgia Home Ins. Co., 28 S. W. 133, p. 86 (500), 105 (618).
- Ladies of Maccabees of the World v. Kendrick, 165 S. W. 110, p. 555 (115), 558 (138), 610 (445).
- Lampasas Hotel & Park Co. v. Home Ins. Co., 43 S. W. 1081, p. 42 (216).
- Lampasas Hotel & Park Co. v. Phoenix Ins. Co., 38 S. W. 361, p. 67 (359).
- Lane v. General Accident Ins. Co., 113 S. W. 324, p. 508 (99), 514 (129a), 516 (141).
- Laughlin v. Fidelity Mutual Life Assn., 28 S. W. 411, p. 301 (124), 333 (298), 353 (410), 384 (612).

- Lawson v. United Benevolent Assn.**, 185 S. W. 976, p. 567 (187), 574 (230), 581 (266), 582 (276), 584 (289).
- Lea v. Union Central Life Ins. Co.**, 43 S. W. 927, p. 288 (47).
- Lester v. New York Life Ins. Co.**, 19 S. W. 356 (24).
- Levy v. Taylor**, 1 S. W. 900, p. 594 (339, 340).
- Lewy v. Gilliard**, 13 S. W. 304, p. 317 (211).
- Life Assn. of America v. Goode**, 8 S. W. 639, p. 312 (185).
- Lion Fire Ins. Co. v. Heath**, 68 S. W. 305, p. 128 (771), 148 (911), 185 (1207).
- Lion Fire Ins. Co. v. Starr**, 12 S. W. 45, p. 83 (469), 117 (691, 692), 176 (1130).
- Lion Ins. Co. v. Wicker**, 55 S. W. 741, p. 190 (1236).
- Liverpool, L. & G. Ins. Co. v. Colgin**, 34 S. W. 291, p. 50 (255), 130 (787).
- Liverpool, L. & G. Ins. Co. v. Delta County Farmers Assn.**, 121 S. W. 599, p. 119 (705, 706, 707).
- Liverpool, L. & G. Ins. Co. v. Ende**, 65 Tex. 118, p. 102 (599), 109 (647), 182 (1187).
- Liverpool, L. & G. Ins. Co. v. Joy**, 62 S. W. 546, p. 167 (1058, 1063, 1064, 1065), 183 (1197, 1198).
- Liverpool, L. & G. Ins. Co. v. Lester**, 176 S. W. 602, p. 45 (226a), 46 (229a), 97 (558a), 164 (1037a), 177 (1141a), 178 (1149a).
- Liverpool, L. & G. Ins. Co. v. McCollum**, 149 S. W. 775, p. 149 (915, 918).
- Liverpool, L. & G. Ins. Co. v. Nations**, 59 S. W. 817, p. 56 (294), 176 (1136).
- Liverpool, L. & G. Ins. Co. v. Ricker**, 31 S. W. 248, p. 53 (274), 59 (308).
- Liverpool, L. & G. Ins. Co. v. Stern**, 29 S. W. 678, p. 46 (229), 49 (247).
- London & L. Fire Ins. Co. v. Davis**, 84 S. W. 260, p. 31 (147), 66 (356).
- London, L. & G. Ins. Co. v. Joy**, 64 S. W. 786, p. 183 (1197, 1198).
- London & L. Fire Ins. Co. v. Schwulst**, 46 S. W. 89, p. 152 (943), 165 (1046), 171 (1089).
- London Guarantee & Accident Co. v. City of Beaumont**, 139 S. W. 894, p. 480 (6).
- Lone Star Ins. Union v. Brannan**, 184 S. W. 691, p. 576 (238, 239, 240).
- Lone Star Lodge No. 1935, Knights and Ladies of Honor v. Cole**, 131 S. W. 1180, p. 540 (41 to 45), 596 (346).
- Loyal Americans of the Republic v. McClanahan**, 109 S. W. 973, p. 602 (375), 607 (419).
- Males v. Sovereign Camp W. O. W.**, 70 S. W. 108, p. 602 (381).
- Manchester Fire Ins. Co. v. Simmons**, 35 S. W. 722, p. 78 (427, 428), 130 (788), 184 (1200).

- Maness v. Sun Ins. Co.*, 32 S. W. 326, p. 63 (332).
Manhattan Life Ins. Co. v. Cohen, 139 S. W. 51, p. 296 (108), 372 (529, 530), 312 (188), 314 (199), 397 (693).
Manhattan Life Ins. Co. v. Fields, 26 S. W. 280, p. 339 (334), 367 (505).
Manhattan Life Ins. Co. v. LePert, 52 Tex. 504, p. 334 (310).
Manhattan Life Ins. Co. v. Fields, 26 S. W. 280, p. 336 (319).
Mannheim Ins. Co. v. Charles Clarke & Co., 157 S. W. 291, p. 75 (413, 414), 112 (664), 139 (854), 177 (1145), 193 (1259, 1260, 1261).
Marine Fire Ins. Co. v. Burnett, 29 Tex. 433, p. 47 (234 to 239), 123 (728, 729).
Martin v. McAllister, 61 S. W. 522, 63 S. W. 624, p. 364 (479).
Maryland Casualty Co. v. Glass, 67 S. W. 1062, p. 519 (164), 523 (192).
Maryland Casualty Co. v. Hudgins, 72 S. W. 1047, 76 S. W. 745, p. 491 (11), 502 (63, 64, 66), 503 (69), 510 (107, 108), 518 (158).
Maryland Motor Car Ins. Co. v. Haggard, 168 S. W. 1011, p. 670 (6, 7).
Matkin v. Supreme Lodge Knights of Honor, 18 S. W. 306, p. 535 (20, 21).
Mattison v. Sovereign Camp W. O. W., 60 S. W. 897, p. 589 (313).
Maxey v. Franklin Life Ins. Co., 164 S. W. 438, p. 295 (99), 385 (620), 387 (631).
Mayher v. Manhattan Life Ins. Co., 27 S. W. 124, p. 363 (478).
McBride v. Fidelity & Casualty Co., 37 S. W. 1091, p. 658 (19).
McCarthy v. Mutual Reserve Fund Life Assn., 74 S. W. 921, p. 393 (668b).
McCarty v. Hartford Fire Ins. Co., 75 S. W. 934, p. 153 (946), 162 (1022), 163 (1026, 1028), 176 (1137, 1138).
McClary v. Trazevant & Cochran, 112 S. W. 954, p. 15 (46).
McCorkle v. Texas Benevolent Assn., 8 S. W. 516, p. 569 (201), 574 (229).
McDonald v. Aetna Life Ins. Co., 187 S. W. 1005, p. 359 (442), 398 (700, 701).
McKee v. Garner, 168 S. W. 1031, p. 526 (225).
McLeary v. Orient Ins. Co., 32 S. W. 583, p. 17 (55), 109 (645).
McNeill v. Chinn, 101 S. W. 465, p. 313 (190, 192), 314 (196, 197).
McPherson v. Camden Fire Ins. Co., 185 S. W. 1055, p. 1 (3), 44 (223), 60 (317), 61 (320), 85 (489).
McWilliams v. Modern Woodmen of America, 142 S. W. 641, p. 303 (384), 535 (19), 550 (90), 558 (136, 137).
Mecca Fire Ins. Co. v. Coghlan, 134 S. W. 266, p. 65 (342).
Mecca Fire Ins. Co. v. First State Bank, 135 S. W. 1083, p. 33 (165), 144 (883).
Mecca Fire Ins. Co. v. Moore, 128 S. W. 441, p. 154 (962), 164 (1037), 186 (1213), 190 (1231).

- Mecca Fire Ins. Co. v. Smith, 135 S. W. 688, p. 18 (60), 95 (544), 107 (629).
- Mecca Fire Ins. Co. v. Stricker, 136 S. W. 599, p. 59 (309, 310, 811), 169 (1081).
- Mecca Fire Ins. Co. v. Wilderspin, 118 S. W. 1131, p. 57 (296), 138 (852), 180 (1173).
- Mechanics' & Traders' Ins. Co. v. Dalton, 189 S. W. 771, p. 89 (522b), 92 (536a, 536b), 172 (1094a), 176 (1138a), 179 (1159).
- Mechanics' & Traders' Ins. Co. v. Davis, 167 S. W. 175, p. 70 (377), 85 (490).
- Mellville v. Wickham, 169 S. W. 1123, p. 582 (274, 275), 592 (328).
- Merchants' & Bankers' Fire Underwriters v. Brooks, 188 S. W. 243, p. 23 (95), 24 (97, 99), 38 (193), 71 (384), 116 (686), 126 (748), 133 (806).
- Merchants' & Bankers' Fire Underwriters v. Williams, 181 S. W. 859, p. 53 (273).
- Merchants' Ins. Co. v. Arnold, 32 S. W. 579, p. 150 (926).
- Merchants' Ins. Co. v. Bonnet, 48 S. W. 1110, p. 69 (368).
- Merchants' Ins. Co. v. Levy, 33 S. W. 996, p. 114 (668).
- Merchants' Ins. Co. of New Orleans v. Nowlin, 56 S. W. 198, p. 21 (86), 126 (753).
- Merchants' Ins. Co. v. Reichman, 40 S. W. 831, p. 122 (720), 125 (743).
- Merchants' Ins. Co. v. Story, 35 S. W. 68, p. 62 (326, 327).
- Merchants' Mut. Ins. Co. v. N. V. LaCroix, 45 Tex. 158, p. 147 (899 to 902).
- Meredith v. State, 184 S. W. 204, p. 293 (86 to 94).
- Metropolitan Life v. Betz, 99 S. W. 1140, p. 329 (268), 387 (628), 388 (640).
- Metropolitan Life Ins. Co. v. Bradley, 79 S. W. 367, 82 S. W. 1031, p. 298 (112, 114, 115), 335 (311), 381 (594).
- Metropolitan Life Ins. Co. v. Gibbs, 78 S. W. 398, p. 326 (256), 344 (355), 358 (440), 375 (548), 381 (595, 596), 386 (627).
- Metropolitan Life Ins. Co. v. Lennox, 124 S. W. 623, p. 390 (651 to 654).
- Metropolitan Life Ins. Co. v. Love, 108 S. W. 821, p. 278 (7, 8).
- Metropolitan Life Ins. Co. v. Wagner, 109 S. W. 1120, p. 357 (435), 378 (568), 385 (619), 390 (648).
- Middleton v. Texas Power & Light Co., 185 S. W. 556, p. 479 (1 to 5).
- Milwaukee Mechanics' Ins. Co. v. Frosch, 130 S. W. 600, p. 117 (694), 130 (784, 785), 159 (1001), 175 (1129, 1130), 181 (1175), 184 (1199), 189 (1228, 1229).
- Minor v. St. John's Union Grand Lodge, etc., 13 S. W. 893, p. 536 (22), 540 (38 to 40).
- Missouri, K. & T. Ry. Co. v. Murray, 150 S. W. 217, p. 140 (864).
- Missouri, K. & T. Ry. Co. v. Union Ins. Co., 39 S. W. 975, p. 35 (174).

- Missouri Pac. Ry. Co. v. International Marine Ins. Co., 19 S. W. 459, p. 142 (871).
- Mitchell v. Western Casualty & Guaranty Ins. Co., 163 S. W. 630, p. 512 (122).
- Modern Brotherhood of America v. Chandler, 146 S. W. 626, p. 606 413, 414).
- Modern Brotherhood of America v. Jordan, 167 S. W. 794, p. 555 (113), 604 (397), 606 (407, 411), 609 (435).
- Modern Order of Praetorians v. Hollmig, 103 S. W. 474, p. 537 (28), 554 (110 to 112), 611 (453), 617 (478).
- Modern Order of Praetorians v. Taylor, 127 S. W. 260, p. 507 (93), 598 (358), 616 (473, 474).
- Modern Woodmen of America v. Lynch, 141 S. W. 1055, p. 559 (144), 568 (195, 196), 608 (427).
- Modern Woodmen of America v. Metcalfe, 154 S. W. 662, p. 598 (356).
- Modern Woodmen of America v. Owens, 130 S. W. 858, p. 544 (59), 549 (85 to 88), 552 (98 to 103), 598 (359), 599 (365), 602 (377).
- Modern Woodmen of America v. Yanowsky, 187 S. W. 728, p. 593 (332), 597 (350), 599 (361 to 363), 617 (486), 619 (503 to 507).
- Monger & Henry v. Queen Ins. Co., 99 S. W. 887, p. 79 (432).
- Moore v. Supreme Assembly of Royal Soc. of Good Fellows, 93 S. W. 1077, p. 578 (252).
- Moriarity v. United States Fire Ins. Co., 49 S. W. 132, p. 33 (164), 97 (560, 561), 184 (1203 to 1205).
- Morris v. Travelers' Ins. Co., 43 S. W. 898, p. 352 (406).
- Morrison v. Insurance Co. of North America, 6 S. W. 605, p. 86 (504).
- Mott v. Spring Garden Ins. Co., 154 S. W. 658, p. 159 (996), 168 (1068, 1069).
- Mullins v. Hartford Life Ins. Co., 63 S. W. 909, p. 308 (157).
- Mullen v. Mutual Life Ins. Co., 32 S. W. 911, 34 S. W. 605, p. 337 (322), 381 (597).
- Mullins v. Thompson, 51 Tex. 7, p. 359 (446), 360 (448, 449).
- Murphy v. American Central Ins. Co., 54 S. W. 407, p. 115 (678, 679, 680).
- Mutual Life Ins. Assn. of Donley County v. Rhoderick, 164 S. W. 1067, p. 580 (265a).
- Mutual Life Ins. Co. v. Baker, 31 S. W. 1072, p. 330 (277), 393 (668).
- Mutual Life Ins. Co. v. Blodgett, 27 S. W. 286, p. 295 (101), 302 (132), 346 (368), 367 (508).
- Mutual Life Ins. Co. v. Crenshaw, 116 S. W. 375, p. 329 (270), 391 (658).
- Mutual Life Ins. Co. v. Davis, 154 S. W. 1184, p. 334 (309), 338 (326), 344 (355), 386 (622).

- Mutual Life Ins. Co. v. Elliot, 53 S. W. 1014, p. 311 (179).
Mutual Life Ins. Co. v. Ford, 130 S. W. 769, p. 325 (246), 368 (511, 512), 380 (588), 386 (623, 624); 131 S. W. 406, p. 332 (291, 292, 293).
Mutual Life Ins. Co. v. Hargus, 99 S. W. 580, p. 320 (227 to 229), 321 (233, 236).
Mutual Life Ins. Co. v. Hayward, 34 S. W. 801, p. 355 (421, 424), 388 (641).
Mutual Life Ins. Co. v. Hodnette, 147 S. W. 615, p. 288 (46).
Mutual Life Ins. Co. v. Malone, 95 S. W. 577, p. 313 (189, 195),
Mutual Life Ins. Co. v. Mellot, 57 S. W. 887, p. 383 (607a), 389 (643).
Mutual Life Ins. Co. v. Nichols, 24 S. W. 910, p. 324 (245), 346 (365), 347 (368), 379 (582), 393 (669).
Mutual Life Ins. Co. v. Simpson, 28 S. W. 837, p. 330 (275), 331 (290), 355 (425); 31 S. W. 501, p. 327 (259).
Mutual Life Ins. Co. v. Tillman, 19 S. W. 294, p. 381 (598, 599), 389 (642).
Mutual Life Ins. Co. v. Walden, 26 S. W. 1012, p. 356 (427), 367 (507).
Mutual Reserve Fund Life Assn. v. Bozeman, 52 S. W. 94, p. 342 (344), 347 (370), 393 (668a).
Mutual Reserve Fund Life Assn. v. Green, 109 S. W. 1131, p. 398 (704).
Mutual Reserve Life Ins. Co. v. Jay, 101 S. W. 545, p. 323 (241); 109 S. W. 1116, p. 366 (495), 390 (656, 657).
Mutual Reserve Fund Life Assn. v. Lovenberg, 59 S. W. 314, p. 334 (306), 342 (345), 352 (409).
Mutual Reserve Fund Life Assn. v. Payne, 32 S. W. 1063, p. 370 (524), 355 (422, 423).
Mutual Reserve Life Ins. Co. v. Seidel, 113 S. W. 945, p. 291 (72, 73), 299 (115a), 302 (130), 311 (182), 312 (184).
Mutual Reserve Fund Life Assn. v. Sullivan, 29 S. W. 190, p. 330 (274), 346 (366).
Mutual Reserve Fund Assn. v. Tolbert, 33 S. W. 295, p. 377 (560).

Naquin v. Texas Savings & Real Estate Inv. Assn., 67 S. W. 85, p. 136 (835).
National Council of the Knights and Ladies of Security v. Sealey, 64 S. W. 801, p. 556 (123), 606 (412), 611 (454), 618 (493).
National Fire Ins. Co. v. J. W. Caraway & Co., 130 S. W. 458, p. 61 (324), 82 (458, 459).
National Fraternity v. Karnes, 60 S. W. 576, p. 326 (251), 347 (373, 374, 375), 568 (194), 600 (368), 617 (480).
National Life Ins. Assn. v. Hagelstein, 156 S. W. 353, p. 278 (5, 6), 323 (238, 239), 350 (395), 365 (492).

- National Life Ins. Co. v. Manning, 86 S. W. 618, p. 334 (302), 339 (333), 340 (336), 342 (347), 351 (405).
- National Life Assn. v. Parsons, 170 S. W. 1038, p. 358 (436), 370 (518, 519), 397 (696).
- National Live Stock Ins. Co. v. Henderson, 164 S. W. 852, p. 677 (13, 14).
- National Live Stock Ins. Co. v. Gomillion, 178 S. W. 1050, p. 677 (5, 10), 678 (15, 17).
- National Live Stock Ins. Co. v. Warren, 181 S. W. 790, p. 678 (18).
- National Surety Co. v. Murphy-Walker Co., 174 S. W. 997, p. 656 (1, 2), 657 (6), 658 (24).
- National Surety Co. v. Silberberg Bros., 176 S. W. 97, p. 674 (4, 5, 8, 9).
- National Union Fire Ins. Co. v. Akin, 160 S. W. 669, p. 173 (1104), 177 (1144).
- National Union Fire Ins. Co. v. Dorroh, 133 S. W. 475, p. 25 (105), 87 (511 to 513), 101 (589).
- National Union Fire Ins. Co. v. Walker, 156 S. W. 1095, p. 84 (472).
- New Jersey Fire Ins. Co. v. Baird, 187 S. W. 356, p. 96 (553), 103 (606).
- Newman v. Norris Implement Co., 147 S. W. 725, p. 309 (166), 309 (169).
- Newman v. Tarwater, 159 S. W. 495, p. 384 (614).
- New Orleans Ins. Assn. v. Griffin, 18 S. W. 505, p. 86 (503), 104 (611, 612).
- New Orleans Ins. Assn. v. Griffin & Shook, 66 Tex. 232, p. 98 (570), 99 (573).
- New Orleans Ins. Co. v. Gordon, 3 S. W. 718, p. 375 (547), 70 (375).
- New Orleans Ins. Co. v. Jameson, 25 S. W. 307, p. 133 (813).
- New York Life v. Baese, 31 S. W. 824, p. 292 (79).
- New York Life Ins. Co. v. English, 67 S. W. 884, p. 276 (2), 338 (325), 367 (501); 70 S. W. 440, 72 S. W. 58, p. 395 (678), 396 (684 to 686).
- New York Life Ins. Co. v. Hagler, 169 S. W. 1064, p. 317 (215), 343 (352), 370 (520, 521).
- New York Life Ins. Co. v. Ireland, 17 S. W. 617, p. 360 (461).
- New York Life Ins. Co. v. Malone, 95 S. W. 577, p. 313 (189, 195).
- New York Life v. Miller, 32 S. W. 550, p. 320 (231).
- New York Life Ins. Co. v. Orlopp, 61 S. W. 336, p. 298 (111), 305 (148), 336 (320, 321), 366 (496).
- New York Life Ins. Co. v. Scott, 57 S. W. 677, p. 336 (318), 352 (408).
- New York Life Ins. Co. v. Smith, 41 S. W. 680, p. 336 (316), 340 (335), 353 (414).
- Niagara Ins. Co. v. Lee, 11 S. W. 1024, p. 17 (56), 40 (205), 126 (749), 157 (975).
- Niagara Ins. Co. v. Lollar, 156 S. W. 1140, p. 149 (919), 152 (941).

- Niagara Fire Ins. Co. v. Mitchell, 164 S. W. 919, p. 41 (212, 213).
Nixon v. Malone, 95 S. W. 577, 98 S. W. 380, p. 313 (189, 195).
North American Acc. Ins. Co. v. Bowen, 102 S. W. 163, p. 491 (14),
496 (32, 33a), 499 (41), 522 (188).
North American Acc. Ins. Co. v. Frazer, 112 S. W. 812, p. 520 (172).
North American Acc. Ins. Co. v. Trenton, 99 S. W. 740, p. 499 (43),
524 (206), 525 (212, 213).
North American Ins. Co. v. Jenkins, 184 S. W. 307, p. 492 (21),
516 (143), 527 (234, 235, 236).
North British & Mercantile Ins. Co. v. Freeman, 33 S. W. 1091, p.
57 (299), 66 (355).
North British & Mercantile Ins. Co. v. Gunter, 35 S. W. 715, p. 39
(198), 110 (649), 174 (1113).
Northern Assur. Co. v. Applegate, 145 S. W. 295, p. 159 (998).
Northern Assur. Co. v. City Savings Bank, 45 S. W. 737, p. 67
(360).
Northern Assur. Co. v. Crawford, 59 S. W. 916, p. 65 (347), 184
(1206).
Northern Assur. Co. v. Flournoy, 19 S. W. 793, p. 70 (373).
Northern Assur. Co. v. Morrison, 162 S. W. 511, p. 162 (1016),
146 (895), 165 (1045), 173 (1105), 177 (1142), 182 (1184).
Northern Assur. Co. v. Samuels, 33 S. W. 239, p. 127 (758), 132
(799), 167 (1061).
Northwestern Life Assn. v. Findley, 68 S. W. 695, p. 292 (80),
327 (260), 346 (364), 365 (490), 371 (527).
Northwestern Life Assur. Co. v. Sturdevant, 59 S. W. 61, p. 370
(524), 371 (525).
Northwestern Mutual Life Ins. Co. v. Freeman, 47 S. W. 1025, p.
345 (362), 352 (407), 376 (553).
Northwestern Mutual Life Ins. Co. v. Whiteselle, 188 S. W. 22, p.
295 (100a), 364 (484, 485).
Northwestern National Life Ins. Co. v. Blasingame, 85 S. W. 819,
p. 359 (443).
Northwestern National Ins. Co. v. Mize, 34 S. W. 670, p. 77 (426),
95 (552).
Northwestern National Ins. Co. v. Woodward, 45 S. W. 185, p. 138
(847, 848).
Northwestern National Ins. Co. v. Woodward, 45 S. W. 185, p. 151
(931), 155 (965).
Norwich Union Fire Ins. Soc. v. Cheaney Bros., 128 S. W. 1163, p.
30 (141), 87 (509), 175 (1128).
Norwich Union Fire Ins. Soc. v. Dalton, 175 S. W. 459, p. 17 (53),
23 (93, 94), 192 (1254).
Norwood v. Alamo Fire Ins. Co., 35 S. W. 717, p. 14 (39).
Nussbaum & Scharff v. Trinity & B. V. Ry. Co., 149 S. W. 1083,
p. 140 (863).

- Oakland Home Ins. Co. v. Davis, 33 S. W. 587, p. 123 (725), 174 (1112).
- Occident Fire Ins. Co. v. Linn, 179 S. W. 523, p. 168 (1066, 1067), 181 (1180).
- Oglesby v. Durr, 173 S. W. 275, p. 10 (23), 12 (31, 32, 33).
- Oklahoma Fire Ins. Co. v. McKey, 152 S. W. 440, p. 33 (160), 107 (628), 147 (907).
- Oklahoma Fire Ins. Co. v. Ross, 170 S. W. 1062, p. 144 (885), 175 (1122), 177 (1143).
- Old Colony Ins. Co. v. Starr-Mayfield Co., 135 S. W. 252, p. 94 (543).
- Olsen v. California Ins. Co., 32 S. W. 446, p. 194 (1269).
- Order of Columbus of Baltimore v. Fuqua, 60 S. W. 1020, p. 575 (235), 592 (330), 604 (398).
- Order of United Commercial Travelers v. Roth, 159 S. W. 176, p. 520 (167, 175), 525 (214), 526 (219).
- Order of United Commercial Travelers v. Simpson, 177 S. W. 169, p. 496 (30), 500 (48), 522 (189, 190), 524 (211).
- Orient Ins. Co. v. Harmon, 177 S. W. 192, p. 129 (775, 776, 777, 780, 781, 782).
- Orient Ins. Co. v. Levy, 33 S. W. 995, p. 114 (668).
- Orient Ins. Co. v. Moffatt, 39 S. W. 1013, p. 166 (1052, 1054), 169 (1076), 170 (1086).
- Orient Ins. Co. v. Parlin & Orendorff Co., 38 S. W. 60, p. 114 (675).
- Orient Ins. Co. v. Prather, 62 S. W. 89, p. 88 (515), 107 (631), 163 (1031).
- Orient Ins. Co. v. Wingfield, 108 S. W. 788, p. 29 (126 to 131).
- Orient Mutual Ins. Co. v. Reymershoffer's Sons, 56 Tex. 234, p. 112 (660 to 662), 113 (665).
- Overton v. Colored Knights of Pythias, 173 S. W. 472, p. 581 (267), 619 (497).
- Pacific Mutual Ins. Co. v. Shaffer, 70 S. W. 566, p. 300 (123), 377 (563).
- Pacific Mutual Life Ins. Co. v. Terry, 84 S. W. 656, p. 327 (257), 331 (289), 387 (629).
- Pacific Mutual Life Ins. Co. v. Williams, 15 S. W. 478, p. 375 (546).
- Paden v. Briscoe, 17 S. W. 42, p. 589 (314).
- Palatine Ins. Co. v. Boyd, 50 S. W. 643, p. 39 (200).
- Palatine Ins. Co. v. Brown, 34 S. W. 462, 35 S. W. 1060, p. 77 (420), 77 (425).
- Pan Handle National Bank v. Security Co., 44 S. W. 15, p. 70 (370), 135 (830, 831).
- Parish v. Mutual Benefit Life Ins. Co., 49 S. W. 153, p. 306 (152), 355 (426).
- Parker v. Ross, 11 S. W. 865, p. 136 (832).
- Pelican Fire Ins. Co. v. Troy Co-op. Assn., 13 S. W. 980, p. 154 (960), 158 (993).

- Pelican Ins. Co. v. Schwartz, 19 S. W. 374, p. 117 (690), 157 (979).
Pennsylvania Fire Ins. Co. v. Brown, 36 S. W. 590, p. 78 (429).
Pennsylvania Fire Ins. Co. v. Faires, 35 S. W. 55, p. 66 (350), 103 (607), 150 (925).
Pennsylvania Fire Ins. Co. v. Jameson Bros., 73 S. W. 418, p. 151 (930).
Pennsylvania Fire Ins. Co. v. Moore, 51 S. W. 878, p. 118 (701).
Pennsylvania Fire Ins. Co. v. Waggener, 97 S. W. 541, p. 69 (365), 88 (514), 90 (529), 188 (1223).
Penn. Mutual Life Ins. Co. v. Maner, 109 S. W. 1084, p. 365 (495, 496).
Perry v. Standard Life & Acc. Ins. Co., 125 S. W. 374, p. 492 (20).
Philadelphia Underwriters v. Brown, 151 S. W. 899, p. 154 (954), 162 (1020, 1021), 167 (1057).
Philadelphia Underwriters v. Fort Worth & D. C. Ry. Co., 71 S. W. 419, p. 34 (157), 141 (868), 174 (1115).
Philadelphia Underwriters v. Neurenberg, 144 S. W. 357, p. 159 (997), 305 (146).
Phoenix Assur. Co. v. Allison, 27 S. W. 894, p. 136 (833, 834).
Phoenix Assur. Co. v. Coffman, 32 S. W. 810, p. 74 (408, 409), 99 (576, 577), 159 (1003).
Phoenix Assur. Co. v. Davenport, 41 S. W. 399, p. 158 (989).
Phoenix Assur. Co. of London v. Davenport, 41 S. W. 399, p. 55 (292).
Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co., 49 S. W. 222, p. 40 (207), 48 (242, 243), 60 (320), 108 (635), 111 (654); 49 S. W. 271, p. 153 (949), 158 (992).
Phoenix Assur. Co. v. Padgitt, 42 S. W. 800, p. 166 (1053), 167 (1059, 1060), 169 (1082, 1083).
Phoenix Assur. Co. v. Stenson, 63 S. W. 542, p. 166 (1050, 1051), 167 (1062), 189 (1225); 79 S. W. 866, p. 81 (447), 159 (994), 131 (792).
Phoenix Ins. Co. v. Boren, 18 S. W. 484, p. 157 (978).
Phoenix Ins. Co. v. Burton, 39 S. W. 319, p. 63 (334).
Phoenix Ins. Co. v. Center, 31 S. W. 446, p. 125 (739).
Phoenix Ins. Co. v. Dunn, 41 S. W. 109, p. 33 (163), 101 (592), 160 (1008).
Phoenix Fire Ins. Co. v. Hagne, 34 S. W. 654, p. 89 (518), 156 (973).
Phoenix Ins. Co. v. Levy, 33 S. W. 992, p. 114 (668).
Phoenix Ins. Co. v. Moore, 46 S. W. 1131, p. 128 (770), 129 (778, 779).
Phoenix Ins. Co. v. Padgitt, 42 S. W. 800, p. 33 (161), 48 (244).
Phoenix Ins. Co. v. Pfeifer, 39 S. W. 1001.
Phoenix Insurance Co. v. Shearman, 43 S. W. 930, p. 124 (735).
Phoenix Ins. Co. v. Swann, 41 S. W. 519, p. 46 (228), 63 (335), 124 (734), 158 (987, 990).
Phoenix Ins. Co. v. Ward, 26 S. W. 763, p. 13 (36), 108 (636).

- Phoenix Ins. Co. v. Willis, 6 S. W. 825, p. 43 (221), 61 (322), 71 (383).
- Phoenix Ins. Co. v. Witt, 25 S. W. 796, p. 70 (372).
- Piedmont and Arlington Life Ins. Co. v. Ray et al., 50 Tex. 511, p. 308 (161), 375 (550), 397 (694).
- Planters' Mutual Ins. Co. v. Lyons, et al., 38 Tex. 253, p. 98 (566 to 569).
- Pledger v. Sovereign Camp W. O. W., 42 S. W. 653, p. 549 (83), 562 (156).
- Polemanakos v. Austin Fire Ins. Co., 160 S. W. 1134, p. 43 (220, 222), 180 (1171).
- Polk v. State Mutual Fire Ins. Co., 151 S. W. 1126, p. 39 (201).
- Prentice v. Security Ins. Co., 153 S. W. 925, p. 38 (195), 137 (841 to 846), 154 (959).
- Price v. Garvin, 69 S. W. 985, p. 2 (6), 7 (21, 22).
- Price v. Supreme Lodge Knights of Honor, 4 S. W. 633, p. 581 (268).
- Provident Savings Life Assur. Soc. v. Ellinger, 164 S. W. 1024, p. 283 (20, 21), 318 (221 to 223), 321 (234).
- Provident Sav. Life Assur. Soc. v. Oliver, 53 S. W. 594, p. 330 (276), 345 (361).
- Providence Washington Ins. Co. v. Levy & Rosen, 189 S. W. 1035, p. 3 (12a).
- Prudential Life Ins. Co. v. Pearson, 188 S. W. 513, p. 283 (19).
- Prudential Life Ins. Co. v. Smyer, 183 S. W. 825, p. 282 (15, 17), 397 (689).
- Queen Ins. Co. of America v. May, 35 S. W. 829, p. 24 (96), 54 (281, 282), 58 (302), 99 (578, 579), 101 (593).
- Queen Ins. Co. v. Chadwick, 35 S. W. 26, p. 107 (627).
- Queen Ins. Co. v. Jefferson Ice Co., 64 Tex. 578, p. 32 (153), 115 (681), 120 (711, 712, 713), 138 (849), 154 (955).
- Queen City Ins. Co. v. Long, 132 S. W. 82, p. 178 (1154).
- Queen Ins. Co. v. State, 24 S. W. 397, p. 2 (9, 10).
- Ragley Lumber Co. v. Insurance Co. of North America, 94 S. W. 185, p. 41 (210).
- Rau v. American National Ins. Co., 154 S. W. 645, p. 517 (145, 146).
- Red River National Bank v. De Berry, 105 S. W. 998, p. 361 (466 to 468), 379 (583).
- Reliance Life Ins. Co. v. Beaton, 187 S. W. 743, p. 287 (40), 397 (690).
- Reliance Ins. Co. v. Dalton, 178 S. W. 966, 180 S. W. 668, p. 61 (323), 88 (516), 104 (609), 180 (1169, 1170), 183 (1194, 1195).
- Reppond v. National Life Ins. Co., 101 S. W. 786, p. 310 (175), 325 (247 to 249), 328 (263 to 269), 333 (301, 303), 340 (338), 349 (388), 389 (644).

- Reserve Loan Life Ins. Co. v. Benson, 167 S. W. 266, p. 311 (177), 383 (607), 396 (682).
- Ribble v. Roberts, 180 S. W. 620, p. 302 (131).
- Rieden v. Brotherhood of Railroad Trainmen, 127 S. W. 260, p. 507 (94).
- Rives v. Fire Assn. of Philadelphia, 77 S. W. 424, p. 80 (439, 440, 441).
- Roberts, et al. v. Lancashire Ins. Co., 23 S. W. 955, p. 37 (188); 48 S. W. 559, p. 83 (464, 465), 95 (548), 111 (655), 112 (658), 122 (719).
- Roberts, et al. v. Sun Mutual Ins. Co., 48 S. W. 559, p. 83 (464, 465), 95 (548), 111 (655), 112 (658), 122 (718), 162 (1024); 23 S. W. 955, p. 37 (188); 35 S. W. 995, p. 132 (800).
- Roberts v. Roberts, 99 S. W. 886, p. 562 (155).
- Ross v. Southern Surety Co., 169 S. W. 1056, p. 657 (12, 13).
- Roth v. Travelers' Protective Assn., 115 S. W. 31, p. 492 (18), 493 (22, 23), 498 (39, 39a), 499 (43a), 523 (201).
- Rowlett v. Mitchell, 114 S. W. 845, p. 364 (482, 483).
- Royal Casualty Co. v. Nelson, 153 S. W. 674, p. 503 (72), 509 (100, 101), 523 (195), 526 (225).
- Royal Exchange Assur. v. Rosborough, 142 S. W. 70, p. 84 (473).
- Royal Fraternal Union v. Lundy, 113 S. W. 185, p. 280 (13), 343 (353), 562 (158 to 161).
- Royal Fraternal Union v. Stahl, 126 S. W. 920, p. 496 (33), 521 (176), 526 (226).
- Royal Indemnity Co. v. Schwartz, 172 S. W. 581, p. 670 (3, 4, 5).
- Royal Neighbors of America v. Bratcher, 151 S. W. 885, p. 554 (105, 106).
- Royal Ins. Co. v. Brown, 36 S. W. 591, p. 78 (430).
- Royal Neighbors of America v. Heard, 185 S. W. 882, p. 599 (360).
- Royal Ins. Co. v. McIntyre, 34 S. W. 669, p. 114 (669, 670), 114 (673, 674); 37 S. W. 1068, p. 169 (1080), 170 (1085).
- Royal Ins. Co. v. Okasaki, 177 S. W. 200, p. 30 (138), 85 (493 to 495).
- Royal Ins. Co. v. Texas & G. Ry. Co., 115 S. W. 117, p. 30 (134, 135, 136), 35 (173).
- Royal Ins. Co. v. W. P. Wright & Co., 148 S. W. 824, p. 84 (475), 151 (935).
- St. Louis & S. W. Ry. Co. v. Brass, 133 S. W. 1075, p. 142 (872, 875).
- St. Louis, B. & M. Ry. Co. v. Jenkins, 172 S. W. 984, p. 382 (602, 604, 605).
- St. Louis & S. W. Ry. Co. v. Miller, 66 S. W. 139, p. 145 (887).
- St. Paul F. & M. Ins. Co. v. Cronin, 131 S. W. 649, p. 175 (1131).
- St. Paul F. & M. Ins. Co. v. Huff, 172 S. W. 755, p. 45 (226), 75 (412), 172 (1099), 190 (1233).
- St. Paul F. & M. Ins. Co. v. Hodge, 71 S. W. 386, p. 158 (988).

- St. Paul F. & M. Ins. Co. v. Laster, 187 S. W. 969, p. 152 (944), 160 (1006), 193 (1264).
- St. Paul F. & M. Ins. Co. v. McGregor, 63 Tex. 399, p. 147 (903), 194 (1267).
- St. Paul F. & M. Ins. Co. v. Stogner, 98 S. W. 218, p. 100 (593), 171 (1091).
- San Antonio Brewing Assn. v. J. M. Abbott Oil Co., 129 S. W. 373, p. 658 (20 to 22).
- San Antonio Life Ins. Co. v. Griffith, 185 S. W. 335, p. 288 (48), 289 (62 to 65).
- Schmitt v. New Braunfelser Unterstuetzungs Verein, 73 S. W. 568, p. 610 (446).
- Schonfield v. Turner, 12 S. W. 626, p. 585 (292), 594 (338).
- Schumacher v. Schumacher, 75 S. W. 50, p. 361 (465).
- Scottish Union & National Ins. Co. v. Andrews & Matthews, 89 S. W. 419, p. 17 (54), 39 (197), 60 (319), 81 (450), 90 (526).
- Scottish Union & National Ins. Co. v. Clancy, 8 S. W. 630, p. 129 (774), 132 (801); 18 S. W. 439, p. 124 (737).
- Scottish Union & National Ins. Co. v. Moore, 81 S. W. 573, p. 81 (448), 126 (757).
- Scottish Union & National Ins. Co. v. Wade, 127 S. W. 1186, p. 3 (11, 12), 44 (224).
- Scottish Union & National Ins. Co. v. Weeks' Drug Co., 118 S. W. 1086, p. 82 (452 to 454), 105 (617), 180 (1172).
- Screwmen's Benevolent Assn. v. O'Donohoe, 60 S. W. 683, p. 597 (352).
- Screwmen's Benevolent Assn. v. Whitridge, 68 S. W. 501, p. 589 (310).
- Searcy v. Kelly, 98 S. W. 1080, 102 S. W. 100, p. 593 (333, 334).
- Security Co. v. Panhandle National Bank, 57 S. W. 22, p. 39 (202).
- Security Life Ins. Co. v. Allen, 170 S. W. 131, p. 307 (156), 309 (170), 381 (592).
- Security Life Ins. Co. v. Stephenson, 136 S. W. 1137, p. 291 (74), 309 (164), 311 (178).
- Security Life & Annuity Co. v. Underwood, 150 S. W. 293, p. 333 (296), 334 (304, 305), 340 (337), 344 (358), 351 (401), 380 (584), 391 (663).
- Security Mutual Life Ins. Co. v. Calvert, 100 S. W. 1033, 105 S. W. 320, p. 290 (67), 347 (369), 358 (438), 389 (645), 391 (659 to 662), 392 (665).
- Security, Trust & Life Ins. Co. v. Hallum, 73 S. W. 554, p. 337 (324).
- Security Trust & Life Ins. Co. v. Stuart, 163 S. W. 396, p. 397 (698).
- Seiders v. Merchants' Life Assn. of U. S., 54 S. W. 753, p. 279 (10), 298 (109, 110), 323 (240), 324 (243).
- Seinsheimer & Co. v. Maryland Motor Car Ins. Co., 157 S. W. 228, p. 192 (1244, 1251).

- Sergeant v. Goldsmith Dry Goods Co., 159 S. W. 1036, p. 10 (24, 25, 26, 27, 28, 29).
- Shawnee Fire Ins. Co. v. Chapman, 132 S. W. 854, p. 100 (588), 154 (963), 175 (1133), 187 (1215).
- Shaw v. Southland Life Ins. Co., 185 S. W. 915, p. 144 (885a), 372 (532), 397 (688), 658 (23).
- Simonds v. Fireman's Fund Ins. Co., 35 S. W. 300, p. 59 (306).
- Simpson v. Mecca Fire Ins. Co., 133 S. W. 491, p. 176 (1135).
- Slaughter v. Hall, 133 S. W. 496, p. 15 (47, 48).
- Smith v. Covenant Mutual Ben. Assn., 43 S. W. 819, p. 341 (339), 550 (91, 92), 564 (172, 173), 569 (199, 202), 617 (479, 482).
- Smith v. Hessey, 134 S. W. 256, p. 363 (476).
- Snow v. National Cotton Oil Co., 34 S. W. 177, p. 227 (115).
- Southern Cold Storage & Produce Co. v. A. F. Dedhman & Co., 73 S. W. 545, p. 34 (169), 135 (826, 827).
- Southern National Ins. Co. v. Barr, 148 S. W. 845, p. 61 (321), 120 (708).
- Southern National Ins. Co. v. Cobb, 180 S. W. 155, p. 50 (250, 253).
- Southern National Ins. Co. v. Wood, 133 S. W. 286, p. 118 (695).
- Southern Surety Co. v. First State Bank of Montgomery, 167 S. W. 833, p. 658 (25).
- Southern Union Life Ins. Co. v. White, 188 S. W. 266, p. 354 (420), 397 (695), 383 (608).
- Southwestern Insurance Co. v. Woods' National Bank, 107 S. W. 114, p. 357 (432), 364 (486), 366 (497 to 499).
- Southwestern Surety Ins. Co. v. Anderson, 155 S. W. 1176, 152 S. W. 816, p. 657 (14 to 18).
- Southwestern Surety Ins. Co. v. Stein Double-Cushion Tire Co., 180 S. W. 1165, p. 659 (28 to 30).
- Southwestern Surety Co. v. Thompson, 180 S. W. 947, p. 480 (8), 481 (15), 482 (22, 30).
- Sovereign Camp W. O. W. v. Bailey, 163 S. W. 683, p. 605 (400), 608 (421), 612 (461).
- Sovereign Camp W. O. W. v. Boehme, 97 S. W. 847, p. 602 (380).
- Sovereign Camp W. O. W. v. Brown, 88 S. W. 372, p. 549 (84).
- Sovereign Camp W. O. W. v. Carrington, 90 S. W. 921, p. 531 (7), 556 (125), 607 (417).
- Sovereign Camp W. O. W. v. Dees, 100 S. W. 366, p. 550 (89).
- Sovereign Camp W. O. W. v. Fraley, 59 S. W. 879, p. 534 (13, 17, 18), 545 (62, 63).
- Sovereign Camp W. O. W. v. Gray, 64 S. W. 801, p. 556 (124).
- Sovereign Camp W. O. W. v. Hicks, 84 S. W. 425, p. 569 (198), 573 (224, 225), 574 (228).
- Sovereign Camp W. O. W. v. Jackson, 138 S. W. 1137, p. 602 (378), 611 (452).

- Sovereign Camp W. O. W. v. Lillard, 174 S. W. 619, p. 537 (32), 549 (82a), 556 (126).
- Sovereign Camp W. O. W. v. Robinson, 187 S. W. 215, p. 533 (9, 10, 11), 603 (390).
- Sovereign Camp W. O. W. v. Rothschild, 40 S. W. 553, p. 579 (256, 257, 258).
- Sovereign Camp W. O. W. v. Ruedrich, 158 S. W. 170, p. 603 (386, 387), 610 (449), 619 (498).
- Sovereign Camp W. O. W. v. Wagon, 164 S. W. 1082, p. 573 (222, 223), 580 (265), 618 (488).
- Splawn v. Chew, 60 Tex. 532, p. 584 (285), 587 (299), 588 (309).
- Springfield F. & M. Ins. Co. v. Cannon, 46 S. W. 375, p. 169 (1073).
- Springfield F. & M. Ins. Co. v. Green, 36 S. W. 143, p. 37 (189).
- Springfield F. & M. Ins. Co. v. McKinnon & Call, 59 Tex. 507, p. 36 (177, 178).
- Springfield F. & M. Ins. Co. v. Nelms, 184 S. W. 1094, p. 123 (731).
- Springfield F. & M. Ins. Co. v. Wade, 68 S. W. 977, p. 66 (351).
- Spring Garden Ins. Co. v. Brown, 143 S. W. 292, p. 67 (357).
- Spring Garden Ins. Co. v. I. & G. N. Ry. Co., 131 S. W. 1147, p. 140 (860).
- Stacy v. Parker, 132 S. W. 532, p. 312 (187), 362 (469).
- Stahl v. Grand Lodge A. O. U. W., 98 S. W. 643, p. 583 (278).
- Standard Life & Acc. Ins. Co. v. Askew, 32 S. W. 31, p. 516 (139).
- Standard Life & Acc. Ins. Co. v. Davis, 45 S. W. 826, p. 500 (47).
- Standard Life & Acc. Ins. Co. v. Koen, 33 S. W. 133, p. 511 (116), 517 (149 to 151), 519 (160), 523 (191).
- Standard Life & Acc. Ins. Co. v. Taylor, 34 S. W. 781, p. 504 (73), 512 (121).
- Standard Fire Ins. Co. v. Willock, 29 S. W. 218, p. 76 (418).
- State v. Burgess, 107 S. W. 366, 109 S. W. 922, p. 676 (2, 34).
- State Division, Lone Star Ins. Union v. Blassengame, 162 S. W. 6, p. 569 (203), 607 (415), 610 (448), 617 (481).
- State Mutual Fire Ins. Co. v. Cathey, 153 S. W. 935, p. 168 (1072), 169 (1074), 181 (1176), 182 (1185); 172 S. W. 187, p. 192 (1250), 193 (1257).
- State Mutual Fire Ins. Co. v. Kellner, 169 S. W. 636, p. 84 (470, 471).
- State Mutual Life Ins. Co. v. Long, 178 S. W. 778, p. 387 (630).
- State Mutual Fire Ins. Co. v. Taylor, 157 S. W. 950, p. 22 (88), 23 (91), 24 (101, 102), 181 (1182), 192 (1243, 1245).
- State Mutual Life Ins. Co. v. Rosenberry, 175 S. W. 757, p. 353 (415, 416).
- State v. Trinity Life & Annuity Soc., 127 S. W. 1174, p. 541 (49, 50).
- Stengel v. Colorado National Life Assur. Co., 147 S. W. 1193, p. 303 (136).

- Stevens v. Germania Life Ins. Co.*, 62 S. W. 824, p. 312 (186), 316 (208, 209), 365 (487), 370 (523).
- Stratton v. Westchester Fire Ins. Co.*, 182 S. W. 4, p. 134 (821 to 825), 137 (837).
- Struve v. Moore*, 136 S. W. 1175, p. 309 (165).
- Suggs v. Travelers' Ins. Co.*, 9 S. W. 676, p. 373 (536).
- Sullivan v. Hartford Fire Ins. Co.*, 36 S. W. 73, p. 37 (186, 187), 168 (1071); 34 S. W. 999, p. 159 (1004).
- Sun Insurance Office v. Beneke*, 53 S. W. 98, p. 69 (369), 70 (371), 119 (703), 144 (886).
- Sun Life Ins. Co. v. Phillips*, 70 S. W. 603, p. 347 (371, 372), 367 (500), 375 (545).
- Sun Mutual Ins. Co. v. Brown*, 36 S. W. 590, p. 78 (429).
- Sun Mutual Ins. Co. v. Mattingly*, 13 S. W. 1016, p. 123 (727), 126 (750).
- Sun Mutual Ins. Co. v. Seeligson & Co.*, 59 Tex. 3, p. 148 (913).
- Sun Mutual Ins. Co. v. Texarkana Foundry & Machine Co.*, 15 S. W. 34, p. 99 (575).
- Sun Mutual Ins. Co. v. Tufts*, 50 S. W. 180, p. 21 (85), 30 (180), 46 (230), 118 (700).
- Supreme Council A. L. H. v. Batte*, 79 S. W. 629, p. 547 (77, 78), 611 (456).
- Supreme Council A. L. H. v. Garrett*, 85 S. W. 27, p. 560 (146).
- Supreme Council, American Legion of Honor v. Landers*, 72 S. W. 880, p. 567 (189), 590 (321), 606 (406).
- Supreme Council of American Legion of Honor v. Larmour*, 16 S. W. 633, p. 530 (6), 548 (82), 555 (117), 595 (341).
- Supreme Council A. L. H. v. Lyon*, 38 S. W. 435, p. 566 (186).
- Supreme Council American Legion of Honor v. Storey*, 75 S. W. 901, p. 591 (322), 596 (342, 343, 344), 600 (367), 602 (379).
- Supreme Council Catholic Knights v. Gambati*, 69 S. W. 114, p. 565 (179 to 183).
- Supreme Hive of Ladies of Maccabees v. Owens*, 167 S. W. 233, p. 570 (205).
- Supreme Lodge Fraternal Union of America v. Ray*, 166 S. W. 46, p. 548 (79).
- Supreme Lodge of the Fraternal Brotherhood v. Jones*, 143 S. W. 247, p. 555 (119, 120), 557 (132), 608 (428, 429).
- Supreme Lodge Knights of Honor v. Keener*, 25 S. W. 1084, p. 569 (200), 577 (244, 245).
- Supreme Lodge K. of H. v. Rampy*, 45 S. W. 422, p. 601 (372), 605 (404, 405).
- Supreme Lodge P. K. and L. of H. v. Grace, et al.*, 60 Tex. 569, p. 544 (58).
- Supreme Lodge Knights and Ladies of Honor v. Payne*, 108 S. W. 1160, p. 551 (94), 552 (97).

- Supreme Lodge K. P. v. Mims, 167 S. W. 835, p. 543 (55), 547 (75), 565 (177), 566 (185), (618 (494), 619 (500)).
- Supreme Lodge Knights of Pythias v. Neeley, 135 S. W. 1046, p. 562 (162 to 167), 565 (178), 591 (324).
- Supreme Lodge National Reserve Assn. v. Turner, 47 S. W. 44, p. 544 (57), 567 (190), 575 (231, 232).
- Supreme Lodge National Reserve Assn. v. Mondrowski, 49 S. W. 919, p. 592 (326).
- Supreme Lodge of Pathfinder v. Johnson, 168 S. W. 1010, p. 597 (347), 603 (385), 609 (440).
- Supreme Lodge United Benevolent Assn. v. Johnson, 77 S. W. 661, p. 530 (1 to 5).
- Supreme Lodge United Benevolent Assn. v. Lawson, 133 S. W. 907, p. 537 (30), 557 (133 to 135), 597 (348), 615 (465, 468, 471).
- Supreme Ruling of the Fraternal Mystic Circle v. Crawford, 75 S. W. 844, p. 610 (447).
- Supreme Ruling of Mystic Circle v. Ericson, 131 S. W. 92, 146 S. W. 160, p. 533 (12), 542 (51), 546 (67 to 73), 557 (131), 564 (168 to 170), 566 (184), 603 (388).
- Supreme Ruling of the Fraternal Mystic Circle v. Hansen, 161 S. W. 54, p. 555 (122), 568 (191), 580 (261 to 264), 611 (457).
- Supreme Ruling of Fraternal Mystic Circle v. Hoskins, 171 S. W. 812, p. 534 (14), 541 (48), 576 (243).
- Supreme Tent of Knights of Maccabees v. Cox, 60 S. W. 971, p. 524 (203), 611 (455).
- Swayne v. Chase, 30 S. W. 1049, p. 133 (809, 811).
- Swenson v. Sun Fire Office, 5 S. W. 60, p. 90 (524, 525).
- Tabor v. Modern Woodmen of America, 163 S. W. 324, p. 578 (251), 579 (254).
- Taylor v. Travelers' Ins. Co., 39 S. W. 185, p. 294 (97).
- Teutonia Ins. Co. v. Tobias, 145 S. W. 251, p. 84 (474).
- Texas Banking & Ins. Co. v. Cohen et al., 47 Tex. 406, p. 72 (389 to 393).
- Texas Banking & Ins. Co. v. Hutchins, 53 Tex. 61, p. 152 (938), 182 (1188).
- Texas Banking & Ins. Co. v. Stone, 49 Tex. 4, p. 47 (233), 50 (252), 155 (968), 172 (1094).
- Texas Cent. Ry. Co. v. Cameron, 149 S. W. 709, p. 514 (131).
- Texas Fire Ins. Co. v. Knights of Tabor Lodge, 74 S. W. 809, p. 91 (533), 106 (625).
- Texas Home Mutual Ins. Co. v. Bowlin, 70 S. W. 797, p. 152 (940).
- Texas Life Ins. Co. v. Roberts, 119 S. W. 926, p. 289 (58 to 61).
- Texas Moline Plow Co. v. Niagara Fire Ins. Co., 87 S. W. 192, p. 116 (687, 688).
- Texas Mutual Life Ins. Co. v. Davidge, 51 Tex. 244, p. 308 (162), 375 (553), 376 (556), 377 (564), 385 (617), 395 (680).

- Texas National Fire Ins. Co. v. White, et al.**, 165 S. W. 118, p. 28 (124, 125).
- Texas & N. O. Ry. Co. v. Commercial Union Assur. Co.**, 137 S. W. 401, p. 140 (861, 862).
- Texas & Pacific v. Levi & Bro.**, 59 Tex. 674, p. 146 (893).
- Texas Shortline Ry. Co. v. Waymire**, 89 S. W. 452, p. 481 (14), 481 (19).
- Thies v. Mutual Life Ins. Co.**, 35 S. W. 676, p. 383 (609), 386 (626).
- Thomas v. Leake**, 3 S. W. 703, p. 584 (286).
- Tinker v. State**, 179 S. W. 572, p. 192 (1253).
- Traders' Ins. Co. v. Chase**, 31 S. W. 1103, p. 134 (817).
- Travelers' Ins. Co. v. Harris**, 178 S. W. 816, p. 491 (13), 501 (50, 51), 504 (74), 519 (161), 522 (184).
- Travelers' Ins. Co. v. Hunter**, 70 S. W. 798, p. 505 (83), 520 (173), 521 (177).
- Travelers' Ins. Co. v. Jones**, 73 S. W. 978, p. 301 (126), 493 (23b, 23c, 23d), 494 (26).
- Travelers' Protective Assn. v. Dewey**, 78 S. W. 1087, p. 493 (23a).
- Travelers' Protective Assn. v. Weil**, 91 S. W. 886, p. 504 (77).
- Trenton v. North American Acc. Ins. Co.**, 89 S. W. 276, p. 495 (29).
- Trinity Life & Annuity Soc. v. Love**, 115 S. W. 26, 279 (9); 116 S. W. 1139, p. 533 (8).
- Underwood v. First National Bank of Galveston**, 185 S. W. 395, p. 384 (616).
- Underwriters' Fire Assn. v. Henry**, 79 S. W. 1072, p. 25 (104), 150 (924), 157 (980).
- Underwriters' Fire Assn. v. Palmer & Co.**, 74 S. W. 603, p. 52 (271), 82 (456), 185 (1208).
- Union Central Life Ins. Co. v. Chowning**, 28 S. W. 117, p. 333 (299), 353 (411, 412), 367 (502 to 504, 506, 507, 509).
- Union Central Life Ins. Co. v. Hughes**, 70 S. W. 1010, p. 334 (308).
- Union Central Life Ins. Co. v. Wilkes**, 47 S. W. 546, 49 S. W. 1038, p. 320 (230), 343 (351), 353 (413).
- United Benevolent Assn. v. Baker**, 141 S. W. 541, p. 555 (118).
- United Benevolent Assn. v. Cass**, 119 S. W. 123, p. 547 (74).
- United Benevolent Assn. v. Shepherd**, 66 S. W. 577, p. 600 (371).
- United Moderns v. Colligan**, 77 S. W. 1032, p. 544 (61a), 589 (315).
- United Moderns v. Pike**, 76 S. W. 774, p. 570 (204), 574 (226, 227).
- United Moderns v. Pistole**, 86 S. W. 377, p. 565 (176), 604 (391), 605 (403), 607 (416), 609 (434).
- United States Fidelity & Guaranty Co. v. Pressler**, 185 S. W. 326, p. 482 (24, 29).
- Virginia F. & M. Ins. Co. v. Cannon**, 45 S. W. 945, p. 128 (769), 131 (791, 794), 158 (991), 191 (1238), 170 (1084).
- Virginia F. & M. Ins. Co. v. Cummings**, 78 S. W. 716, p. 81 (446), 173 (1110), 194 (1268).

- Waggoner v. Burg, 147 S. W. 342, p. 309 (168).
Wagner v. Westchester Fire Ins. Co., 50 S. W. 569, p. 21 (84), 101 (591), 102 (595), 104 (613), 189 (1230).
Warren v. Springfield F. & M. Ins. Co., 35 S. W. 810, p. 54 (280), 122 (722).
Washington Fire Ins. Co. v. Cobb, 163 S. W. 608, p. 58 (315), 64 (339, 340, 341), 139 (854, 855), 172 (1097).
Washington Life Ins. Co. v. Berwald, 12 S. W. 436, p. 382 (601); 72 S. W. 436, p. 338 (326), 339 (331); 76 S. W. 442, p. 319 (224, 225).
Washington Life Ins. Co. v. Gooding, 49 S. W. 123, p. 317 (212, 213), 397 (692).
Washington Life Ins. Co. v. Lovejoy, 149 S. W. 398, p. 303 (138, 139), 305 (150), 311 (180), 318 (216 to 220).
Washington Life Ins. Co. v. Reinhardt, 142 S. W. 596, p. 287 (41 to 45).
Waters v. Wandless, 35 S. W. 184, p. 16 (49).
Westchester Fire Ins. Co. v. McMinn, 188 S. W. 25, p. 40 (206), 41 (211), 86 (496), 180 (1161), 193 (1262).
Westchester Fire Ins. Co. v. Wagner, 38 S. W. 214, p. 27 (116, 120), 108 (639), 124 (736); 30 S. W. 959, p. 186 (1211).
Westchester Ins. Co. v. Storm, 25 S. W. 318, p. 86 (499), 89 (522).
Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co., 167 S. W. 816, p. 21 (82), 30 (143), 63 (330), 71 (381), 100 (586), 151 (933), 162 (1018), 175 (1124, 1125), 192 (1249).
Western Assurance Co. v. Kemendo, 60 S. W. 661, p. 81 (445), 82 (451), 83 (460, 466).
Western Indemnity Co. v. MacKechnie, 185 S. W. 615, p. 491 (12), 505 (80, 81), 517 (148), 524 (205).
West v. Grand Lodge of the A. O. U. W., 37 S. W. 966, p. 548 (80), 583 (281).
Whaley v. Bankers' Union of the World, 88 S. W. 259, p. 538 (33), 542 (53, 54).
Wichita Southern Life Ins. Co. v. Roberts, 186 S. W. 411, p. 342 (248), 348 (379, 380), 387 (632).
Wilkinson v. Travelers' Ins. Co., 72 S. W. 1016, p. 292 (81), 497 (37a, 37b), 501 (53), 514 (133).
Williamsburg City Fire Ins. Co. v. Weeks Drug Co., 133 S. W. 1097, p. 73 (402), 75 (411), 119 (704).
Williams v. Detroit Oil & Cotton Co., 123 S. W. 405, p. 482 (27).
Williams v. Fletcher, 62 S. W. 1082, p. 583 (279).
Wilson v. Aetna Ins. Co., 33 S. W. 1085, p. 86 (497).
Wilton v. New York Life Ins. Co., 78 S. W. 403, p. 294 (96), 295 (104), 397 (687).
Woodall v. Pacific Mutual Life Ins. Co., 79 S. W. 1090, p. 358 (441), 359 (444), 511 (113), 526 (220, 221).
Wooden v. Wooden, 116 S. W. 627, p. 587 (300), 592 (329).

- Woodmen of the World v. Dodd, 134 S. W. 254, p. 568 (193), 590 (317).
- Woodmen of the World v. Hipp, 147 S. W. 316, p. 590 (318, 319), 603 (433).
- Woodmen of the World v. Locklin, 67 S. W. 331, p. 598 (354), 610 (450), 612 (460), 615 (470), 616 (475), 617 (485).
- Woodmen of the World v. McCoslin, 126 S. W. 894, p. 609 (437), 614 (462, 463, 464, 466), 616 (472).
- Woodmen of the World v. Torrence, 103 S. W. 652, p. 592 (327).
- Works, Pritchett & May v. Springfield F. & M. Ins. Co., 79 S. W. 42, p. 87 (506).
- Wright v. Grand Lodge K. P., Colored, 173 S. W. 270, p. 581 (270), 582 (277), 600 (369, 370), 619 (499, 502).
- Wright v. Hartford Fire Ins. Co., 118 S. W. 191, p. 52 (263, 264).
- Young v. State Bank of Marshall, 117 S. W. 476, p. 375 (549).

***KEY NUMBER INDEX TO NOTES.**

(For Fraternal Benefit Insurance Notes, see post page 742.)

I. CONTROL AND REGULATION IN GENERAL.

2. What Constitutes Insurance, 276.
3. Power to Control and Regulate.
4. Constitutional and Statutory Provisions, 1, 276, 479 (1, 2, 3, 4, 5), 656 (1, 2, 3, 4).
5. Authority or License to do Business, 4.
7. License Fees and Taxes, 5.
8. Resources and Securities.
9. Reports and Statements.
10. Supervision by Public Officers or Courts.
15. Foreign Underwriters or Companies and Their Agents.
 16. What Constitutes "Doing Business," 278.
 17. Application of Local Laws, 278, 657.
 18. Subjection to Special Requirements, 6, 657 (12, 13, 14, 15, 16, 17, 18).
 20. Local Authority or License and License Fees or Taxes, 278.
 21. Local Funds and Securities, 6, 279.
 22. Appointment and Regulations of Local Agents, 7, 279.
 24. Effect of Non-compliance with Law.
 25. Civil Liability of Agents.
 26. Actions, 280, 676 (1).
30. Offenses by Officers, Agents or Brokers.

II. INSURANCE COMPANIES.

(A) Stock Companies.

32. Incorporation, Organization, and Existence, 282, 676 (2).
33. Capital and Stock, 282, 676 (3), 670 (1).
35. Officers.
36. Franchises and Powers.
38. Profits, Dividends and Surplus.
41. Insolvency and Dissolution.
 47. Consolidation, 283.
 50. Assets and Receivers.

(B) Mutual Companies.

52. Incorporation, Organization and Existence, 10, 676 (4).
54. Constitutions and By-Laws, 487.
55. Members, 11.
56. Officers.
57. Franchises and Powers.
58. Special Funds, 12.
60. Guaranty Obligations.
61. Insolvency and Dissolution.
 63. Rights and Liabilities of Members.

*As a means of reference, all of the Southwestern key-numbers are here given, even though not referred to in the notes.

II. INSURANCE COMPANIES (Continued).

- 64. Remedies, and Proceedings on Insolvency, 12.
- 69. Proceedings to Enforce Dissolution, 12.
- 70. Assets and Receivers, 12.
- 71. Assessments by Receivers.

III. INSURANCE AGENTS AND BROKERS.**(A) Agency for Insurer.**

- 73. The Relation in General, 13.
- 74. Appointment or Employment of Agent, 14, 284.
- 76. Evidence as to Agency, 14, 285, 658 (21, 22).
- 77. Estoppel to Deny Agency.
- 78. Scope and Extent of Agency, 14.
- 79. Duration and Termination of Agency, 285.
- 81. Individual Interest of Officer or Agent.
- 82. Accounting by Agent.
- 83. Liabilities of Agents and Their Sureties, 15, 286, 658 (23).
- 84. Compensation of Agent, 15, 287, 480 (7).
- 85. Breach of Contract by Principal, 289.
- 86. Extent and Exercise of Powers of Agents, 16.
 - 87. In General, 290.
 - 88. General or Special Agents, 290.
 - 90. Effect of Provisions of Policy, 16.
 - 91. Effect of Instructions to Agents, 16.
 - 92. Evidence as to Authority.
- 93. Unauthorized and Wrongful Acts of Agents, 17, 291.
- 94. Ratification, 17, 292.
- 95. Notice to Agent, 18.

(B) Agency for Applicant or Insured.

- 96. Creation of Agency to Procure Insurance in General, 18.
- 99. Notes for Stock, 670 (2).
- 103. Authority and Duties of Agent as to Principal, 19.
- 107. Extent and Exercise of Powers of Agent.
 - 108. In General, 19.
- 109. Representation of Both Parties, 292.
- 111. Unauthorized and Wrongful Acts of Agents, 20.
- 113. Notice to Agent, 20.

IV. INSURABLE INTEREST.

- 114. Necessity in General.
- 115. What Constitutes Interest in General, 21.
- 116. What Constitutes Interest in Human Life or Health, 294.
- 118. Insurance Without Interest, 295.
 - 119. Wagering Policies in General, 295.
- 121. Necessity of Interest to Sustain Assignment.
- 122. Assignment of Policy to Person Without Interest, 295.
- 123. Extinction of Interest.

V. THE CONTRACT IN GENERAL.**(A) Nature, Requisites, and Validity.**

- 124. Nature of the Contract, 22.
- 125. What Law Governs, 298.
- 126. Subjects of Insurance.
- 128. Executory Agreements to Insure, 22.
- 129. Powers of Agents in Respect of Contracts in General, 299.
- 130. Application or Offer and Acceptance, 22, 299, 490.
- 131. Validity of Oral Contracts, 23, 300.

V. THE CONTRACT IN GENERAL (Continued).

- 132. Binding Slips or Memoranda, 23.
- 133. Form and Requisites of Policy, 23, 300, 657 (7, 8, 9).
- 134. Papers Accompanying Policy, 24, 301, 677 (5), 658 (20).
- 135. Incorporation of Constitution, By-laws, or Rules of Insurer, 490.
- 136. Delivery and Acceptance of Policy, 24, 301, 490.
- 137. Payment of Premium or Dues, 24, 302.
- 138. Validity in General, 25, 490, 657 (10, 11).
- 139. Legality of Object.
- 140. Partial Invalidity.
- 140½. Amount of Insurance.
- 141. Estoppel or Waiver as to Defects or Objections, 26, 302.
- 142. Ratification of Defective or Invalid Contract, 26.
- 143. Reformation, 27, 303, 490.
- 144. Modification, 28, 303.
- 145. Renewals, 29, 480 (8), 677 (6).

(B) Construction and Operation.

- 146. Application of General Rules of Construction, 30, 304, 480 (9), 491, 656 (3, 4), 677 (7, 8).
- 147. What Law Governs, 32, 305, 491.
- 150. Matter on Margin of or Slip Attached to Policy, 32, 306.
- 151. Construing Together Policy and Accompanying Papers, 306, 491, 677 (9, 10).
- 152. Construing Statutes and Charter, By-laws or Rules of Insurer as Part of Policy, 492.
- 154. Construction by Parties.
- 155. Evidence to Aid Construction.
- 156. Parties to Contract and Relations Between Them, 492.
- 157. Subject Matter Insured in General.
- 161. Property Covered by Insurance Against Fire or Other Causes of Loss.
 - 162. In General, 32.
 - 163. Description of Property, 33.
 - 165. Description of Location, 35.
- 168. Duties and Obligations Guaranteed.
- 170. Amount of Insurance.
 - 171. Amount Fixed by Policy in General.
- 172. Amount of Insurance—Valued Policy, 35.
- 175. Commencement of Risk, 35.
- 176. Term and Duration of Risk, 36, 480 (10).
 - 177. Term Fixed by Policy in General, 36.
- 179. Entire or Severable Contract, 36.
- 179½. Loans on Policies, 306.

VI. PREMIUMS, DUES AND ASSESSMENTS.

- 182. Persons Liable for Premiums.
- 183. Amount of Premiums, 307, 480 (11, 12).
- 184. Rebate from Premiums, 307.
- 186. Payment of Premiums, 37, 308, 492.
- 187. Notes for Premiums, 309.
- 188. Actions for Premiums, 309, 480 (13).
- 189. Premium or Deposit Notes, 38, 310.
- 190. Grounds of Assessment in General.
- 191. Power and Duty to Make Assessment.
- 192. Liability to Assessment.
- 193. Amount of Assessment.

VI. PREMIUMS, DUES AND ASSESSMENTS (Continued).

- 197. Enforcement of Assessment.
- 198. Refunding or Recovery of Premiums or Assessments Paid, 311.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

- 199. Assignability of Policies, 38.
- 200. What Law Governs, 312.
- 203. Right of Insured to Assign Life or Accident Policy, 313.
- 205. Consent of Beneficiary to Assignment by Insured, 313.
- 207. Consent of Insurer, 39.
- 208. Validity of Oral Assignment, 313.
- 209. Form and Requisites of Assignment in Writing, 314.
- 212. Validity of Assignment in General, 314.
- 213. Construction of Assignment.
- 215. Transfer of Subject of Insurance Without Policy.
- 216. Fraud in Procuring Transfer.
- 218. Rights and Liabilities of Assignee, 315.
 - 219. In General, 39.
 - 222. Transfer as Collateral Security, 40, 316.

VIII. CANCELLATION, SURRENDER, ABANDONMENT OR RESCISSION OF POLICY.

- 226. When a Policy May Be Cancelled, 40.
- 228. Right of Insurer to Cancel, 40, 493.
- 229. Notice to Cancel, 41, 658 (19).
- 230. Repayment of Unearned Premium on Cancellation, 41.
- 232. Acts Constituting Cancellation, 42.
- 233. Validity of Cancellation, 42, 493.
- 234. Ratification of Invalid Cancellation.
- 235. Evidence of Cancellation, 43.
- 236. Operation and Effect of Cancellation.
- 237. Remedies for Wrongful Cancellation, 318, 494.
- 238. Right of Insured to Surrender in General, 317.
- 239. Right to Surrender Life or Accident Policies.
- 240. Acts Constituting Surrender and Acceptance.
- 241. Validity of Surrender, 317.
- 243. Operation and Effect of Surrender.
- 244. Repayment and Recovery of Premiums or Paid-up Value on Surrender, 43.
- 245. Abandonment by Insured or Beneficiary, 319.
- 246. Rescission by Agreement of Parties, 43.
- 247. Rescission by Insurer, 321.
- 248. Rescission by Insured or Beneficiary, 320, 494.
- 249. Actions for Rescission, 321.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.**(A) Grounds in General.**

- 250. Statutory Provisions, 44, 323.
- 252. Representations.
- 253. In General, 323.
- 254. Falsity.
- 255. Materiality, 45, 324.
- 256. Effect of Misrepresentations, 46, 324, 674 (1), 658 (24).
- 257. Concealment.
 - 258. In General.
 - 259. Knowledge of Facts by Applicant or His Agent.

IX. AVOIDANCE OF POLICY, ETC. (Continued).

- 262. Fraud or False Swearing in Obtaining Insurance, 46, 658 (24).
- 263. Warranties.
 - 264. In General, 46, 325.
 - 265. Distinction Between Warranties and Representations, 48, 326.
 - 267. Fulfillment or breach, 49, 326, 658 (25).
 - 268. Effect of Breach.
- 269. Conditions Precedent.

(B) Matters Relating to Property or Interest Insured.

- 278. Use of Building, 50.
- 279. Occupation of Building, 50
- 280. Description and Condition of Goods, 50.
- 281. Amount or Value, 51, 677 (11).
- 282. Title or Interest of Insured, 52.
- 283. Incumbrances, 57.
- 285. Fidelity of Employees and Others, 658 (24).
- 285½. Liability Insurance.
- 286. Special Circumstances Affecting Risk, 59.
- 287. Precautions Against Loss, 674 (2).
- 288. Other Insurance, 60.

(C) Matters Relating to Person Insured.

- 290. Age.
- 291. Health and Physical Condition, 327, 495.
- 292. Medical Attendance.
- 293. Family History, 330.
- 295. Residence, 331.
- 296. Occupation, 331.
- 297. Habits, 331, 496.
- 299. Special Circumstances Affecting Extent of Risk.
- 301. Other Existing Insurance, 332.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.**(A) Grounds in General.**

- 302. Statutory Provisions. (A) Grounds in General, 60.
- 306. Conditions Subsequent, 60.
- 308. Fulfillment or Breach, 60.
- 310. Notice and Proceedings to Give Effect to Forfeiture, 61, 332, 496.
- 311. Parties Affected by Forfeiture of Policy, 61.

(B) Matters Relating to Property or Interest Insured.

- 319. Change in Use of Building, 62.
- 322. Change in Occupancy of Building, 62.
- 323. Building Becoming Vacant, 63.
- 325. Change in Value of Goods Insured, 63.
- 326. Keeping or Use of Prohibited Articles, 65.
- 328. Change of Title or Interest, 67.
- 330. Incumbrances, 66.
- 332. Fidelity of Employees and Others.
- 332½. Liability Insurance.
- 333. Special Causes Increasing Risk, 72.
- 334. Precautions Against Losses, 74.
- 335. Keeping Books, Papers, and Safe, 76.
- 336. Additional Insurance, 86, 497.

X. FORFEITURE OF POLICY, ETC. (Continued).**(C) Matters Relating to Person Insured.**

339. Change of Occupation.

(D) Assignment of Policy, 89, 90, 333.**(E) Non-payment of Premiums or Assessments, 91, 333.**

349. Default as Ground of Forfeiture in General, 91, 496.

350. Statutory Provisions, 335.

351. What Law Governs.

352. Notice of Time for Payment, 335.

353. Necessity, 337.

356. Extension of Time for Payment, 91, 338.

357. In General.

358. By Agent or Broker, 339, 497.

359. Sufficiency of Payment or Tender to Prevent Forfeiture.

360. In General, 339.

361. To Agent or Broker, 340.

362. Excuses for Non-payment, 91, 341.

363. Rights of Insured After Default, 92.

365. Reinstatement, 341, 498.

366. Election Between Rights.

367. Insurance for Limited Term or Amount, 343.

368. Paid-up Policy or Value, 343.

369. Surrender Value.

370. Actions.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

371. Application of Doctrines of Estoppel and Waiver, 344.

372. What Conditions May Be Waived, 92, 344.

373. Liability of Insured to Estoppel by Acts, Conduct or Statements of Officers or Agents, 92, 498.

374. Powers of Officers or Agents Respecting Waiver, 93.

375. In General, 345, 499.

376. Effect of Provisions of Policy, 94, 345, 481 (14).

377. Knowledge of or Notice of Facts in General, 96, 346.

378. Knowledge of or Notice to Officers and Agents, 98, 346.

379. Insertion of False Answers in Application by Agent or Under His Direction, 103, 348, 499.

380. Fraudulent or Collusive Acts of Agent, 103.

381. Form and Requisites of Express Waiver.

382. In General.

383. Oral Waiver, 103.

384. Waiver in Writing, 104, 348.

386. Waiver of Provisions of Policy as to Mode of Waiver, 104.

387. Construction and Operation of Express Waiver, 105, 349, 499.

388. Implied Waiver in General, 105, 349, 481 (14, 15).

389. Issuance and Delivery of Policy Without Objection, 107, 500.

390. Failure to Assert Forfeiture or to Cancel or Rescind Policy, 108, 350, 500.

391. Admission of Liability on Policy.

392. Demand, Acceptance, or Retention of Premiums or Assessments, 109, 351, 500.

393. Consent to Assignment of Policy, 110, 353.

396. Requiring, Accepting, or Retaining Proofs of Loss, 110.

XI. ESTOPPEL, WAIVER, ETC. (Continued).

- 397. Participating in Adjustment of Loss, 111, 481 (16), 674 (3).
- 399. Payment of Loss.
- 400. Provisions of Policy Against Forfeiture, 354.

XII. RISKS AND CAUSES OF LOSS.**(A) Marine Insurance.**

- 402. Marine Risks in General, 112.
- 403. Perils of the Sea, 112.

(B) Insurance of Property and Titles.

- 421. Fire.
- 422. Explosion.
- 423. Lightning, Wind, Tornadoes, and Other Storms.
- 424. Accident.
- 425. Theft, 674 (4).
- 426. Injury to or Death of Animals, 677 (12).
- 427. Proximate Cause of Loss.
- 429. Wrongful Acts of Insured.

(C) Guaranty and Indemnity Insurance, 656 (1-30).

- 430. Default or Other Misconduct of Officer or Employee, 657 (5, 6).
- 432. Non-payment of Debt Insured.
- 435. Liability Incurred for Personal Injury or Loss of Life, 481 (17, 18, 19, 20), 670 (3).
- 437. Wrongful Acts of Insured, 481 (21).

(D) Life Insurance.

- 438. Provisions of Policy as to Liability, 354.
- 444. Suicide, 355.
 - 445. In General, 356.
 - 446. Effect of Insanity, 356.
- 448. Death Caused by Beneficiary.

(E) Accident and Health Insurance.

- 449. What Constitutes Accident in General, 503.
- 450. Diligence Required of Insured.
- 451. Risks and Exceptions in Policy in General, 501.
- 452. Risks of Travel, Railroads, and Other Conveyances.
- 454. Bodily Infirmities or Disease.
- 455. External, Violent and Accidental Means of Injury, 503.
- 456. External and Visible Signs of Injury, 503.
- 460. Intoxication.
- 461. Voluntary or Unnecessary Exposure to Danger, 504.
- 464. Intentional Injuries, 504.
- 465. Suicide or Self-inflicted Injuries.
- 466. Proximate Cause of Injury or Death, 505.
- 467. Limitations as to Time of Death or Disability Caused by Accident.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.**(B) Insurance of Property and Titles.**

- 493. Total Loss, 113.
- 494. Partial Loss in General.
- 495. Provisions Making Insured a Co-insurer, 116.
- 498. Value of Property Destroyed, 116.
 - 499. In General.
 - 500. Valued Policies, 118.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER (Continued).

- 501. Insurance of Part of Value.
- 503. Amount of Interest of Insured, 119.
- 504. Effect of Other Insurance, 119.
- 507. Loss of Rent and Profits, 121.

(C) Guaranty and Indemnity Insurance, 658 (26).

- 511. Loss of Debt Insured.
- 512. Liabilities Incurred for Injuries to Persons or Property, 482 (22).
- 513. Expenditures, 670 (4, 5).
- 514. Damages Incurred or Paid, 482 (23).

(D) Life Insurance.

- 515. Amount Payable on Death, 356.
- 517. Amount of Incontestable or Paid-up Policy.
- 519. Participation in Dividends or Profits.
 - 520. In General.
- 522. Share in Tontine Fund.
- 523. Deductions and Offsets, 357.

(E) Accident and Health Insurance.

- 524. Total Disability, 506.
- 525. Confinement to House or Bed or Under Care of Physician.
- 527. Particular Injuries Specified in Policy, 507.
- 528. Immediate, continuous or Permanent Disability, 507.
- 529. Death from Accident.
- 530. Limitation of Liability by Provisions of Policy, 508.
- 531. Classification of Risk, 508.

XIV. NOTICE AND PROOF OF LOSS.

- 533. Effect of Requirements of Policy in General, 121.
- 535. Necessity of Notice.
- 536. Necessity of Statement of Proof of Loss, 357.
- 537. Persons Who May Give Notice or Make Proof, 122.
- 538. Persons to Whom Notice or Proof May Be Given or Made, 122, 509, 677 (13).
- 539. Time for Notice and Proof, 123, 482 (24), 509, 677 (14).
- 542. Statements or Proof of Loss of or Damage to Property.
- 543. Proofs of Death of or Injury to Insured, 358, 510.
- 546. Necessity of Certificate of Magistrate, 123.
- 548. Examination of Insured.
- 549. Inspection of Person of Insured After Injury or Death, 510.
- 550. Effect of Statements and Proofs in General, 358.
- 552. Misstatements or Omissions, 511.
- 553. Fraud or False Swearing, 123.
- 554. Estoppel or Waiver as to Notice and Proofs or Defects and Objections, 124, 511.
 - 555. In General.
 - 556. Powers of Officers or Agents, 125.
 - 558. Implied Waiver in General, 126, 358.
 - 559. Denial of Liability, 126, 358, 482 (25), 511.
 - 560. Failure to Object or to State Ground of Objection, 127.
 - 561. Adjustment of Loss and Negotiations for Settlement, 127, 512.

XV. ADJUSTMENT OF LOSS.

- 563. Effect of Provisions of Policy in General.
- 566. Effect of Adjustment, 128.
- 567. Effect of Provisions of Policy for Appraisal or Arbitration, 128.
- 568. Demand of Appraisal or Arbitration, 128.
- 569. Agreement for Appraisal or Arbitration.
- 570. Appointment of Appraisers or Arbitrators.
- 572. Proceedings on Appraisal or Arbitration, 129.
- 574. Validity and Effect of Appraisal or Award, 129.
- 575. Failure of Appraisal or Arbitration.
- 576. Estoppel or Waiver as to Adjustment or Arbitration, 131.
- 578. Refusal to Adjust or Arbitrate Loss.
- 579. Settlement Between Parties, 359.

XVI. RIGHT TO PROCEEDS.

- 580. Policy Payable to Owner of Property or Interest Insured, 133.
- 581. Policy Payable to or for Benefit of Mortgagee of Property Insured, 135.
- 582. Policy for Benefit of Persons Interested in Property Insured, 137.
- 583. Life or Accident Policy Payable to Insured, His Representatives, or Estate, 359.
- 584. Life or Accident Policy Designating Beneficiary, 512.
 - 585. Rights of Persons Designated in General, 360.
 - 586. Vested Interest of Beneficiary, 360.
 - 587. Change of Beneficiary, 361.
 - 589. Death of Beneficiary, 361.
 - 590. Rights of Creditors, 361.
- 591. Life Policy for Benefit of Creditor, 362.
- 591½. Indemnity Insurance.
- 593. Assignee of Policy Before Loss, 363.
- 594. Assignment of Claim for Loss, 137.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

- 595. Election to Rebuild or Replace Property, 138.
- 597. Time of Payment, 513.
- 598. Interest on Amount of Loss, 138, 364, 482 (26), 513.
- 599. Mode and Sufficiency of Payment, 365.
- 600. Effect of Payment.
- 601. Recovery of Payment, 139, 365.
- 602. Damages for Refusal of Payment, 365, 513, 674 (7), 678 (15).
- 603. Release or Discharge from Liability, 365, 670 (6).
- 605. Subrogation of Insurer, 514.
 - 606. On Payment of Loss in General, 139, 670 (7).
 - 607. Under Assignment of Rights of Insured, 140.

XVIII. ACTIONS ON POLICIES.

- 608. Nature and Form of Remedy.
- 610. Statutory Provisions, 372.
- 612. Conditions Precedent in General, 145, 371.
- 614. Defenses.
 - 615. In General, 145, 372, 514.
- 618. Venue, 373, 515.
- 620. Limitations by Provisions of Policy, 373, 515.
 - 621. Time Before Action Can Be Maintained, 146.

XVIII. ACTIONS ON POLICIES (Continued).

- 622. Time Within Which Action Must Be Brought, 146, 374, 516.
- 623. Waiver of Limitations, 147, 517.
- 624. Parties, 148, 375.
- 625. Process, 148.
 - 626. In General, 375.
 - 627. Against Foreign Insurance Companies, 149.
- 628. Declaration, Complaint or Petition.
 - 629. Form and Requisites in General, 149, 150, 375, 517.
 - 632. Description, Situation and Condition of Subject-matter.
 - 633. Title or Interest of Insured, 151, 678 (16).
 - 634. Performance or Waiver of Conditions, 151, 376.
 - 635. Loss and Cause Thereof, 152, 518.
 - 636. Other Insurance.
 - 637. Assignment of Policy.
 - 638. Non-payment.
 - 639. Anticipating Defenses, 518.
- 640. Plea, Answer or Affidavit of Defense, 153, 377, 482 (28).
- 641. Replication or Reply and Subsequent Pleadings, 155, 377.
- 642. Demurrer, 154.
- 643. Amended and Supplemental Pleadings, 377.
- 645. Issues, Proof and Variance, 155, 157, 378, 518.
- 646. Presumptions and Burden of Proof, 158, 378, 519.
- 647. Admissibility of Evidence, 380.
 - 648. In General, 160, 520.
 - 650. Application for Insurance.
 - 651. Policy or Other Contract, 164.
 - 653. Interest or Title of Insured, 165.
 - 654. Performance or Breach of Warranty or Condition, 678 (17).
 - 654½. Payment of Premiums, 383.
 - 655. Fraud or Misrepresentation.
 - 658. Loss or Damage to Property and Cause Thereof, 160.
 - 659. Death of or Injury to Person Injured, and Cause Thereof, 385, 521.
 - 660. Valuation of Property, 168.
 - 661. Amount of Loss, 169.
 - 662. Notice and Proof and Adjustment of Loss, 170, 522.
 - 663. Persons Entitled to Proceeds, 385.
 - 664. Estoppel or Waiver, 171, 386.
- 665. Weight and Sufficiency of Evidence, 172, 387, 482, (29), 522, 674 (8).
- 666. Amount of Recovery, 176, 390, 524.
- 668. Questions for Jury, 177, 390, 524, 674 (9).
- 669. Instructions, 181, 393, 482 (30), 525.
- 670. Verdict and Findings, 189, 295, 527, 678 (18).
- 672. Judgment, 189, 396, 527.
- 673. Execution and Enforcement of Judgment.
- 675. Costs and Attorney's Fees, 397, 528.

XIX. REINSURANCE.

- 677. The Contract in General.
 - 679. Construction and Operation, 659 (28).
- 684. Extent of Liability of Reinsurer, 194, 398, 659 (29).
- 686. Actions on Contracts of Reinsurance, 659 (30).

INDEX TO FRATERNAL BENEFIT INSURANCE NOTES.

FRATERNAL BENEFIT INSURANCE.

(A) Corporations and Associations.

- 687. Nature and Status in General, 530.
- 688. Exemption from General Laws Regulating Insurance, 531.
- 690. Authority or License to Do Business, 533.
- 691. Regulation and Supervision of Business.
- 692. Incorporation and Organization.
- 693. Constitutions and By-laws, 533.
- 694. Membership, 535.
- 695. Officers and Agents, 536.
- 696. Powers of Association in General, 538.
- 697. Superior, Subordinate, and Affiliated Bodies, 540.
- 698. Special Funds.
- 699. Reinsurance, 541.
- 700. Insolvency and Dissolution.
 - 701. Insolvency and Its Effect in General, 541.
 - 704. Reorganization, 542.
 - 705. Consolidation, 542.
 - 708. Assets and Receivers.

(B) The Contract in General.

- 711. Nature of the Contract, 544.
- 712. What Law Governs.
- 713. Application and Acceptance.
- 714. Form and Requisites of Certificates of Membership.
- 715. Application as Part of Contract, 544.
- 716. Charter or Articles of Incorporation as Part of Contract.
- 717. Constitution, By-laws, or Rules as Part of Contract, 544.
 - 718. Existing Provisions.
 - 719. Subsequent Provisions or Amendments, 545.
- 720. Delivery and Acceptance of Certificate, 549.
- 721. Payment of Dues, 550.
- 722. Validity in General, 548.
- 723. Misrepresentation, Fraud, or Breach of Warranty, 551.
- 724. Estoppel or Waiver as to Defects or Objections, 556.
- 725. Modification and Reformation.
- 726. Construction and Operation in General, 558.
- 727. Assignment or Other Transfer, 560.
 - 728. In General.
- 730. Cancellation, Surrender, Abandonment, or Rescission, 562.
- 730½. Actions for Breach of Contract, 564.

(C) Dues and Assessments.

- 735. Amount of Assessment, 564.
- 740. Mode and Sufficiency of Payment.
- 741. Effect of Payment, 565.
- 743. Refunding or Recovery of Dues or Assessments Paid, 565.

FRATERNAL BENEFIT INSURANCE (Continued).

(D) Forfeiture or Suspension.

- 744. Nature and Grounds in General, 567.
- 745. Statutory Provisions Against Forfeiture, 568.
- 746. Effect of Suspension of Subordinate Body.
- 747. Effect of Expulsion or Suspension of Member, 568.
- 748. Violation of Terms or Conditions of Contract, 568.
- 749. Non-payment of Dues or Assessments, 569.
 - 750. Default as a Ground of Forfeiture in General, 570.
 - 751. Notice of Time of Payment, 569.
 - 753. Sufficiency of Payment or Tender to Prevent Forfeiture, 570.
 - 754. Excuses for Non-payment, 572.
- 755. Estoppel or Waiver Affecting Right of Forfeiture, 574.
- 756. Notice and Proceedings to Give Effect to Forfeiture, 578.
- 757. Effect of Forfeiture or Suspension, 578.
- 758. Reinstatement, 578.
 - 759. Right in General, 579.
 - 760. Payment of Arrears, 579.
 - 761. Health and Condition of Insured, 580.
- 765. Remedies for Relief Against Forfeiture.

(E) Beneficiaries and Benefits.

- 766. Status of Beneficiaries in General.
- 767. Insurable Interest of Beneficiary, 581.
- 768. Persons Who May Be Beneficiaries.
 - 769. In General, 581.
 - 770. Statutory Provisions, 582.
 - 771. Provisions of Charter or By-laws, 582.
- 772. Designation of Beneficiary, 584.
 - 773. In General.
 - 774. Revocation, 584.
- 777. Invalid or Ineffective Designation, 585.
- 778. Failure to Make Designation, 585.
- 779. Change of Beneficiary.
 - 780. Right to Change in General.
 - 782. Rights of Beneficiary Previously Designated, 586.
 - 783. Vested Interest of Beneficiary, 586.
 - 784. Mode of Changing Designation, 587.
- 785. Death of Beneficiary Before Insured, 589.
- 786. Loss or Contingency on Which Benefits Become Payable, 589.
 - 787. In General.
 - 788. Suicide.
- 789. Notice and Proof of Loss, 590.
- 791. Amount of Benefits, 591.
- 793. Rights of Beneficiaries to Proceeds, 591.
- 795. Rights of Representatives of Insured, 592.
- 796. Rights of Representatives of Beneficiaries, 593.
- 797. Rights of Creditors, 593.
- 798. Payment of Benefits.
- 799. Interest on Amount of Benefits.
- 800. Damages for Refusal of Payment, 595.
- 801. Release or Discharge of Association from Liability, 596.

(F) Actions for Benefits.

- 802. Nature and Form of Remedy.

FRATERNAL BENEFIT INSURANCE (Continued).

(F) Actions for Benefits (Continued).

- 803. Provisions of Charter, By-laws, or Certificate of Membership.
- 805. Resort to Courts for Settlement of Disputes, 596.
- 809. Defenses, 597.
- 812. Limitations, 597.
- 813. Parties, 597.
- 814. Process and Appearance, 598.
- 815. Pleading, 598.
- 816. Evidence.
 - 817. Presumptions and Burden of Proof, 601.
 - 818. Admissibility, 604.
 - 819. Weight and Sufficiency, 607.
- 820. Amount of Recovery.
 - 821. In General.
- 823. Trial.
 - 825. Questions for Jury, 611.
 - 826. Instructions, 614.
 - 827. Verdict and Findings, 618.
- Appeal and Error, 618.

INDEX TO CASE LAW.

(Reference to Pages.)

For index to statutory law, see page 772.

For key-number index notes, see pages 732-742.

Abandonment, see Cancellation, Surrender, etc., of policy.

Acceptance, written, not necessary, 550.

Of premium by association, 108, 351, 500, 550, 558, 574.

Accident and Health Insurance, index (482)1.

Case law, 483.

Statutory law, 399, 432.

What constitutes, 503.

Accidental means of death, 503.

Accumulations forbidden, 217 (note 2).

Actions, 143, 279, 309, 371, 480 (13), 514, 596, 659 (30), 676 (1).

Resort to courts for settlement of disputes, 596.

Jurisdiction as affected by net amount in controversy, 143, 516.

Joinder of causes of action, 144, 372, 516.

Conditions precedent, 145, 371.

Defenses in general, 145, 372, 514, 597.

Limitations by provisions of policy, 146, 373, 515, 597.

Time before action may be maintained, 146.

Time within which action must be brought, 146, 374, 515.

Waiver of limitations, 147, 517.

Parties, 148, 374, 597.

Venue, 148, 372, 373, 515, 597.

Process, 148, 371, 375, 516, 598.

Against foreign insurance companies, 149.

Petition.

Form and requisites in general, 149, 375, 517.

Insurable interest, 150.

Anticipating defenses, 518.

Title or interest of insured, 151, 678 (16).

Performance or waiver of conditions, 151, 376.

Loss and cause thereof, 152, 517.

Non-payment, 152.

Plea, answer or affidavit of defense, 153, 377, 482 (28), 517, 599.

Interpleader, 600.

Demurrer, 154.

Reply of insured 155.

Issues, proof and variance, 155, 378, 518, 600.

Issues and proof in general, 155, 378.

Variance, 157, 378.

Presumption and burden of proof, 159, 378, 519, 601.

Burden of showing a prima facie case, 379.

In showing suicide, 378, 601, 607.

Presumption of death, 602.

Violation of law, 601.

Insured was not in sound health, 378.

Forfeiture, 601.

Waiver, 379.

Actions (Continued)

- Insurer to be a fraternal benefit association, 601.
- Deceased indebted to recipient of proceeds of policy, 379.
- Survivorship, 379, 602.
- Financial condition of insured, 379.
- Delay in delivery of certificate, 602.
- Validity of change of beneficiary, 602.
- Admissibility of evidence, 160, 380, 519, 603.
 - Policy or other contract, 161.
 - As to fraud and misrepresentations, 161.
 - As to pleading, 607.
 - As to transfer of policy, 161.
 - Payment of premiums, 383, 603.
 - Performance of warranty, 678 (17).
 - What property included, 162.
 - As to additional insurance, 162.
 - Interest or title of insured, 163.
 - As to incumbrances, 164.
 - As to inventories, 165.
 - Loss or damage to property and cause thereof, 166.
 - Arson, 166.
 - As to use of gasoline, 168.
 - Condition of insured property, 168.
 - Valuation of property, 168.
 - Amount of loss, 169.
 - Notice and proof and adjustment of loss, 170.
 - Persons entitled to proceeds, 171, 385.
 - Estoppel or waiver, 171, 385.
 - Death or injury of insured and cause thereof, 385, 521.
 - Refusal to pay claim, 521.
 - As to health of applicant or member, 605.
 - As to representations of agent, 606.
 - As to misstatements of examiner, 606.
 - As to expulsion of member, 607.
 - Res gestae, 607.
 - Report of death, 607.
 - As to condition of association, 607.
 - Miscellaneous, 165.
- Weight and sufficiency of evidence, 173, 386, 482 (29), 522, 607, 674 (8).
 - As to policy, 173.
 - As to payment of premium, 387, 609.
 - Authority and agreement to extend premium, 388.
 - As to additional insurance, 174.
 - As to ownership, 174.
 - Showing false answers in application and effect, 389.
 - Showing suicide, 388, 607.
 - To show death of insured, 609.
 - To show violation of law, 608.
 - To show knowledge of insurer as to habits of insured, 608.
 - Miscellaneous, 175, 610.
- Amount of recovery, 176, 390, 524.
- Questions for the court, 177.
- Questions for the jury, 177, 390, 524, 610, 674 (9).
 - As to issue and delivery of policy, 392.
 - Certainty as to policy, 612.
 - In regard to application, 390.
 - Misrepresentations, 611.

Actions (Continued)

- As to good health of insured, 392, 612.
- As to suicide, 392.
- Payment of dues, 610.
- As to waiver of forfeiture, 392.
- Violation of law, 612.
- Total disability, 612.
- As to incumbrances, 178.
- As to additional insurance, 178.
- As to increased hazard, 178.
- As to iron safe clause, 179.
- As to inventory, 179.
- As to proofs of loss, 179.
- As to cancellation, 177.
- As to reinstatement, 612.
- In regard to release from liability and settlement, 392.
- Miscellaneous, 179.
- Instructions, 181, 393, 482 (30), 525, 612.
 - As to burden of proof, 612.
 - As to estoppel and waiver, 613.
 - As to rules and by-laws, 612.
 - As to payment of dues, 613.
 - As to agents, 394.
 - As to sale of stock, 394.
 - Incumbrances, 182.
 - Ownership, 183.
 - Additional insurance, 183.
 - Increase of hazard, 183.
 - Vacancy, 185.
 - Value of insured property, 185.
 - Total loss, 186.
 - Arson, 188.
 - Violation of law, 614.
 - Good health of insured, 615.
 - Diseased condition of member, 616.
 - Compromise and settlement, 186.
 - Fraud, 186.
 - Forgery of signatures, 613.
 - Proofs of loss, 187.
 - Waiver of transfer of property, 185.
 - Contribution, 188.
 - Assignment, 188.
 - Attorney's fees, 395.
 - Miscellaneous, 188.
- Argument of counsel, 188.
- Verdict and findings, 189, 395, 527, 617, 678 (18).
- Judgment, 189, 205 (note), 395, 527, 618.
- Costs and attorney's fees, 396, 528.
- Appeal and error, 190, 397, 527, 619.
 - New trial, 619.
 - Insufficiency of evidence, 619.
 - Action of jury, 619.
 - Certificate, 619.
 - Reformation of policy, 190.
 - Payment of premiums, 191.
 - Value of property, 191.
 - Arbitration and total loss, 191.
 - Iron safe clause, 191.

Actions (Continued)

Ownership, 190.

Tender in lower court, 620.

Judgment on a severable contract, 620.

Conclusions of law and fact, 620.

Additional insurance, 59, 85, 89, 97 (558), 98, 119, 162, 174, 178, 183, 331, 497.

Consent of agent to, 89.

Adjuster. See adjustment of loss, 133 (806).

Adjustment of loss, 127, 128, 170, 359.

Settlement between parties, 127, 191, 359, 369, 482 (23).

Necessity of consideration, 359.

Effect of adjustment, 128, 140 (862), 482 (23).

Effect of provisions of policy for appraisal or arbitration, 128.

Demand of appraisal or arbitration, 128, 191.

Proceedings on appraisal or arbitration, 129, 191.

Validity and effect of appraisal or award, 131.

Estoppel or waiver as to adjustment or arbitration, 131.

Participation in, 111, 481 (16), 674 (3).

Rights of parties after adjustment, 132, 482 (23).

Where company is not licensed to do business in Texas, 221 (note 3).

Administration, fund due on certificate not subject to, 593 (332).

Admissibility of evidence. See **Actions**.

Age, statement as to, 323 (241), 575.

Agency lists, inspection of, 226 (note).

Agents and brokers, 12, 283, 488, 536.

Statutory regulations, 220, 279.

Must be authorized to solicit insurance, 12, 283, 488, 538.

Persons debarred from acting as agent, 221 (note 1), 224 (note), 225 (note), 284, 489.

Who are agents, 13, 221 (note 2), 222 (note), 283, 488, 658 (21, 22).

Issued only through resident agents, except, 13, 223 (note), 284, 488.

Solicitor deemed agent, 13, 284, 488.

Relation in general, 13, 536.

Appointment or employment of agent 7, 14, 284.

Evidence as to agency, 14.

Revocation of authority, 13, 294, 489.

Compensation of agents, 15, 223 (note), 287, 480.

Subrogation of agent, 308.

Liabilities of agents and sureties, 3, 14, 286, 372 (532), 658 (23).

Scope and extent of agency, 14.

Extent and exercise of powers of agents, 16, 93, 94, 345, 498.

In general, 16, 290, 388.

General and special agents, 24 (101), 290.

Effect of provisions of policy, 16.

Effect of instructions to agents, 16.

Unauthorized and wrongful acts of agent, 16, 291.

In accepting notes, 291, 388, 670 (2).

Trade talk of agents, 292, 319.

Breach of agency contract by insurer, 289.

Duration and termination of agency, 285.

Notice to agent, 17, 97, 346, 608.

Agency for insured, 18.

To procure insurance, 18.

Duties as to principal, 19.

Actions for breach of contract, 19.

Extent and exercise of powers, 19.

Unauthorized and wrongful acts, 20.

Agents and brokers (Continued).

- Notice to agent, 20.
- Representation of both parties, 17 (note 57), 108 (640), 292.
- Ratification, 17, 292.
- Demand, acceptance or retention of premium by agent, 352.
- Criminal prosecution of, 292, 293, 537.
- Instructions, 394.
- Amendments to charter, 228 (notes 1, 2), 258 (note 2), 402 (note), 422 (note).
- Subsequent, 544 to 547, 559.
- Amount of loss, 51, 52, 169.
 - Of premium, 37, 307, 480 (11, 12).
 - Of recovery, 176, 390, 524.
 - Of insurance, 677 (11).
 - Of interest of insured, 118.
 - Payable on death, 356, 591.
 - Interest on, 138, 364, 482 (26), 513.
- Analysis of rate, 37.
- Animals, injury to, 677 (12).
- Annual premiums and expenses, 261 (note).
- Answer. See Actions, 153, 377, 482 (28), 517, 599.
- Anti-trust law, 688.
 - Violations, 689 (note).
- Appeal and error, 190, 397, 527, 619.
- Application. See Contract in General.
 - Attached to policy, 409 (note).
 - Question for jury, 390.
- Appraisal, 128.
- Arbitration. See Adjustment of Loss, 191.
- Argument of counsel, 188.
- Arrears, payment of, 579.
- Arson, 166 (10), 188, 274.
- Assessments. See Premiums, Dues and Assessments.
- Assessment on natural premium companies, 278 (6).
 - Assets, 435 (note 2).
 - Taxation, 435 (note 3).
 - Exemption from penalty, 435 (note).
 - Application of penalty statute, 368.
- Assets, 12, 435 (note 2).
- Assignment of claim for loss, 137, 594.
- Assignment or other transfer of property, 38, 89, 90, 312, 560, 594.
- Assignability of policies, 38.
 - To person without interest, 295.
 - Right of insured to assign policy, 312.
 - What law governs, 312.
 - Consent of insurer, 39, 109, 353.
 - Consent of beneficiary, 313.
 - Restrictions on assignment, 90.
 - Validity of assignment in general, 90, 314.
 - Validity of oral assignment, 90, 313.
 - Transfer by gift, 313 (195).
 - Form and requisites of assignment in writing, 314.
 - Rights of representatives of insured after assignment, 594.
 - Rights and liabilities of assignee, 39, 89, 315, 363, 594.
 - Transfer as collateral security, 39, 89, 316, 560.
 - Effect of will after assignment by beneficiary to testator, 561.
 - Where fraud is alleged, 71, 561.
 - Instructions, 188.

- Attorney's fees, 396, 528, 670 (4, 5).
- Instructions, 395.
- Amount of where penalty is assessed, 370.
- Automobile accident insurance, 670 (4, 5, 6, 7).
- Authority of agents. See Agents and Brokers, 12, 220, 283, 488, 538.
- Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition, 43, 322, 494, 551.
- Misrepresentations shall not constitute defense, 43, 322.
 - Interpretation of statutory provision, 323.
 - No defense based upon valid, unless, 44, 322, 495.
 - Must be material, 322, 494, 555.
 - Defense based on, not valid after two years, 322.
 - Shall not be defeated on immaterial fact, 323, 495.
 - Companies shall not misrepresent policies, 323.
 - Grounds of avoidance in general, 44.
 - Statutory provisions—case law, 44.
 - Representations, 323.
 - Must be material to avoid contract, 45, 323.
 - Effect of misrepresentations, 45, 324, 674 (1), 658 (24).
 - Where unintentional, 551.
 - Fraud or false swearing in obtaining insurance, 46.
- Warranties in general, 47, 324.
 - Definition, 46.
 - In marine insurance, 47.
 - Practical application of general doctrine, 325.
 - Breach of as to personal property not a defense, 43.
- Distinction between warranties and representations, 48, 326.
- Fulfillment or breach of warranty, 49, 326, 554, 628 (25).
- Matters relating to property or interest insured, 50.
 - Use of building, 50.
 - Occupation of building, 50.
 - Description and condition of goods, 50.
 - Amount or value, 51.
 - Title or interest of insured, 51, 52.
 - Equitable title, 52.
 - Outstanding lien or mortgage, 52.
 - Leasehold interest, 53.
 - Marital interests, 54.
 - Partnership property, 55.
 - Vendor's rights, 56.
 - Vendee in contract for sale, 56.
 - Miscellaneous, 56.
 - Fee simple title by deed as condition precedent, 56.
 - Not duty of insurer to make further inquiries, 56.
 - As to when condition of ownership refers, 56.
 - Incumbrance, 56.
 - Mixed personalty and realty, 57.
 - Rights of mortgagee, 57.
 - Miscellaneous, 57.
 - Omission to inform insurer of existence of lien, 58.
 - Notice and inquiry of insurer as to lien, 58.
 - Special circumstances affecting risk, 59.
 - Other insurance, 59.
- Matters relating to person insured.
 - As to health and physical condition of applicant, 329, 495.
 - As to having consulted a physician, 328.
 - Breach of warranty before delivery of certificate, 553.
 - As to good health of applicant at time of delivery of policy, 329, 553.

Avoidance of policy, etc. (Continued).

- As to beneficiary, 553.
- As to family history, 329.
- As to residence, 330.
- As to occupation, 330.
- As to habits, 331, 494.
- As to other existing insurance, 331.

Fraud of physician, 553.

Persons making false statements guilty of misdemeanor, 556.

Award. See Adjustment of Loss.

Bailee, insurance of, 21 (84).

Beneficiary. See Right to Proceeds.

Consent to assignment, 313.

Effect of will after assignment, 561.

Matters relating to, 553.

Change of, 602.

Benefits, 543, 580. See Right to Proceeds.

Different from State requirements, 627 (note).

Funeral, 571.

Sick, 496 (33).

Binding Slips, 22, 23.

"Blue-sky" laws, 679.

Bonds, 6 (D), 648.

Surety company, 648 (note 9), 651 (note 2).

Attachment of contract to, 658 (20).

Requisites of, 657 (7).

Sufficiency of, 657 (8, 9).

Alterations in contract, 657 (10, 11).

Solvency of surety, 659 (27).

To be filed, 231 (notes 1, 2, 3, 4).

Building, 65 (4).

Federal, 657 (5).

Indemnity, 657 (6).

Life insurance agents, 14, 286, 658 (23).

Foreign insurance companies.

Compliance with statute, 6 (D), 657 (12).

Contract of agency, 657 (13).

Inures to benefit of policy holders, 657 (14).

Presentment of claim to receiver, 657 (15).

Ruling not prejudicial to surety, 657 (16).

Bond cannot be proven by certified copy, 657 (17, 18).

Cancellation and notification to insured, 658 (19).

Books, keeping, 75 to 82.

Borrowing money, 405 (note 5).

Breach of contract of agency, 19, 289.

Brokers. See Agents and Brokers.

Building bonds, 656 (4).

Burden of proof. See Actions—presumption and burden of proof, 612.

In showing forfeiture, 601.

Burglary insurance, index, 674.

Statutory law, 671.

Business, what constitutes doing, 278.

By-laws, 10, 260 (notes 1 to 6), 311 (177), 491, 544, 627.

Instructions, 612.

Notice of, 487.

Must show what, 487.

Fraternal benefit, 533, 627 (note).

Calendar year, 5 (2).

Cancellation, surrender, abandonment or rescission of policy, 40, 317, 493, 562.

In general, 40, 317, 493, 562.

When a policy may be cancelled, 40.

Right of insurer to cancel, 40, 493.

Rescission by insurer, 321.

Actions for rescissions, 321.

Right of insured to surrender, 317, 370.

Abandonment by insured, 318.

Rescission by insured or beneficiary, 319, 494.

By reason of false representations of agent, 319.

Rescission by agreement of parties, 43.

Acts constituting cancellation, 42.

Notice to cancel, 41.

Validity of cancellation, 42, 493.

Evidence of cancellation, 43.

Remedies for wrongful cancellation, 317, 494, 562.

Repayment of unearned premium, 41.

Repayment and recovery of premiums, 43.

Measure of damages for, 318, 563.

Validity of surrender, 317, 370.

Restraining cancellation of certificate, 562.

Present value of a life policy, 563.

Question for the jury, 177.

Carrier, 142.

Insurance for benefit of, 90 (527, 528).

See Subrogation.

Actions against, 145 (887), 146 (893).

Casualty companies, index 670, 213 (note).

Statutory law, 660.

Mutual, not legal, 661 (note 1).

Case law, 213 (note), 482 (29).

Causes of loss. See Risks and Causes of Loss.

Proximate, 505.

Certificate of Authority to do business, 6 (D).

Certificate. See Contract in General, Policy.

Exchange of, 566.

Certificate of magistrate, 123.

Certificates of stock, 208 (note).

Changes in law as to damages for refusal of payment, 366.

Changes in use of building, 62.

Occupancy of, 28 (124, 125), 62.

Value of goods, 63.

Title or interest, 67 to 72.

Location 92, (535), 104 (3).

Charter, 9, 258 (notes 1, 3).

Classification of risk, 480 (5), 508.

Clear-space clause, 74 (404), 106 (626), 108 (633).

Co-insurance, 115, 116, 118 (700, 701).

Collateral security, 39, 84, 316, 560.

Combinations of insurance companies, 2. See Anti-Trust Law.

Commissioner of Insurance and Banking, 195, 196, 278 (C), 533 (8).

Community property, 363, 364, 592.

Commencement of risk, 35.

Companies. See Insurance Companies, 276.

Compensation of agents, 15, 223 (note), 287, 480 (7).

- Compromise and settlement. See Adjustment of Loss.
- Instructions, 186.
- Concealment of facts, 303.
- Conclusions of law and fact, 620.
- Concurrent insurance. See Additional Insurance.
- Condition of insured property, 50, 168.
 - Of association, 607.
- Condition precedent, 145, 371. See Forfeiture of Policy for Breach of.
- Consideration, necessity of, 359.
- Consolidation of companies, 283, 318 (221, 222), 542, 543.
- Conspiracy to defraud, 7 (E).
- Constitution, 311 (177), 487, 533, 627 (note).
 - As part of contract, 490.
- Constitutional provisions, 1, 479 (1 to 5). See Control and Regulation in General.
- Constitutionality of law as to damages for refusal of payment, 366.
 - Of old Workmen's Compensation law, 479.
- Contingency on which policy is payable, 589.
- Contributory negligence, 452 (Sec. 1), 479 (1).
- Contract in general, 21, 296, 489, 543.
 - Nature, requisites and validity, 21, 296, 489, 543.
 - What law governs, 297.
 - Policy governed by laws of Texas, 21, 489.
 - What constitutes contract, 544.
 - Shall contain entire contract, 21, 489.
 - Shall contain what, 296, 543.
 - Shall not contain what, 297.
 - Foreign policies may contain what, 297.
 - Benefits, 543.
 - Level premium policies illegal, 297.
 - Forms of policies to be filed, 297.
 - Mutual assessment policies regulated, 489.
 - Nature of the contract, 22, 243.
 - Parties to contract and their relations, 492.
 - Validity of oral contracts, 23, 300.
 - Form and requisites of Policy, 23, 300, 420 (notes).
 - Validity of policy in general, 25, 490, 543.
 - Executory agreements to insure, 22.
 - Binding slips or memoranda, 23.
 - Application or offer and acceptance, 22, 299, 490.
 - Papers accompanying policy, 23.
 - Policy must be accompanied by copy of questions, 301, 489.
 - Application as part of contract, 543.
 - Must be properly executed, 543.
 - Application for reinstatement must be authoritative, 544.
 - Constitution, by-laws or rules as part of contract, 490.
 - Delivery and acceptance of policy, 24, 301, 490, 549.
 - Delivery where applicant is sick or dead, 549.
 - Delivery must be made to applicant, 549.
 - Delayed delivery, 550.
 - Written acceptance not necessary, 550.
 - Estoppel as to defects in policy, 26, 302.
 - Presumption of knowledge of contents of policy, by-laws, etc, 26, 544.
 - Payment of premiums or dues, 24, 302, 550.
 - Acceptance by association, 550.
 - Order given on another for advance premium, 550.
 - Premium notes, 301.
 - Indisputable policies, 301.

Contract in general (Continued).

- Misstatement or concealment of material facts in application, 303.
- Ratification, 26.
- Reformation, 26, 190, 303, 490.
- Modification, 28, 303.
- Renewal, 8, 480 (8), 559, 677 (5).
- Construction and operation, 30, 71, 304, 491.
 - Application of general rules of construction, 30, 71, 304, 480 (9), 491, 558, 677 (7, 8).
 - What constitutes contract of insurance, 558.
 - Entire or severable contract, 36.
 - What law governs, 32, 305, 491.
 - Construing together policy and application, 306, 491, 677 (notes 9, 10).
 - Construing statutes, charter, by-laws or rules as part of policy, 491, 544.
 - What is regarded as a by-law, 544.
 - Slip attached to policy, 32, 306.
 - Commencement of risk, 35.
 - Term and duration of risk, 36.
 - Term fixed by policy, 36.
 - Subsequent provisions or amendments, 544.
 - Effect of, 544.
 - Notice to commissioner necessary, 545.
 - Agreement to be bound by, 545.
 - Reduction of certificates and limitation as to payment of benefits, 545.
 - Effect on existing members, 546.
 - Effect where new charter is obtained, 546.
 - Where amendment is not valid, 547.
 - Where by-law should be inserted in certificate, 547.
 - Increase in rate of assessment, 547.
 - Exchange of certificate for new one, 559.
 - Property covered, 32.
 - Description of, 32.
 - Real, 32.
 - Personal, 33.
 - Description of location, 34.
 - Amount of insurance, 677 (11).
 - Valued policies, 35.
 - Loans on policies, 306.
 - Loan value of, 306.
- Construction of cotton contract, 71.
- Construction and operation. See Contract in General, 659 (29).
 - Of foreign insurance statutes, 276.
 - State statute by Commissioner of Insurance, 4.
- Construing together
 - Policy and application, 306, 491, 677 (notes 9, 10).
 - Statutes, charter, by-laws, etc., 491, 544.
- Contribution. See Payment or Discharge, etc.
 - Instructions, 188.
- Control and regulation in general, 1, 276.
 - What are insurance companies? 276.
 - Construction of foreign insurance statutes, 276.
 - Constitutional and statutory provisions,
 - In general, 1, 479 (1, 2, 3, 4, 5).
 - As regards combinations of insurance companies, 2.
 - As regards the liability of agents, 3.
 - Effect of construction of statute by Commissioner of Insurance, 4.

Control and regulation in general (Continued).

- As regards fraternal benefit companies, 529.
 - Exemptions, 529, 642 (note).
 - Provisions not to apply to local mutual aid associations, 529.
 - Chapter 15 does not apply to, 487, 529.
 - Failure to pay within time specified does not apply to, 529.
- Foreign companies.**
 - Authority or license to do business (st.), 4.
 - Case law, 4.
 - License fees and taxes, 4.
 - Subjection to special requirements (st.), 5.
 - Case law, 5.
 - Local funds and securities, 6.
 - Appointment of local agents, 7.
- Conviction of a felony, 568.
- Co-operative life insurance.**
 - Liquidation of companies, 438 (note).
 - Reinsurance, 438 (note).
 - Loans on policies, 442 (note).
- Costs and attorney's fees, 396, 528.
- Cotton contract, construction of, 35 (173 to 175), 71.
 - Insurance, 5 (C), 14, 37 (191, 192), 119 (702).
- Covenant. See Forfeiture of policy for breach of.
- Creditors, 90 (526), 145 (891), 148 (910a), 312 (187), 361, 362, 374, 593, 595.
 - Rights of, after breach of warranty by insured, 61.
- Credits, 566.
- Criminal prosecution of agents, 292, 293, 537.
- Custom in collecting or paying dues, 572, 573.
- Damages for failure to pay. See Payments or Discharge, Contributions, etc.**
 - Does not apply to fraternal benefit companies, 529.
- Damages incurred or paid, 482 (23).
- Damages on void policy, 567.
- Damages to property and cause thereof, 166.
- Death.**
 - Reinstatement after, 342.
 - Presumption of, 602.
- Death or injury of insured and cause thereof, 385, 521, 609.
- Debtor, deceased a, 379.
- Deductions and offsets, 356.
- Default or other misconduct of officer or employee, 657 (5).
- Default in payment, 91, 334, 496, 570.
 - Rights after, 341, 567.
- Defects in policy.**
 - Estoppel as to, 26, 302, 556.
- Defenses, 145, 372, 514, 597.
- Definition.**
 - Fire insurance, 1.
 - Life insurance, 276.
 - Accident and health insurance, 483.
 - Fraternal benefit insurance, 529.
- Delivery of policy, 24, 39 (201), 106, 301, 392, 490, 500, 549, 550, 598 (354), 602.
- Demand, acceptance or retention of premiums. See Estoppel, Waiver, or Agreement, etc.
- Demurrer, 154. See Actions.
- Denial of liability, 126, 358, 482 (25), 511.

Deposit of deed of trust to office building, 414 (note 1).

Securities, 279 (10), 414 (note 2).

What companies must make, 648 (notes), 651 (notes), 653 (notes).

Description of goods, 50.

Property covered, 32, 33.

Location, 34.

Disability.

Continuous and permanent, 507.

Total, 505.

Discharge from liability, 365, 392, 596, 670 (6).

Discrimination, 306, 488.

Diseased condition, 616.

Dissolution, 12, 541.

Distinctions, companies shall not make, 217 (note 1).

Dues. See Premiums, Dues, etc.

Duration of risk, 36.

Election to rebuild or replace, 138.

Embezzlement of agent, 286.

Employee, default of, 657 (5).

Employees' indemnity insurance for cities, 480 (6).

Entire contract, 36.

Equitable title, 52.

Estoppel, waiver, or agreement affecting right to avoid or forfeit policy,
92, 131, 171, 344, 385, 498, 574. See Notice and Proof of
Loss.

Application of doctrines of estoppel and waiver, 344.

What conditions may be waived, 92, 344, 481 (14), 576.

Adjustment or arbitration, 131.

Estoppel of insured, 93.

Estoppel of insurer, 344, 576.

Liability of insurer to estoppel by acts, conduct or statements of agents,
92, 194, 498, 512.

Powers of agents respecting waiver, 93, 345, 498.

Effect of provisions of policy, 94, 345.

Knowledge of or notice of facts, 96, 346, 608.

To officers or agents, 97, 194, 346, 608.

As to additional insurance, 98, 108 (638).

As to ownership of property, 100, 108 (639), 185.

As to incumbrances, 101, 108 (634, 635, 636)).

As to miscellaneous matters, 101.

Insertion of false answers in application by agent or under his direc-
tion, 26 (110), 102, 348, 499.

By medical examiner, 558.

Mistake or fraud of agent, 26 (110), 103.

Form and requisites of express waiver, 103, 348, 481 (14).

Oral waiver, 103.

Waiver in writing, 104, 348.

Waiver of provisions of policy as to mode of waiver 104, 481 (14).

Construction and operation of express waiver, 104, 349, 499.

Implied waiver in general, 105, 125, 349, 481 (14), 481 (15).

Issuance and delivery of policy without objection, 106, 500.

Provisions of policy against forfeiture, 353.

Failure to assert forfeiture or cancel policy, 108, 350, 500.

Estoppel or waiver affecting right of forfeiture, 185, 392, 499, 574.

Acceptance of dues and assessments, 558, 574.

Failure of insurer to send notices as per custom, 574.

Use of intoxicating liquor, 574.

Estoppel, waiver, etc. (Continued).

Knowledge of habits of insured, 575.

False statements as to age in application, 575.

Estoppel by acts of insurer, 576.

Demand, acceptance or retention of premiums, 108, 351, 500, 550, 558, 565, 574.

Notes, 351.

By agent, 352.

With knowledge of habits and occupation of insured, 352.

By offer of a loan, 352.

By future assessment, 352.

Incomplete reinstatement, 352.

What necessary to show waiver of forfeiture, 353.

Estoppel or waiver as to defects or objections, 556. See Notice and Proof of Loss.

Waiver of good health requirement, 556.

Waiver of payment of first premium, 557.

Who may not waive, 558.

Authority to waive suspension, 576.

What will not operate as a waiver, 558.

Consent to assignment of policy, 109, 353.

Requiring, accepting or retaining proofs of loss, 110.

Participation in adjustment of loss, 111, 481 (16), 674 (3).

Instructions, 613.

Evidence.

Admissibility of, see actions.

Insufficiency of, 619.

Excess insurance, 5(C).

Exceptions in policy, 501.

Excuses for non-payment of premium, 91, 340, 572.

Executory agreements to insure, 22.

Exemption of proceeds, 512, 595.

Expenditures, 670 (4, 5).

Expenses, 261 (note).

Exposure to danger, 504.

Express waiver, 103, 104, 348, 349, 481 (14), 499.

Expulsion of member, 565, 607.

Effect of, 567, 578.

Of lodge, 567.

Extension of premium, 106 (621, 622), 338, 388.

Extent of loss and liability of insurer, 113, 356, 505, 591.

Policy a liquidated demand, 113.

Particular injuries specified in policy, 507.

Limitation of liability by provisions of policy, 508.

Classification of risk, 508.

Provisions making insured a co-insurer, 115, 116.

Continuous and permanent disability, 507.

Total loss—what constitutes, 113.

Effect of statute, 114.

Total disability, 505.

Value of property destroyed, 116.

Fraudulent valuation of goods, 117.

Valued policies, 117.

Value of a paid-up policy, 591.

Amount of interest of the insured, 118.

Effect of other insurance, 119.

Loss of rent and profits, 121.

Amount payable on death, 356, 591.

Extent of loss and liability of insurer (Continued).

- Deductions and offsets, 356.
- Expenditures, 670 (4, 5).
- Nature and extent of liability of surety, 656 (3), 658 (26).
- Building bonds, 656 (4).
- Damages incurred or paid, 482 (23).
- External, violent and accidental means of death, 503.
- External and visible signs of injury, 503.
- Extra hazardous, 31 (149 to 151).
- Failure to assert forfeiture, 108, 350, 500.
- Fall of building, 74 (405 to 407).
- False answers, 303, 317 (214), 320 (226), 348, 389, 499, 575.
- Guilt of misdemeanor, 556.
- Representations of agent, 102, 302, 303, 319, 348, 499.
- Swearing, 123, 590.
- Family history, 329.
- Federal court, removal to, 201 (notes 1, 3).
- Fee simple title as condition precedent, 49 (267), 53 (273), 56.
- Fees, filing, 206 (notes).
- Felony, conviction of, 568.
- Fidelity, guaranty and surety companies, index, 648, 651, 653, 656.
- Statutory law, 646.
- What companies must make deposit, 648 (notes), 651 (notes), 652 (notes).
- May become sureties on what bonds, 648 (note 9), 651 (note 2).
- Filing fees, 206 (notes).
- Financial condition of insured, 379, 383 (607a).
- Fire insurance, index, vii.
- Case law, 1.
- Statutory law, 195.
- Fire-proof safe, 75 to 82.
- Foreclosure of mortgages, 97 (562).
- Foreign insurance companies. See Insurance Companies and Control and Regulation in general.
- Damages for failure to pay, 368.
- Forfeiture of policy for breach of promissory warranty, covenant or condition precedent, 60, 280 (13), 304, 332, 496, 567.
- Statutory provisions, 60, 335.
- Covenants or provisions of policy, 60, 353.
- Under obligation of order, 567.
- Temporary breach of a policy, 61.
- Breach of technical or immaterial provisions, 61.
- Proceedings to give effect to forfeiture, 61, 332, 496, 577.
- Parties affected by forfeiture of policy, 61.
- Rights of creditors after breach by insured, 61.
- Violation of terms or conditions of contract, 568.
- Conviction of a felony, 568.
- Use of narcotics or intoxicants, 568.
- Sale of intoxicants, 568.
- Matters relating to property or interest insured, 62.
- Change in use of building, 62.
- Change in occupancy of building, 62.
- Change in value of goods insured, 63.
- Building becoming vacant, 63.
- Keeping or use of prohibited articles, 65.
- Incumbrances, 66.
- Change of title or interest, 67.
- In general.

Forfeiture of policy, etc. (Continued).

- As between partners, 68.
- Mortgages and rights of mortgagees, 69.
- What constitutes a change in title, 69.
- Fraudulent assignment, 71.
- Construction of a cotton contract, 71.
- Miscellaneous, 72.
- Special causes increasing risk, 73.
- Precautions against loss, 74, 674 (2).
- (a) As regards marine insurance, 75.
- Keeping books, papers and safe, 75.
- In general, 75.
- The iron-safe clause a warranty, 76.
- Substantial compliance necessary, 77.
- Meaning of "fire-proof safe," "last inventory," etc., 77.
- Certain statutory provisions do not affect, 78.
- Books not in safe at time of fire, 78.
- Loss of some of the books, 79.
- Substantial compliance with iron-safe clause, 80.
- Insufficient compliance with iron-safe clause, 82.
- Additional insurance, 85, 497.
- Consent of agent to additional insurance, 89.
- Assignment of policy, 89, 333.
- Rights of assignee, 89.
- Assignment as collateral security, 89.
- Restrictions on assignment in general, 90.
- Invalid or inoperative assignment, 90.
- Non-payment of premiums; 91, 333, 367, 568.
- Default as ground of forfeiture in general, 91, 334, 496, 570.
- Notice of time for payment, 335, 569.
- Necessity for, 337.
- What is sufficient notice, 569.
- Extension of time of payment, 91, 334, 338, 497.
- By agent or broker, 339.
- Excuses for non-payment, 91, 340, 572.
- Custom of secretary to collect, 572.
- Agreement of clerk to pay dues, 573.
- Custom of paying dues and not suspending at once, 572.
- Insanity of member, 573.
- Suspension of local camp, 573.
- Sufficiency of payment to prevent forfeiture, 339, 570.
- To agent or broker, 340.
- Rights of insured after default or after suspension, 341, 567.
- Paid-up policy or value, 343.
- Insurance for limited term or amount, 343.
- Reinstatement, 341, 497, 576, 578.
- Payment of arrears as a preliminary, 579.
- Certificate of health as a preliminary, 580.
- After death, 342.
- Effect of expulsion or suspension, 567, 578.
- Of lodge, 567.
- Vote of association required after, 570.
- Where forfeiture is prohibited during sickness, 571.
- Funeral benefits not forfeited when, 571.
- As to enforcing suspension, 108, 350, 500, 576.
- Estoppel or waiver affecting right of forfeiture, 185, 353, 392, 499, 574.
- Damages for failure to reinstate, 578.
- Remedies for relief against forfeiture, 343.

- Forfeiture, burden of showing, 601.
- Failure to assert, 108, 350, 500.
- Forgery of signatures, 613.
- Form of policy, as to approval of, 420 (notes 1, 2, 3, 4).
 - To be filed, 297.
 - Requisites, 23, 300.
- Fraternal benefit insurance, index, (528) 1.
 - Case law, 529.
 - Statutory law, 487, 529, 621, 642 (note).
 - Companies, see Insurance Companies, 601.
- Fraud, see avoidance of policy for misrepresentation, etc., 46, 51 (261), 52 (271), 93 (538), 103, 174 (1114), 186, 553, 561.
 - In making proofs of loss, 123, 590.
 - Of agents, 291, 292, 317 (214).
- Fraudulent representations, 320 (226 to 230), 321 (235 to 237).
 - To employees as to accident insurance, 482 (27).
 - Measure of damages, 482 (27).
- Fraudulent insurance, 274.
- Fraudulent valuation of goods, 117.
 - Assignment, 71.
- Fund, policyholders', 268 (note).
 - Local, 6.
 - Special, 540.
- Garnishment, 134 (815 to 825), 148 (913), 512, 595.
- Gasoline on premises, 65, 74, (403), 107 (628).
- General agents, 24 (101), 290.
- General provisions, 211, 485.
- Gift of policy, 313 (195).
- Gifts covered, 32 (158).
- Going concern, what is, 10 (A), 541 (49).
- Grace allowed in policy, 409 (note).
- Gross premiums receipt tax, 213 (note), 214 (notes), 255 (notes 1, 2).
- Guaranteed dividend policies, 408 (note), 411 (note).
 - Fund certificates, 423 (note).
- Guaranty insurance, index, 656.
 - Statutory law, 646.
- Habits of insured, 331, 352, 377 (564), 496, 568, 575, 608.
- Hazard, 73 (H).
- Hazard, increased, 31 (149 to 151), 178, 183.
- Health and Accident insurance, index, (482) 1.
 - Case law, 483.
 - Statutory law, 399 to 482.
- Health, good, 329, 378, 392, 495, 553, 605, 612, 615.
 - Certificate of, 580.
- Homestead, proceeds of insurance on, 54 (282), 122 (722), 133, 134.
- House not a homestead, 134.
- Implied waiver, 105, 349, 481 (14, 15).
- Incontestability, 353.
- Incorporation of companies. See Insurance Companies.
- Increased hazard, 30 (134), 31 (149), 75 (411), 178, 183.
- Incumbrance, 56, 66, 96 (557), 101, 164, 178, 182.
 - Mixed personalty and realty, 57.
 - Record of as notice, 58 (300).
- Indemnity contracts, 30 (137), 45 (226a), 97 (558a), 269 (note).
 - Insurance for cities, 480 (6).
 - Bonds, 657 (6).

- Indictment for arson or willful burning, 274.
- Indisputable policies, 301.
- Industrial accident insurance, index, 479.
 - Statutory law, 451.
- Initiation, injuries during, 539 (37).
- Injunction, 562 (158 to 161), 564 (168).
- Inquiry, not duty of insurer to make when, 56.
- Injury of insured and cause thereof, 385, 521.
 - Intentional, 504.
- Injuries specified in policy, 507.
- Injury to or death of animals, 677 (12).
- Insanity, 317 (215), 356, 573.
- Insolvency, 12, 312, 541.
- Inspection of person or property of insured, 95 (545), 105 (617), 126 (746), 510.
- Instructions. See Actions.
- Insurable interest, 20, 363, 581.
 - What constitutes interest in human life or property, 20, 294, 580.
- Insurance without interest, 295, 363, 372 (530), 581.
- Wagering policies, 295.
- Assignment of policy to person without interest, 295.
- Insurance companies, 8, 276, 483, 530.
 - What are, 276.
 - Incorporation, organization and existence (stock companies), 231 (notes 1, 2, 3, 4), 276, 277, 280, 281, 483, 484, 672 (2), 675 (notes 1, 2).
 - Same (mutual companies), 8, 486, 531, 676 (4).
 - Laws applicable, 9.
 - Foreign companies may be admitted, when, 9.
 - Law does not apply to what companies, 9.
 - Case law, 10.
 - Nature and status in general—law does not apply to certain companies, 10.
 - Case law, 10.
 - By-laws, 10, 260 (notes 1 to 6).
 - Notice of, 487.
 - Must show what, 487.
 - Constitutions and by-laws, 487, 627 (note).
 - Members, right to vote, etc., 10.
 - Liability of, 11.
 - Special funds, 12.
 - Insolvency and dissolution, 12.
 - Proceedings to enforce dissolution, 12.
 - Assets and receivers, 12.
 - Statutory regulation of foreign companies, 278, 485, 487.
 - As to what constitutes doing business, 278.
 - Application of local laws, 278.
 - Shall file power of attorney, 277, 435 (note 1), 485.
 - Issuance of license, 278, 435 (note 3), 627 (note).
 - Investment in Texas securities, 277, 430 (note 1), 485.
 - Local funds and securities, 279 (10).
 - Held to accept provisions of Title 71, "General Provisions," 485.
 - Regulation of local agents, 279.
 - Actions, 279, 676 (1).
 - Provisions applying to all companies, 487.
 - Companies shall not discriminate, 488.
 - Shall not misrepresent policies, 488.
 - No level premium policies to be issued, 488.

Insurance companies (Continued).

Contract for stock subscriptions, 282, 670 (2).

Receiving notes for, 400 (notes 1, 2), 403 (note), 670 (2).

Capital and stock, 201 (notes 2, 4), 282, 400 (notes 1, 2), 670 (1), 676 (3).

Liability after consolidation of companies, 283.

Fraternal benefit companies.

Nature and status in general, 530.

Organization, statutory regulations, 531, 630 (note).

Admission of foreign fraternal societies, statutory regulations, 532, 625 (note), 627 (note), 633 (note).

Power of attorney and service of process, statutory regulations, 532.

Place of meeting of domestic society, location of principal office, statutory regulations, 532, 622 (note).

No personal liability of officers and members, statutory regulations, 532.

Waiver of provisions of laws, separate jurisdiction, statutory regulations, 532.

Authority or license to do business, 533, 622 (note), 625 (note), 627 (note), 642 (note), 643 (note).

Constitutions and by-laws, 533, 627 (note).

Membership, qualifications for membership, 535.

(A) Statutory provisions, 535.

(a) Whole family protection for members, 535.

(B) Case law, 535.

Powers and liabilities of association in General, 538.

Superior, subordinate and affiliated bodies, 539, 622 (note).

Special funds, statutory provisions, 540.

Reinsurance, what is a contributing member in good standing, 541.

Insolvency and dissolution, when an association had failed, 541.

Reorganization, rights of members, 542.

Consolidation, statutory provisions, 542.

(A) Estoppel to deny liability of members, 542.

(B) Rights of members where consolidation had failed, 542.

(C) Attempt to enforce rights through receiver after consolidation had failed, 543.

Investments, bond for, 628 (note).

Intentional injuries, 504.

Interest, Insurable, see Insurance interest.

Interest insured, 50, 51, 52, 62, 119.

Interest or title of insured, 163.

Interest on premium note, 218 (note 6).

On amount of loss, 139, 364, 482 (26), 513.

On premiums recovered or refunded, 312.

Interpleader, 600.

Intoxicating liquor, use of, 351 (400), 568, 574.

Sale of, 568.

Inventories, 51 (257), 105 (619), 122 (719), 150 (922), 165, 179.

Investments, 405 (notes 1, 2, 3, 4), 406 (notes 1, 2, 3), 427 (note).

Bond for, 628 (note).

In Texas securities, 277, 430 (note 1), 485.

Invoices. See iron safe clause, 95 (547).

Iron-safe clause, 24 (97), 32 (155, 157), 75 to 82, 179, 191.

Issuance and delivery of policy without objection, 106, 500.

Issues, proof and variance. See actions.

Joinder of causes of action, 144, 372, 516.

Judgment, 189, 205 (note), 312, 395, 527, 618, 620.

Jurisdiction, 143, 516.

- Jury. See Actions, 619.
- Keeping of prohibited articles, 65.
 - Books, papers and safe, 75.
- Killed, meaning, 498 (39, 39a).
- Knowledge.
 - Of contents of policy and laws, 26, 544.
 - Or notice of facts. See Estoppel, Waiver, etc.
- Law governing contracts, 21, 32, 278, 297, 305, 489, 491.
- Leasehold interests, 53.
- Level premium policies, 297, 488.
- Liability of officers and members, 11 (A), 532, 542.
 - Of agents, 3, 7 (E), 14, 372 (532).
 - Provisions of policy as to, 354.
 - For personal injury, 481 (17, 18, 19, 20, 22), 670 (3).
 - Denial of, 126, 358, 482 (25), 511.
 - Release from, 365, 392, 596, 670 (6).
 - Extent of, 194, 541, 659 (29).
- License to do business, 4, 278, 435 (note 3), 533, 622 (note), 625 (note), 627 (note), 642 (note), 643 (note).
- Fees and taxes, 4.
- Lien, 52, 57, 58.
- Life insurance, index, (275) 1.
 - Case law, 276.
 - Statutory law, 399.
- Limit to extent of insurance, 5, 234 (notes 1, 2).
- Limitation, 146, 373, 515, 597. See actions, 566.
 - Of liability by policy, 508.
- Liquidation, 438 (note).
- Live stock insurance companies, index, 675.
 - Statutory law, 675.
 - Notes on, 676.
 - Requirements, 675 (notes 1, 2).
- Loans on policies, 306, 349 (391 to 393), 352, 442 (note).
- Loan value of, 306.
- Local laws, 278.
- Lodges, superior and subordinate, 539.
- Losses to be paid promptly, 513.
 - Reduction of, by insurance, 514.
- Loss of rent and profits, 119 (704), 121.
- Loss of money and securities in transportation, index, 674.
 - Statutory law, 671.
- Loss or damage to property and cause thereof, 166.
- Loss, precautions against, 74, 75, 674 (2).
- Magistrate, certificate of, 123.
- Mandamus, 278 (C).
- Married woman's property, insurance on, 69 (369).
- Marine insurance, 47, 75, 106 (624), 111, 112, 139 (854).
- Materiality, 1. See Avoidance of Policy for Misrepresentation, etc.
- Marital interests, 54.
- Meeting of society, 487 (2), 532, 577 (244), 622 (note).
- Measure of damages, 128 (768), 318, 563, 567.
- Members, 10, 11, 532, 535, 542, 543, 607.
- Misconduct of officers or employee, 657 (5).
- Misrepresentations. See Avoidance of policy for, 323, 510, 611.
 - Of policies, 488.
- Misstatements of examiner, 606.
 - Of applicant, 303.
 - In notice and proof, 511.

- Mistake, 25 (104, 105, 107), 27 (116, 117, 119, 120, 122), 103.
Modification, 28, 303.
Moral hazard, 73 (H).
Mortgage, 69, 97 (559, 560), 119 (703), 135.
Mortgagee, rights of, 39 (202), 40 (208), 41 (209), 42 (218), 57, 58 (305), 69, 70 (371), 122 (723), 135, 140 (859), 145 (890).
Mortuary fund, 564 (172, 173), 585 (291).
Mutual aid associations, 529.
Mutual assessment policies regulated, 489.
Mutual assessment accident companies.
 By-laws providing for policy reserves, 447 (note).
 Division of assessments, 450 (note).
Mutual assessment liability accident insurance, 445 (note).
Mutual benefit associations, 531 (7). See *Fraternal Benefit associations*.
Mutual companies in general. See *Insurance Companies*.
Mutual casualty company not legal, 661 (note 1).
Mutual relief association, 530 (6), 596 (342).

Name of occupant omitted, 124 (738).
 Beneficiary inserted, 598 (353).
Names, similarity of, 400 (note).
Narcotics, use of, 568.
New trial, 619.
Notes for premiums, 38, 92 (534), 106 (621, 622, 625), 218 (note 6), 299 (116), 301, 302, 308, 309, 310, 311 (178, 181, 182), 312 (184, 185), 333, 334, 349, 351.
 Accepted by agents, 291, 299 (115a), 388, 670 (2).
 Interest on, 218 (note 6).
 For stock, 282, 670 (2).
Notice and proof of loss, 121, 170, 357, 509, 590.
Necessity of proofs of loss, 122, 357, 590.
 Effect of requirements of policy, 121.
 Sufficiency, 358, 510.
 Effect of statements and of proofs in general, 358.
 Misrepresentations not to constitute defense, 510.
 Misstatements in notice and proof, 511.
 Fraud or false swearing, 123, 590.
 Persons who may make proofs of loss, 122.
 Persons to whom notice or proof may be made, 122, 509, 677 (13).
 Time for notice and proof, 122, 482 (24), 509, 590, 677 (14).
 Inspection of person of insured after injury or death, 510.
 Necessity of certificate of magistrate, 123.
 Estoppel or waiver as to notices and proofs or defects and objections, 124, 358, 511, 556.
 Powers of officers or agents, 125.
 Implied waiver in general, 125.
 Denial of liability, 126, 358, 482 (25), 511.
 Failure to object or to state ground of objection, 127.
 Adjustment of loss and negotiations for settlement, 127.
 Estoppel of insurer to deny authority of its agent after adjustment of loss, 512.
 Requiring, accepting or retaining proofs of loss, 110.
 Question for the jury, 179.
 Instructions, 187.
Notice.
 To cancel, 41.
 To agent, 17, 20.

Notice (Continued).

To insured of premium due, 297 (a), 335, 569, 574.

Necessity for, 337.

Of by-laws, 487.

Novation of agency contract, 15.

Occupation of building, 50.

Change in, 62.

Of insured, 330, 352.

Risks of, 503.

Occupation tax on agents, 229 (note).

Office buildings, 406 (notes 1, 2, 3), 414 (note 1), 415 (note 1).

Officers interested in loans or leases, 406 (notes 1, 2), 407 (notes 3, 6).

May sell stock, 407 (note 4).

Liability of, 532.

Offsets and deductions, 356.

Oral contracts, 23, 300.

Waiver, 103.

Organization of insurance companies. See Insurance Companies.

Other insurance. See Additional Insurance.

Over valuation of goods, 51 (261), 88 (514).

Ownership, 56, 100, 174, 182, 185, 190.

Paid-up policies, what not necessary, 410 (note 1), 343.

Value of, 591.

Papers accompanying policy, 23.

Papers, keeping, 75 to 82.

Parties, 40 (204), 148, 374, 597.

To contract, 492.

Partner, insurable interest, 294, 372 (531).

Premium on policy, 360 (450).

Partnership property, 27 (115), 55, 56 (295), 68 (361), 69 (368), 107 (630), 145 (889), 148 (911).

Change in title of, between partners, 25 (106, 109), 68.

Payment. See premiums, dues and assessments.

Payment or discharge, contribution and subrogation, 138, 364, 512, 595.

Election to rebuild or replace property, 138.

Insurance on goods during transportation, 142.

In possession of warehouseman, 142.

Mode and sufficiency of payment, 365.

Time of payment, 512.

Losses shall be paid promptly, 513.

Interest on amount of loss, 138, 364, 482 (26), 513.

Release or discharge from liability, 365, 392, 596, 670 (6).

Damages for refusal of payment, 365, 595, 674 (7), 678 (15).

Statutory regulations, 365.

Change in law, 366.

As to constitutionality of law, 366.

As to its construction and operation, 368.

Application to foreign companies, 368.

Application to assessment companies, 368.

Necessity for demand as a condition precedent, 368.

Offer of settlement no bar, 369.

Good faith on part of insurer with no desire to evade payment, 369.

Insurer liable for payment though policy has been surrendered, 370.

Computation of penalty, 370.

Amount of attorney's fees, 370.

Reduction of loss by insurance, 514.

Recovery of payment, 139, 365.

Payment or discharge, contribution and subrogation (Continued).

Subrogation of insurer, 139, 514.

On payment of loss, 139, 670 (7).

Under assignment of rights of insured, 141.

Pay roll, 480 (12, 13).

Penalty for failure to pay. See payment or discharge, contribution, etc.

Computation of, 370.

Petition. See actions.

Performance of warranty. See forfeiture of policy for breach of, etc.,
and avoidance of policy for misrepresentation, etc.

Also, 678 (17).

Personal property.

Breach of warranty as to, 43.

Person insured, matters relating to, 328.

Physician, consultation of, 328.

Fraud of, 553.

Pleading. See actions, 607.

Policy. See Contract in General, 161, 619.

Certainty as to, 612.

Delivery, 392, 602. See delivery.

Effect of provisions in appraisal and arbitration, 128.

Fee in excess, 217 (note 3).

Forfeiture of. See forfeiture of Policy for Breach of Promissory War-
ranty, 280 (13).

Fraud, 161.

Guaranteed dividend not prohibited, 408 (note).

Injuries specified in, 507.

Liquidated demand, a, 113.

Limitation of liability in, 508.

Must not be misrepresented, 488.

Reformation, 190.

Temporary breach of, 61.

Transfer of, 161.

Void, measure of damages on, 567.

Violation of terms of, 568.

Weight and sufficiency of evidence, 173.

Power of attorney, 277, 435 (note 1), 485, 532.

Powers of agents. See Agents and Brokers.

Association, 538.

As to notice and proof of loss, 125.

Respecting waiver, 93.

Precautions against loss, 74, 75, 674 (2).

Premiums, dues and assessments, 37, 306, 492, 564.

Insurance commission law does not apply to certain companies, 38.

Companies shall not discriminate, 306.

Nor accept rebates, 307, 492.

Amount of premium, 37, 307, 480 (11, 12).

Payment of premium, 24, 38, 191, 302, 307, 383, 387, 388, 492, 550,
603, 609, 610, 613.

Waiver of payment, 557.

Must furnish analysis of rate, 37.

As to collection of premium, 37, 550.

Premium notes, 38, 218 (note 6), 308, 310. See notes.

How paid, 307.

Actions for premiums, 309, 480 (13).

Subrogation of agent, 308.

Time of payment, 512.

Extension of payment, 91, 334, 338, 339, 388, 497.

Premiums, dues and assessments (Continued).

Voluntary payment of premium, 567.

Non-payment, 91, 333, 367, 568.

Excuses for non-payment, 91, 340, 572.

Validity of assessments, 564.

Special assessments, 625 (Note).

Unequal assessments sometimes permissible, 564.

Mode and sufficiency of payment, 339, 340, 365, 565, 570.

Where camp is suspended and member is entitled to benefits, 565, 573.

By officer of camp, 340, 565.

Where constitution provides for rerating, 564.

Re-rating without authority, 566.

Exchange of certificates, 566.

Measure of damages on void policy, 567.

As to when receipt may be given, 565.

Effect of payment—estoppel, 558, 565, 574.

Demand, acceptance or retention of premiums. See estoppel, waiver or etc.

Refunding or recovery of premiums or assessments paid, 43, 139, 310, 365, 565.

After void expulsion of member, 565.

After premium note has been negotiated, 310.

Because of insolvency, 312.

Credits, 566.

Limitations, 566.

Judgment and interest, 312.

Repayment of unearned premium, 41.

Presumption and burden of proof. See Actions.

Prima facie case, 379.

Prohibited articles, keeping of, 65.

Proceeds. See right to proceeds.

Process, 148, 149, 280 (12), 371, 375, 516, 532, 598.

Promissory warranty. See Forfeiture of Policy for Breach of.

Proof. See actions—Issues Proof and Variance.

Proofs of loss. See Notice and Proofs of Loss.

Property included, 32, 33, 162.

Insured, 50, 62.

Proximate cause of injury or death, 505.

Questions for the court, 177.

For the jury. See Actions.

Copy of to accompany policy, 301, 489.

Rate, 24 (102).

Analysis of, 37.

Ratification, 26.

Of acts of agent, 17, 292.

Rebates, 307 492.

Rebuild, election to, 138.

Receipt, when it may be given, 565.

Receivers, 12, 543, 657, (15).

Recovery of premiums, 43, 139, 310, 365, 565.

Reduction of loss by insurance, 514.

Reformation, 26, 190, 303, 490.

Refunding of premiums, 43, 139, 310, 365, 565.

Refusal to pay claim, 521.

- Reinstatement, 341, 342, 352, 544. See *Forfeiture of Policy for Breach of Promissory Warranty*, etc.
 Clause not necessary, 410 (Note).
 Question for jury, 612.
 Damages for failure of, 578.
- Reinsurance, 193, 235, 398, 541 (notes 1, 2), 407 (note), 415 (note 2), 541, 689 (Note).
 Combination of companies to reinsure, 689 (Note 1).
 Statutory regulations, 193.
 Directors, by board of, 438 (Note).
 Construction and operation of contract, 659 (29).
 Extent of liability of reinsurer, 194, 541, 659, (29).
 Knowledge of agent, 194.
 Action on contract of reinsurance, 659 (30).
 In co-operative life insurance companies, 438 (Note).
- Remedies.
 For wrongful cancellation, 317, 494, 562.
 For relief against forfeiture, 343.
- Rent and profits, loss of, 121.
- Reorganization, 542.
- Repayment of premium, 41, 43. See *Premiums, Dues and Assessments*.
- Removal to Federal court, 201 (Note 1, 3).
- Renewal, 28, 480, (9), 559, 595, 677, (5).
 Premiums, 287.
- Repeal of laws, 216 (note), 228 (note 1), 673 (note).
- Report of death, 607.
- Replace, election to, 138.
- Representations. See *Avoidance of Policy for Misrepresentation*, etc.
 Of agent, 606.
- Representatives of insured, rights of, 171, 385, 592.
- Re-rating, 564, 566.
- Rescission. See *Cancellation, Abandonment, etc., of Policy*.
- Reserve of title and guaranty company, 198 (note).
- Reserve liability of companies, 202 (note).
 Deposit, 415 (note 1), 418 (note 1, 2), 430 (note 1).
- Res Gestae, 607.
- Resort to courts, 596.
- Residence, 330.
- Restraining cancellation, 562.
- Revocation of permit, 205 (note).
 Of agent's authority, 294.
- Rider, as to vaccination, 411 (note 2).
- Rights of parties after judgment, 132.
- Right to proceeds, 133, 171, 359, 385, 512, 580.
 Policy payable to owner of property or interest insured, 133.
 To insured, his representatives or estate, 359.
- Designation of beneficiary, 360, 512, 584.
 Rights of persons designated, 171, 360, 385, 585, 591.
 Transfer by gift, 313 (195).
 Vested interest of beneficiary, 192, 194, 313, 360, 585, 586.
 Revocation, 584.
 Invalid or ineffective designation, 585.
 Failure to make designation, 585.
 Change of beneficiary, 361, 512.
 Mode of changing, 587.
 By will, 588.
- Death of beneficiary, 361.
 Before insured, 588.

Right to Proceeds (Continued).

Simultaneous death, 589.

Insurable interest of beneficiary, 580.

Where beneficiary has no insurable interest, 363.

Recovery of dues paid by beneficiary having no insurable interest.
581.

Persons who may be beneficiaries, 171, 385, 581, 625 (note).

Provisions of charter or by-laws, 582, 627 (note).

Policy for benefit of mortgagee, 135.

Of persons interest in property insured, 137.

For benefit of creditors, 362.

Renewal of, 595.

Proceeds.

As community property, 363, 592.

After divorce, 364.

Of insurance on homestead, 133.

On a house not a homestead, 134.

On a warehouse, 135.

On tools of a trade, 135.

Rights of representatives of insured, 171, 385, 592.

Of one who pays dues without being designated as beneficiary, 595.

Of representatives of beneficiary, 593.

Of creditors, 361, 593.

Where certificate is assigned, 594.

Assignment.

Of claim for loss, 137, 594.

Assignee of policy before loss, 363, 594.

Proceeds exempt and not attachable, 512, 595.

Risks and causes of loss, 111, 354, 501, 589.

Risk and exceptions in policy in general, 501.

Provisions of policy as to liability, 354.

Marine risks in general, 111.

Perils of the sea, 112.

Contingency on which benefits or policies become payable, 589.

Violation of law, 590.

Suicide, 355, 589.

Effect of insanity, 356.

Time when liability for begins, 356.

Liability incurred for personal injury or loss of life, 481 (17, 18, 19,
20, 22), 670 (3).

What constitutes an accident, 503.

External, violent and accidental means of death, 503.

External and visible signs of injury, 503.

Voluntary or unnecessary exposure to danger, 504.

Intentional injuries, 504.

Wrongful acts of insured, 481 (21).

Risks of occupation, 503.

Injury to or death of animals, 677 (12).

Proximate cause of injury or death, 505.

Theft, 674 (4, 5, 6).

Default or other misconduct of officer or employe, 657 (5).

Indemnity bonds, 657 (6).

Robbery, insurance, index, 674.

Statutory law, 671.

Risks.

Classification of, 508.

Special causes increasing, 73.

Special circumstances affecting, 59.

52—Ins.

- Rules and by-laws. See By-laws.
Instructions, 612.
Rules of construction. See Contract in General.
- Safe, keeping an iron, 75 to 82.
Securities deposited instead of bond, 231 (note).
As reserve 414 (notes 1, 2), 415 (note 2), 418 (notes 1, 2).
Service, 372 (528).
Settlement between parties. See Adjustment of Loss, 191, 359.
Severable contract, 36.
Slip attached to policy, 32, 306.
Sickness, forfeiture prohibited during, 571.
Special agents, 290.
Funds, 12.
Special circumstances affecting risks, 59.
Special causes increasing risk, 73.
Statutory law. See complete index of.
Provisions. See Control and Regulation in General.
Stocks, 201 (notes 2, 4), 282, 400 (notes 1, 2), 407 (note 5), 670 (1), 676 (3).
Sale of, 278 (4), 282, 290 (71), 394, 400 (notes 1, 2), 403 (notes), 670, 679.
Subrogation. See Payment or Discharge, Contribution, etc., 98 (564), 140 (858a), 308.
Supreme governing body, 539, 622 (note).
Meetings of, 622 (note).
Survivorship contracts, 217 (notes 4, 5).
Subsequent provisions or amendments, 544, 545.
Surrender. See Cancellation, Surrender, etc., of Policy.
1), 601, 607.
Surety companies, index, 656.
Statutory law, 646.
Liability of, 656 (3), 658 (26).
Surrender. See cancellation, surrender, etc. of policy.
Survivorship, 379, 602.
Suspension, 573.
Rights after, 341, 567.
Effect of, 567, 578.
Of lodge, 567.
Vote of association required after, 570.
Enforcing, 108, 350, 500, 576.
- Taxation, 213 (note), 214 (note), 255 (1, 2), 411 (note), 430 (note 2), 435 (note 3).
Occupation tax on agents, 229 (note).
Temporary breach, 60 (320).
Tender, 41 (212), 145 (892), 339 (334), 365 (488), 497 (37a), 620.
Theft, 674 (4, 5, 6).
Time essence of contract, when, 332 (295).
Title or interest of insured, 51, 52, 56, 67 to 72.
Change in. See Forfeiture of Policy for Breach of, etc.
Title guaranty insurance, 207 (note), 209 (note), 661 (notes 2, 3).
Tontine dividend, 365 (487).
Tools of trade, insurance on, 135.
Tornado insurance, 28 (125a), 164 (1036a).
Total disability, 505, 612.
Loss, 113, 114, 146 (895), 186, 191.
Trade talk of agents, 292.

- Transfer of property, 67 to 72.
 - Waiver of, 185.
- Transportation, insurance on goods during, 142.
- Trust. See anti-trust law.
 - Defined, 2.
- Ultra vires contract, 25 (108), 37 (191), 146 (894), 538 (33).
- Unearned premium, repayment of, 41.
- Uniform policy, 411 (note 3).
- Use of building, 50.
 - Change in, 62.
- Use of prohibited articles, 65.
- Vacancy, 16 (D), 63, 185.
- Valuation of property, 168.
 - Fraudulent, 117.
- Value of property, 63, 116, 185, 191.
 - Of a life policy, 563.
- Valued policies, 35, 117.
- Variance. See Actions, Issues, Proof and Variance.
- Vendor's lien, 52 (B), 59 (308).
- Vendor's Rights, 56.
- Vendee in contract for sale, 56.
- Venue, 148, 372, 373, 515, 597.
- Verdict of findings, 189, 395, 527, 617, 678 (18).
- Vested interest of beneficiary. See Right to Proceeds, 313 (192, 194).
- Violation of law, 590, 601, 608, 612, 614.
- Violent means of death, 503.
- Voidable contract, 26 (114).
- Voluntary or unnecessary exposure to danger, 504.
- Voluntary insurance association, 536 (25), 538 (34, 35).
- Vote of association after suspension, 570.
- Wagering policies, 295.
- Waiver. See Estoppel, Waiver on Agreement, etc., 379.
- Warehouse, insurance on goods in, 119 (702), 135, 142.
- Warranties. See Avoidance of Policy for Misrepresentation, etc., 76.
 - Breach of, before delivery of policy, 553.
- Watchman, 74 (I).
- Watch clock, 74 (I).
- Whole family protection to members, 535.
- Willful burning, 274.
- Will, effect of, 359, 361 (465), 560 (149), 561.
- Workmen's compensation insurance, index, 479.
 - Statutory law, 451.
- Wrongful act of insured, 481 (21).

INDEX TO STATUTORY LAWS.

(Figures Refer to Pages.)

Access to Books—

Commissioner shall have, 37, 417, 629.
Commissioner and treasurer are entitled to, 418.

Accident Insurance—

Agents, 220 to 227.
General provisions, 211 to 219.
Life, health and accident insurance company (Home), 399 to 422.
Life, health and accident insurance company (Foreign), 422 to 426.
Mutual assessment accident insurance company (Home), 445 to 451.
Affidavits, 445.
Amendments to charter, 401, 423, 446.
Annual statement, 403, 422, 425, 448.
Assessment, 449.
Beneficiary, 450.
Business, what constitutes, 446.
By-law, 423, 447.
Capital stock, 400, 401, 419, 421, 423.
Certificate of authority, 402, 403, 404.
Certificate of membership, 449.
Charter, 207, 208, 400, 401, 421, 423, 445, 446, 449, 450.
Deposits, 413, 424.
Defined, 399.
Directors, 401, 406, 423, 445, 447.
Dividends, 422.
Examination, 402, 447.
Fees, 401, 446.
Fire, marine or inland insurance, 413.
Foreign, 422, 423.
Fraternal benefit societies, 622, 641.
Incorporation, 400, 401, 423, 445, 660.
Industrial accident board, 451 to 478.
Industrial insurance, 421.
Inquiries must answer, 205.
Investments and loans, 208, 209, 219, 425.
Liabilities on policies, 412, 413, 450.
Losses, when payable, 412, 413.
Officers, 423.
Policy forms, 420.
Real estate holdings, 405.
Reinsurance, 407.
Reserve, 197.
Reserve fund, 449.
Service of process, 412.
Stockholders, 209, 210, 401, 402, 404, 407.
Suits on policies, 412.
Taxation, 212 to 214, 412, 413.
Terms defined, 399.
Workmen's compensation, 451.

Action—

Anti-trust law, 691, 693, 695.
 Attorney General, 203, 262, 430, 432, 443, 450, 639, 665, 666, 691, 693, 695.
 Citizens, city, town or village, 250.
 Civic organization, 250.
 Cause of, shall survive, 464 (Sec. 16).
 Commissioner, 404.
 Company, 250, 432.
 County or district attorney, 691, 693.
 Fraternal benefit societies, 639.
 Policyholders, 404.
 State Fire Marshal, 250.
 Stockholders, 404.
 Surety company bonds, 653.

Administrator—

Fidelity, guaranty and surety companies may act as, 646.

Admission Fees—

Mutual accident companies, 446.

Advertising—

Mutual aid association, 642.
 State Treasurer's receipt, 413, 433.
 Sales of stock, 681.

Affidavit—

Agents' for excessive insurance, 234 (4).
 Corporators, 401, 445, 661.
 False, 425.
 Fraternal benefit societies, 628.
 Mutual accident company's corporators, 445.
 Reinsurance, 234 (e).
 Resident agents, as to, 223.

Agents—

Affidavit as to resident agents, 223.
 Anti-trust law, 693, 694, 695.
 Application for license, 225, 269, 443, 643.
 Attorneys exempt from agency laws, 220.
 Blue sky law, under, 679, 682, 683, 684, 685, 686.
 Cause to revoke license, how ascertained, 226, 254.
 Certificate of authority, 220, 221, 225, 272, 404, 443, 643.
 Commissioner or clerk cannot be, 196.
 Commissions paid to licensed agents only, 223.
 Common carriers, properly exempt from resident agent law, 223.
 Company only, shall be agent of, 224.
 Contract with company, 443.
 Co-operative life insurance company, 443.
 Corporation cannot be agent, 225.
 Defined, 220, 654.
 Designation of officer to employ, 225.
 Dividing commissions with unlicensed persons, 223.
 Embezzlement, 227.
 Examination of, 203.
 Excess insurance in unauthorized companies, 234.
 Fidelity, guaranty and surety companies, 223, 654.

Agents—Continued.

Fire, marine, fidelity and casualty companies, 220 to 224, 245, 252, 254.
Fraudulent insurance, 224, 227.
Fraternal benefit societies, 643.
General agents' occupation tax, 227.
Liable to policyholder, 220.
License, 220, 221, 225, 226, 404, 443, 671.
Life companies, 108, 220, 226, 227, 419, 432.
List of, 683.
Misdemeanor, 216, 221, 226, 227, 643, 685.
Misrepresentation of policy, 218, 222.
Mutual burglary, robbery and transportation loss companies, 671.
Non-resident, 223, 224.
Officer designated to employ, 225.
Penalties, 220 to 227.
Policyholder, when personally liable to, 222.
Rebates and discriminations, 216, 252, 253.
Reciprocal indemnity contracts, 269.
Requisition for license, 222, 225, 643.
Resident agents, all policies must be issued through, 223, 224.
Revocation of license, 224, 225, 226, 643.
Securities transferred, 204.
Stock company cannot be agent, 225.
Taxes, subject to payment of, 222, 227.
Unlicensed, 220, 221, 223.
Withdrawn companies, 432.

Amendment—

Fidelity, guaranty and surety companies, 646.
Fire and marine insurance law, Chapter 8, Title 71, 228.
Gross premium tax law, 212.
Fraternal benefit societies (articles of incorporation), 631.
Fraternal benefit societies (constitution), 628, 631, 634.
Surety companies, Chapter 13, Title 71, 646 to 649.

Annual Report—

To Governor by Commissioner, 199.
To Insurance Commissioners, copy of, 199.
To Legislature, 205.

Annual Statement—

Arrangement in tabular form for report, 205.
Assessment companies, 434.
Casualty companies, 664, 665.
County mutual, 264.
Commissioner's report, 205.
Co-operative life companies, 442.
Fee for filing, 206, 259, 268, 403, 435, 442, 448, 668.
Filed when, 422.
Fire and marine companies, 239.
Fidelity, guaranty and surety companies, 649.
Foreign companies, 422, 632.
Form, Commissioner may change, 200, 403, 635, 664.
Fraternal benefit societies, 632, 635.
Gross premiums collected, 212, 664.

Annual Statement—Continued.

Investments in Texas securities, 429.
 Life, health and accident companies, 403, 422, 429.
 Local mutual aid societies, 642.
 Mutual accident companies, 448.
 Mutual burglary, robbery and transportation loss companies, 671, 673.
 Mutual fire, storm, lightning and hail companies, 259.
 Mutual hail companies, 268.
 Premium receipts, 429.
 Printers' mutual companies, 273.
 Reciprocal indemnity, attorney of, 271.
 Taxes, 212, 429, 430, 431.

Anti-Rebate Laws—

Fire Companies, 252, 253.
 Life, Health and Accident Companies, 216.

Anti-Trust Law—

Actions, have precedence, 693.
 Agents' actions, 693, 694, 695.
 Attorney General, 691, 693, 695.
 Boycott, 690.
 Business, to abstain from engaging or continuing in, 688.
 Combinations of persons, firms or corporations, 688, 690.
 Competition, to prevent or lessen, 688, 690, 694.
 Consolidation of stock, bonds, franchises or properties, 690.
 Conspiracy in restraint of trade, 690, 693, 694.
 Contract or agreement void, 692.
 County or district attorney, 690, 695.
 Defaulting corporation, successor to, 691.
 Definitions, 688, 690.
 Fees of county and district attorney, 691, 695.
 Felony, 694, 695.
 Foreign corporations, 690.
 Forfeiture of charter and franchise, 690, 691.
 Injunction, 691.
 Investigation of violations of law, 693.
 Justice of the peace, 693.
 Management or control, two or more corporations under same, 690.
 Monopoly, 690, 693, 694.
 Outside this State, trusts formed, 694.
 Penalties, 690, 691, 692.
 Prices, to fix, maintain or control, 688.
 Prohibited, trusts, monopolies and conspiracies, 690.
 Quo warranto proceedings, 691.
 Rebates, 694.
 Restrictions of trade, 688, 690.
 Trusts, 688, 690, 693, 694.
 Venue, 691, 695.
 Witnesses, sworn and subject to contempt, 693.

Appeal—

Industrial Accident Board, 467 (Sec. 5).
 Texas Employers' Insurance Association, 471.
 Fraternal benefit societies, 640.

Application for Policy—

Agent cannot change, 225.
 Defense, account of misrepresentation, 214, 215, 216, 218.

Application for Policy—Continued.

- Fraternal benefit societies, 626, 628.
- Fraudulent misrepresentation, 215.
- May be made part of policy, 216.
- Misrepresentation, 214, 215, 216, 218.
- Mutual accident companies, 445.
- Mutual fire, lightning, hail and storm companies, 257, 259.
- Notice of misrepresentation, 215, 216.
- Photographic or printed copy, 216.
- Part of contract, 216.
- Reciprocal contracts, 269.

Application—

- Charter, mutual hail company, 266.
- For receiver, Domestic Fraternal Societies, 639.
- Insurance on mutual plan, 256, 265, 445.
- Reciprocal indemnity contracts, 272.
- Shall contain, 257, 265.

Apportionment of Surplus to Policyholders—

- Co-operative life insurance companies, 440.

Appointment—

- Commissioner, 195.
- Commissioner as attorney for service, 425, 434, 631, 633, 649.
- Industrial Accident Board, members of, 465.
- State Fire Insurance Commission, members of, 240.

Appropriation—

- State Fire Insurance Commission, 240.

Arson and Willful Burning—

- Burning personal property insured, 274.
- Owner may destroy except when, 274.
- Case law, 274.
- Fraudulent insurance, 274.

Assessment Life or Natural Premium Company, 434, 435.**Assessment Life or Casualty Companies—**

- Annual statement, 434.
- Assets necessary, 434.
- Certificate of compliance, 434.
- Certificate of payment in full, 434.
- Charter, must file certified copy, 434.
- Commissioner appointed attorney for service, 434.
- Constitution and by-laws, certified copy, 434.
- Exempt from certain laws, 218.
- Fees, 435.
- Fraternal benefit societies exempt, 435.
- Licensed, 434.
- Prerequisites to being licensed, 434.

Assessments—

- Fraternal benefit societies, 626, 628, 635.
- Mutual accident companies, 446, 449, 450.
- Mutual burglary, robbery or transportation loss companies, 672.
- Mutual fire, lightning, hail and storm companies, 257, 259, 261.

Assessments—Continued.

- Mutual hail companies, 265, 266.
- Natural premium companies, 434.
- Texas Employers' Insurance Association, 472 (Secs. 13, 14), 473 (Sec. 15).

Assets and Liabilities—

- Assessment companies, 434.
- Casualty companies, 664.
- Co-operative life companies, 442.
- Fidelity, guaranty and surety companies, 649.
- Fire and marine insurance companies, 232.
- Life, health and accident insurance companies, 403, 422.
- Mutual fire, lightning, hail and storm insurance companies, 259, 262.

Assignee—

- Fidelity, guaranty and surety companies, may act as, 649.

Association—

- Of companies not permitted to do business until, 211.
- Definition of "association," 475 (Sec. 1).
- Corporate powers of, shall not expire, 475 (Sec. 22).

Assumed Risk—

- Workmen's compensation law, no defense, 452 (Sec. 1).

Attachment—

- Compensations exempt from, 453 (Sec. 3).
- Deposits, exempt from, 447.
- Fraternal benefit society benefit, exempt, 634.

Attorney for Service—

- Assessment companies, 434.
- Blue sky law, 685.
- Fidelity, guaranty and surety companies, 649, 653.
- Fraternal benefit societies, 632, 633.
- Life companies, 425.
- Mutual burglary, robbery and transportation loss companies, 673.
- Reciprocal exchange, 270.

Attorney General—

- Anti-trust laws, 691, 693, 695.
- Approving charter, 207, 401, 436, 445, 446, 661.
- Approve reinsurance contract under fire insurance company's bond, 231.
- Certificate of authority revoked, 252, 253.
- Co-operative life insurance companies, 436, 443.
- Fraternal benefit societies, 639.
- Opinions of, 200.
- Receiver, shall ask for, 665.
- Reports to, 199, 258.
- Suits filed, 203, 212, 262, 430, 431, 443, 639, 665, 666, 693.
- Taxes, 430, 431.
- Mutual accident companies, 445, 446, 451.
- Mutual hail companies, inspection of records, 267, 268.

Automobile Insurance—

- Fire companies, 228.
- Casualty companies, 660.

Average Weekly Wages—

- Definition, 475 (Sec. 1).
- Paid to injured employee, 465 (Sec. 18).

Beneficiary—

- Definition, 399.
- Fraternal benefit society, 625, 634.
- Mutual accident company, 450.
- Workmen's compensation act, 456, 464.

Benefits—

- Fraternal benefit society, 622, 626, 634, 637.
- Mutual accident companies, 449.
- Mutual fire, lightning, hail and storm companies, 259.

Blanks—

- Commissioner shall furnish, 199.
- Mutual hail companies, 268.

Blue Sky Law—

- Advertising literature, 681.
- Address of promoters or corporation officers, 680.
- Agents of corporation, 679, 682, 683, 685, 686.
- Appeal from refusal to issue permit, 683.
- Attorney for service, 685.
- Banks and trust companies exempt, 686.
- Bond, 682, 683.
- Books of corporation, 684.
- Cancellation of permit, 683, 684.
- Capital stock, amount of, 680, 684.
- Caption of act, 679.
- Change of price of stock, 680.
- Charter, copy filed, 680.
- Commissions, 679, 680, 682, 684.
- Commissioner of Insurance and Banking, 680, 681, 682, 683, 684, 685, 686, 687.
- Corporations subject to this act, 679.
- Cumulative, this act's, 686.
- Definitions of commissioner and secretary, 687.
- Deposit of collections on sales, 684.
- Deposit of fees, 686.
- Domicile of corporation, 680.
- Emergency clause, 687.
- Examinations, 686.
- Exemption for certain corporations, 686.
- Expenses, incident to sale of stock, 679, 680, 682.
- Expert employed, 681.
- Extension of time for sale, 685.
- Failure to organize, 685.
- Filing of document, 680, 681, 683.
- Filing fee, 680.
- Form of contracts, stocks or deeds, 680.
- Foreign companies, 680, 684, 685.
- Future sale of stock, 682.

Blue Sky Law—Continued.

Inspection of books, 684.
 Insurance companies, Section 9 of act does not apply, 684.
 Interest of salesman in sale, 682.
 Increase of stock, 679, 680.
 List of names of officers, agents, etc., 683.
 Loan companies, 684.
 Location of corporation, 680.
 Mining, oil or gas corporation, 679, 681.
 Misdemeanor, 685.
 Misrepresentation, 683.
 Money for sale of stock deposited in bank, 684.
 Name of corporation, 680.
 New bond, 683.
 Officers of corporation, 680, 681, 683, 684, 685.
 Organizer, 684.
 Organization fee, 679.
 Penalties, 685.
 Permit, 681, 682, 683, 684, 685.
 Power of attorney, 685.
 Price of stock, 680, 682.
 Promoter, 680, 681, 682, 683, 684, 685, 686.
 Promotion fee, 679, 680, 682, 684.
 Railroad companies exempt, 686.
 Sale of stock, 679, 680, 684, 685.
 Secretary of State, 680, 681, 682, 683, 684, 685, 686, 687.
 Service of legal process, 685.
 Statements to be filed, 680, 681.
 Stock, already sold, 682.
 Stock brokers exempt, 686.
 Stock, unsold, 682.
 Stock, considered paid for when, 682.
 Subscriber must be refunded, when, 685.
 Subscription list contracts, 682.
 Suit to reinstate permit, 684.
 Suit upon bond, 683.
 Townsite corporation, 679, 680, 681.
 Value of property must be given, 681.

Board Contracts—

Dividends of life companies, 211, 216, 407, 422.

Bonds—

Approval of, 646.
 Blue sky law, 682, 683.
 Cancellation by surety companies, 655.
 Chief clerk, 195.
 Commissioner, 195.
 Co-operative life companies, officers, 437.
 Deposit in lieu of, 231.
 Excess insurance broker, 235.
 Federal farm loan bonds, 219.
 Fidelity, guaranty and surety companies may make, 646, 649, 652.
 Fidelity, guaranty and surety companies may withdraw, 253, 655.
 Foreign fire company, 230, 231, 232.
 Fraternal beneficiary associations, 627, 628.
 Officers of company, 259, 266, 273, 437.
 Printers' mutual company, 273.
 Securities withdrawn, in lieu of, 652.

Bonds—Continued.

- State and county officials, 646, 649.
- Suit on, 653.
- Unauthorized surety company, made by, 655.
- Withdrawal from, 653, 655.

Burglary, Robbery and Transportation Loss Mutual Companies, 272, 273.**Burglary and Theft Insurance Companies—**

- Agents, 220 to 227.
- Application, 671.
- Certificate of authority, mutual companies, 671.
- Organization, 660, 671.
- Resident agents, 223, 224.

Business of Insurance—

- Companies cannot transact both fire and life, 413.
- Co-operative life insurance companies, 437, 440.
- Life insurance companies, 220.
- Mutual assessment accident companies, 446.
- Mutual burglary and robbery companies, 672.
- Must be transacted through agents, 223.

By-Laws—

- Adoptions, 401, 437, 471 (Sec. 3).
- Assessment companies, 434, 649.
- Casualty companies, 661, 663.
- Co-operative life companies, 437.
- Foreign companies, 423.
- Fraternal benefit societies, 621, 625, 626, 627, 628, 631, 632, 634, 635.
- Home companies, 210.
- Mutual accident companies, 446, 447, 449, 450.
- Mutual fire, storm, lightning and hail companies, 257, 259.
- Mutual hail companies, 266.
- Texas Employers' Insurance Association, 471 (Sec. 2).

Capital Stock—

- Annual statement, 232, 664.
- Bona fide property of company, 208, 402.
- Blue sky law, 679 to 687.
- Casualty companies, 207, 208, 661, 662, 666, 669.
- Change and reinvest, 209.
- Consists of what, 208.
- Deposits, 413, 418, 433.
- Fidelity and surety companies, 218, 646, 649.
- Foreign companies, 423.
- Home company, all kinds, 207, 208, 209.
- Impairment, 198, 229, 230, 419.
- Increased or reduced, 229, 401, 419, 640, 666, 669.
- Industrial companies, 421.
- Investments of, 208, 209, 219, 404, 662.
- Liability companies, 218, 662.
- Life, health and accident companies, 400, 402, 419, 423.
- Live stock companies, 675.
- Mutual accident companies have none, 445, 446, 447.
- New, 230.
- Paid up, 200, 208, 400, 402, 423.
- Shares, 208, 400, 402.

Caption to Acts—

Blue sky law, 679.
 Casualty insurance, 660.
 Co-insurance clause, 237.
 Fire and marine insurance companies, 228, 236.
 Fraternal benefit societies, 621.
 Fidelity, guaranty and surety companies, 646.
 Mutual fire, hail, lightning and storm companies, 256.
 Mutual hail insurance companies, 265.
 Occupation taxes of insurance companies, 212.
 Reciprocal indemnity contracts, 269.
 State Fire Insurance Commission, 238.
 Technical provisions in policy, 236.
 Workmen's compensation act, 451.
 Regulation of sale of stock, 679.

Casualty Insurance Companies, 660 to 669.

Affidavit of corporators, 661.
 Agents, 220 to 227.
 Annual statement, 664, 665.
 By-laws, 661, 663.
 Capital stock, 207, 208, 209, 661, 662, 666, 669.
 Caption of statute, 660.
 Certificate of authority, 208, 662, 666, 668.
 Charter, 207, 208, 661.
 Corporate powers, 663.
 Corporators, number of, 660.
 Cumulative statute, 669.
 Deposits, 662, 665, 666.
 Directors, 209, 210, 661, 662, 663, 666.
 Dividends, 666.
 Emergency clause, 669.
 Examination, 208, 665.
 Fees, 668.
 Forfeit for doing business without license, 666.
 Fraternal benefit society, 622.
 Inquiries, must answer, 255.
 Investment and loans, 209, 219, 662, 667.
 Laws applicable to fire and life companies govern, 218.
 Name, 207, 253.
 Officers, 662, 663.
 Organization, 207, 218, 660.
 Penalty suits, 666.
 Purposes for which incorporated, 660.
 Real estate holdings, 667, 668.
 Reserve on employers' liability business, resident agents, 220, 673.
 Service of process, 668.
 Statute applied only to companies under it, 668.
 Taxation, 212 to 214.
 Stock subscription books, 662.
 Venue for penalty suits, 666.

Certified Copies of Papers—

Charter, 257, 423.
 Commissioner shall furnish, 196, 199, 205, 206, 404.
 Evidence, received as, 204.
 Fees for, 206, 401, 446, 448, 661.

Certificate of Authority—

Agents, 220, 225, 226, 253, 404, 443, 643.
Assessment companies, 434.
Blue sky law, 681, 682.
Burglary, robbery and loss in transportation, mutual companies, 671.
Casualty companies, 198, 200, 205, 208, 662, 665, 668.
Certified copy for agent, 404.
Co-operative life companies, 436, 437, 442.
Excess insurance broker, 234.
Expiration, 200, 402, 403, 421, 432, 442, 443, 625.
Fees, 206, 403, 442, 448, 631, 632, 668.
Fidelity, guaranty and surety companies, 652, 654, 655.
Fire companies, 198, 200, 205, 208, 257, 271.
Foreign companies, conditions precedent, 421, 626.
Fraternal benefit societies, 628, 631, 632.
Home companies, 208.
Issued, 200, 208, 271, 272, 273, 402, 403, 421, 625, 626, 668.
Life, health and accident companies, 198, 200, 203, 205, 225, 402, 403, 421, 426, 427, 431, 432.
Mutual accident companies, 446, 447.
Mutual fire, storm and lightning companies, printers' mutual companies, 257, 258, 262, 263, 265, 273.
Publication of, 211.
Reciprocal indemnity contracts, 272.
Renewals, 403, 413, 421.
Revocation, 198, 200, 203, 205, 225, 226, 235, 252, 253, 258, 262, 263, 270, 419, 422, 432, 440, 447, 636, 640, 654, 655, 665.
Surrender by fidelity, guaranty and surety companies, 652.
Suspension, 198, 203, 258, 263.
Taxes must be paid before issuance, 213.
Void, 413.

Certificate—

Compliance, 434, 632.
Fraternal benefit society, 626.
Preliminary, to solicit members, 257, 265, 436, 437, 628.
Taxes, 213, 430, 431.

Certificate of Deposit—

Fidelity, guaranty and surety companies, 649.
Foreign companies, 424, 649.
Life companies, registration of policies, 415.

Certificate of Membership—

Mutual assessment accident company, 449.

Certificate of Payment in Full—

Assessment companies, 434.

Certificate of Re-Insurance—

Casualty companies, 234.
Fire companies, 234.
Marine companies, 234.

Certificate of Stock—

Issue of new after impairment, 229, 230.
Return of, after impairment, 229.
Mutual accident company has none, 447.

Certificate of Valuation—

Foreign companies, 197.

Charter—

Amendments, 401, 423, 626, 628, 631.
 Assessment companies, 434, 445, 446, 448, 451.
 Attorney General, submitted to, 207, 401, 445, 446, 661.
 Casualty companies, 207, 208, 661.
 Co-operative life companies, 436.
 Fee for filing, 206, 401, 446, 640, 661.
 Fidelity, guaranty and surety companies, 646, 649.
 Filing, 196, 207, 257, 401, 628, 631, 632, 661.
 Foreign companies, 423.
 Forfeiture, 262, 422, 448, 690, 691.
 Fraternal benefit societies, 626, 628, 631, 632.
 Home companies, all kinds, 207, 208.
 Investment companies, 642, 643.
 Life, health and accident companies, 400, 401, 423.
 Mutual accident companies, 445, 446.
 Mutual burglary, robbery and transportation loss companies, 671.
 Mutual fire, lightning, hail and storm companies, 212, 262.
 Mutual hail companies, 265, 266.

Chief Clerk—

Appointment, 195.
 Bond, 195.
 Duties, 195.

Children—

Protection of children of fraternal benefit members, 623.

Claims—

State Treasurer to pay, when company has defaulted, 654.
 Filing claims, time limited, 467 (4).

Clerks—

Department, 195.
 Insurance Commission, 240, 241.
 Industrial Accident Board, 466.

Co-Insurance Clause—

Exemption, as to, 237.
 Forbidden in policies, 237, 249.

Collection of Interest—

On securities, may be permitted by Treasurer, 666.

Commissioner—

Appointment, 195.
 Bond and oath, 195.
 Clerks, 195.
 Inability to act, 196.
 Insurance Commission Chairman, 240.
 Of other States, 199.
 Records of State Treasurer, access to, 204.
 Seal, 196.
 Terms of office, 195.
 Title, 196.
 Vacancies, 195.

Commissioner's Duties, 401 to 434—

- Action, may maintain, 404.
- Annual statement, for, 200, 403, 422, 442, 448, 664, 665.
- Apportionment of surplus, 440, 631.
- Blanks, shall furnish, 199.
- Blue sky law, 681, 680, 682, 683, 684, 686, 687.
- Bonds, shall approve, 230, 235, 273.
- Books, access to companies, 203.
- Business, shall suspend, 198, 200.
- Casualty companies policies, 655.
- Capital, impairment, 198, 229, 419, 423.
- Certified copies of records given, 196, 199, 205, 404.
- Certificate of authority, shall issue, 200, 208, 225, 257, 263, 265, 272, 273, 402, 403, 421, 434, 436, 628, 652, 662, 668.
- Certificate of registration of policies, 415, 416.
- Certificate of re-insurance, 234.
- Certificate of valuation, 197.
- Certificate revoked, 198, 200, 203, 205, 216, 225, 234, 252, 253, 258, 262, 272, 415, 419, 422, 432, 436, 443, 447, 450, 636, 640, 654, 655, 665, 683, 684.
- Certify taxes to Treasurer, 213, 430.
- Charters, 200, 207, 208, 400, 401, 436, 445, 446, 661, 671.
- Deposits, must approve, 413, 414, 425, 649.
- Examinations, 198, 203, 208, 224, 257, 258, 262, 271, 402, 431, 437, 443, 447, 639, 665, 686.
- Examiners, may appoint, 203, 639, 640, 665.
- Fees, 205, 206, 265, 417, 442, 628, 668.
- Fee book, 206.
- File papers, 196.
- Fraternal benefit societies, 628, 631.
- Inquiry, may make, 205.
- Insurance Commission, 238, 250, 252, 253, 255.
- Laws, shall execute, 196.
- License refused, 211, 626.
- Mutilated policies, shall cancel, 416.
- Mutual accident companies, 446, 447.
- Mutual companies, shall admit, 200, 257, 263, 265.
- Net value of policies, 197, 201.
- Policies, shall value, 197, 201, 203, 415, 439.
- Policy forms, shall approve, 420, 440.
- Real estate, forced sale, 668.
- Registration of policies, 415, 416.
- Registration fees, how distributed, 417.
- Reports, 199, 205, 429, 430, 431.
- Reinsurance contracts, 231, 407.
- Reserve calculation, 197, 198, 201, 203, 211.
- Resident agent's law, 224.
- Securities, shall keep record, 416, 417, 418, 419.
- Securities, transfer to Treasurer, 204.
- Service of process, 256, 426, 447.
- State Fire Insurance Commission, member of, 240.
- Suits, shall institute, 198, 203.
- Witness refusing to testify, 200.
- Workmen's compensation, 468, 472, 473, 474, 477.

Complaints—

- Insurance Commission, 250.
- Rates of fire insurance, 250.

Commission—

Blue sky law, 679, 680, 682.
Companies shall not pay to officers, 419.
Agent of company prohibited from paying, 223.

Compensation—

Actions for, 453 (Sec. 3), 456, 457, 458.
Amount of, 456, 457, 458.
Begins on eighth day, 454 (Sec. 6).
Beneficiaries, 456, 464.
Death cases, 456 (Sec. 8).
Funeral benefit, 457 (Sec. 9).
Medical aid, medicine and hospital service, 454, 462.
Minors or mentally incompetent injured workmen, 463, 464.
Filing claim for, time limited to, 453.
Partial incapacity, 457 (Sec. 11).
To employes of sub-contractor, 468 (Sec. 6).
Total incapacity, 457 (Secs. 10, 11a).
Waiver of rights to, 453, 464.
Of all officers, shall be fixed, 437.

Conspiracy in Restraint of Trade—

Defined, 690.
Penalties, 690, 692, 693, 694, 695.
Prohibited, 690.

Constitution and By-Laws—

Amendments, 626, 628, 631, 634.
Assessment companies, 434.
Fraternal beneficiary association, 621, 626, 627, 628, 631, 632, 634, 635.
Mutual accident companies, 447, 449, 450.

Contract Void—

Anti-trust law, 692.

Contributory Negligence—

Workmen's compensation law, no defense, 452 (Sec. 1).

Co-Operative Life Insurance Company, 436 to 444.

Agents, 443.
Annual report, 442.
Apportionment of surplus, 440.
Bonds of officers, 437.
Borrow money, 438, 441.
Business confined to Texas, 440.
By-laws, 437.
Cash value of policy, 441.
Certificate of authority, 436, 437, 442, 443.
Charter, 436.
Contract between company and agent, 443.
Death losses, 438, 439.
Debts, 438, 444.
Default in premium payment, 441.
Deposits, 414 to 419, 438.
Directors, 436, 437, 438, 439, 441.
Dividends, 439, 440.
Examinations, 437, 443.
53—Ins.

Co-Operative Life Insurance Company, 436 to 444—Continued.

Expenses, 439.
Fees, 442.
Felony, officer or director, 438, 439.
Funds, where deposited, 438.
Investments and loans, 219, 438, 439.
Loan on policy, 439, 441.
Medical examination, 441.
Name, 436.
Net premium computed, 439.
Officers, 437, 438, 439, 441.
Organization, 436.
Paid-up insurance, 441.
Penalties, 438, 439, 441.
Policies, 436, 439, 440, 441.
Policy, form prescribed, 440.
Policyholders' loans, 439, 441.
Policyholders' meetings, 437, 443.
Preliminary certificate of authority, 436.
Premiums, 439, 440, 441.
Preliminary term insurance, 440.
Real estate holdings, 438.
Receiver, 443.
Registration of policies, 414 to 419.
Reinsurance, 443.
Reserve, 414, 416, 417, 418, 419, 439, 441, 443, 444.
Surplus to policyholders, 440.
Surrender value of policies, 441.
Suspension of license, 443.
Taxation, 444.
Valuation of policies, 439.
Winding up affairs of company, 443.

Corporation—

Agent, cannot be, 225.
Blue sky law, 679 to 687.
Casualty companies, 665.
Fidelity, guaranty and surety companies, 646.
May be organized to do one or more kinds of insurance, 215.
Mutual fire, lightning, hail and storm companies, 256, 265.
Printers' mutual associations, 273.
Reciprocal indemnity contracts, may exchange, 269, 271.

Corporation Laws—

Govern insurance companies, 210, 404.
Life companies doing life business only, 433.

Corporators—

Casualty companies, 661, 662.
Certify as to capital stock, 208.
Co-operative life companies, 436.
Life, health and accident companies, 400.
Mutual fire, lightning and hail companies, 256, 257.
Stockholders' meetings, 401, 661.

Credit Insurance Companies—

Organization, 660.

County Occupation Tax—

Prohibited, 213.

County or State Officials—

Bonds of, accepted, 649.

Debts—

Co-operative life company, 438.

Fidelity, guaranty and surety company, 649.

Declaration—

Reciprocal indemnity attorney shall be filed, 269.

Defense—

Misrepresentation in policy application, 214, 215, 216.

Technical provisions in fire policy, 236, 237.

Workmen's compensation act, 452 (Sec. 1).

Definitions—

Agents of insurance companies, 220, 654.

Association, 475 (Sec. 1).

Average weekly wages, 475 (Sec. 1).

Beneficiary, 399.

Company, 399.

Conspiracy in restraint of trade, 690.

Foreign companies, 399.

Fraternal benefit societies, 621.

Gross premium receipts, 212.

Home office of company, 399.

Home or domestic companies, 399.

Insured, 399.

Life, health and accident companies, 399.

Lodge system, 621.

Monopoly, 690.

Investment companies, 684.

Mutual accident companies, 446.

Net assets, 399.

Policyholders, 399.

Profits, 399.

Representative form of government, 621.

Subscriber, workmen's compensation, 475 (Sec. 1).

Texas sureties, 427.

Trust, 688.

Deposits—

Approved by Commissioner, 413, 433, 646.

Blue sky law, under, 684, 686.

Casualty companies, 662, 665, 666.

Commissioner shall keep record, 416.

Co-operative life companies, 419, 438.

Fidelity, guaranty and surety companies, 646, 649, 652.

Fire companies, 231, 264.

Foreign companies, 231, 424, 646.

Home companies, 649.

Increased, may be, 417.

Interest on, 649, 666.

Liable for judgment, 424.

Life companies, reserve, 414, 416, 417, 418, 419.

Deposits—Continued.

- Life, health and accident companies, capital stock, 413, 433.
- Mutual fire, storm, lightning and hail companies, 264, 267.
- Not required, when, 424.
- Reciprocal, 424.
- Reciprocal exchange, 269.
- Withdrawal, 264, 417, 652, 665, 666.
- Trustee, with, 649.

Directors—

- Casualty companies, 209, 210, 661, 663.
- Choose officers, 210, 437.
- Commissioner or clerk ineligible, 196.
- Co-operative life companies, 437, 438.
- Election and term of office, 209, 210, 401, 437, 661, 662.
- Foreign companies, 423, 425.
- Fraternal benefit societies, 628.
- Investments, loans and deposits, 419.
- Keep records, 210.
- Make by-laws, 210, 437, 661.
- Meetings, 210.
- Misrepresentation of policy, 218.
- Mutual accident companies, 445, 446, 447, 449.
- Mutual fire, lightning, hail and storm companies, 257.
- Mutual hail companies, 266, 268.
- Number and qualifications, 209, 401, 628.
- Purchase, sale or loan, by or to companies, 406, 419.
- Quorum, 210.
- Resolution of, designating person to employ agents, 225.
- Vacancies, 210.
- Workmen's compensation, Employers' Insurance Association, 471, 472, 473.

Distribution of Funds—

- Fraternal benefit societies, 628.

Disbursements—

- Life companies, 408.

Discrimination—

- Fire companies, 252, 253.
- Life, health and accident companies, 216.

Dividends—

- Casualty companies, 422, 666.
- Co-operative life companies, 434, 440.
- Fire companies, 211.
- Health companies, 211, 422.
- Life companies, 211, 218, 407, 422, 439.
- Marine and inland companies, 211.
- Misrepresentation of, 218.
- Mutual accident companies, 447.
- Reciprocal exchange, 271.
- Surplus profits, 218, 243, 422.
- Workmen's compensation act, 473 (Sec. 16).
- Mutual fire, lightning, hail and storm companies, 262.
- Mutual hail companies, 267.
- Unlawful, 211.

Domestic Servants—

Exempt from workmen's compensation law, 452 (Sec. 2).

Duties of Commissioner, 196 to 206.

Eleemosynary Institutions—

As beneficiaries, 625.

Embezzlement—

Agent of company, 227.

Emergency Clause—

Blue sky law, 687.

Casualty companies, 669.

Co-insurance law, 238.

Fidelity, guaranty and surety companies, 649.

Fire and marine companies, 229, 237, 238.

Fraternal benefit societies, 645.

Insurance commission, 255.

Mutual fire, lightning, hail and storm, 264.

Reciprocal indemnity law, 273.

State Fire Insurance Commission, 255.

Technical provisions in policy, 237.

Workmen's compensation act, 478.

Mutual hail companies, 268.

Employers—

Workmen's compensation act, 475 (Sec. 1).

Employers' Insurance Association, 471 to 475.

Employees—

Action against employer, 453 (Sec. 3).

Assumed risk, 452 (Sec. 1).

Contributory negligence shall not be a defense, 452 (Sec. 1).

Deceased, leaves legal beneficiaries, 456 Sec. 8a).

Deceased, leaves no legal beneficiaries, 457 (Sec. 9).

Definition, 475 (Sec. 1).

Death of injured, 456 (Sec. 8).

Fellow servant, 452 (Sec. 2).

Injured, what compensation shall receive, 456, 457, 458.

Examination of, before board, 466 (Sec. 4).

Non-subscriber, employees of, 454 (Sec. 4).

Record of injuries, 469 (Sec. 7).

Employer—

Workmen's compensation act, 475 (Sec. 1).

Employers' Liability—

Reports as to experience, 469 (Sec. 7).

Reserve liability of company, 472, 473.

Evidence—

Fire Marshal's act, 245.

Instruments and certified copies of records, 204.

Insurance Commission law, 254.

Mutual companies, 272.

Examinations—

Agents, 203, 245.
All companies, 208, 224.
Blue sky law, 686.
Casualty companies, 208, 665.
Co-operative life companies, 437, 443.
Expenses, by whom paid, 203, 258, 402, 431, 437, 443, 447, 639, 640.
Fidelity, guaranty and surety companies, 646.
Fire companies, 208, 665.
Fraternal benefit societies, 628.
Home companies, 208, 632, 639, 640.
Life, health and accident companies, 203, 402, 431, 437.
Medical, shall make, 441.
Mutual accident companies, 447.
Mutual fire, hail, storm and lightning companies, 258, 262.
Reciprocal exchanges, 271.
Reports made and filed, 208.
Reports published, 198.
Resident agent's law, 224.
State Fire Insurance Commission, 245.
Mutual hail companies, 271.
When and how made, 203, 208, 402, 431, 665.

Excess Insurance—

Unauthorized companies, in, 235.

Executor—

Fidelity, guaranty and surety companies, 646.

Exemplary Damages—

Workmen's compensation law, 454 (Sec. 5).

Exemption of Certain Societies—

Blue sky law, 686.
Fraternal benefit society law, 212, 218, 433, 435, 622, 628, 642.

Expenses—

Blue sky law, incident to stock sales, 679, 680.
Co-operative life companies, 439.
Examinations, 203, 402, 431, 437, 443.
Fire Marshal, 244.
Fraternal benefit societies, 626, 628, 639.
Insurance Commission, 213, 240, 241, 255.
Local mutual aid societies, 641.
Mutual accident companies, 449.
Mutual fire, hail, storm and lightning companies, 261.
Mutual hail companies, 267, 268.

Federal Farm Loan Bonds—

All insurance companies may invest in, 219.

Fees—

Assessment companies, 435.
Attorneys in anti-trust suits, 691, 695.
Blue sky law, 680, 686.
Casualty companies, 668.
Certificate, 206, 668.
Certificate of authority, 206, 268, 403, 442, 448, 631, 632, 643, 668.

Fees—Continued.

Certified copy of records, 206, 401, 445, 448, 661.
 Co-operative life companies, 442.
 Examinations, 206, 639, 640.
 Excess insurance broker, 235.
 Fee book, 206.
 Filing documents, 196, 206, 263, 268, 401, 403, 435, 442, 446, 448, 646, 661, 668.
 Filing statement, fidelity, guaranty and surety company, 646.
 Fraternal benefit societies, 631, 632, 643.
 Mutual accident companies, 447.
 Mutual burglary, robbery and transportation loss companies, 673.
 Mutual fire, storm, lightning and hail companies, 256, 257, 263.
 Mutual hail insurance companies, 265, 268.
 Must be paid, 211.
 Printers' mutual companies, 273.
 Reciprocal indemnity contracts, 272.
 Registration of policies, 417.
 State Treasurer, paid over to, 206, 417.
 Valuing policies, 206.

Federal Court—

Removal of suit, 200.

Fellow Servant's Negligence—

Workmen's compensation law, no defense, 452 (Sec. 1).

Felony—

Agent, 227.
 Anti-trust laws, 691, 692, 693, 694, 695.
 Co-operative life company's officers or directors, 438, 439.
 False statement or report, 425.
 Misappropriation of funds, 262.
 Mutual accident companies, 451.
 Officer's false statement, 425.
 Mutual fire, lightning, hail and storm companies, 262.

Fidelity, Guaranty and Surety Company—

Administrator, executor or guardian, may act as, 646.
 Agents, 220 to 227, 649, 654.
 Annual statement, 649.
 Assets, 649.
 Assignee, may act as, 646.
 Attorney for service, 649, 653.
 Bond in lieu of deposits, 652.
 Bonds, may be surety on, 646, 649.
 Bond of State or county official, 646, 649.
 Capital stock, 207, 208, 209, 218, 646, 649.
 Cancellation of bond, 652, 655.
 Caption to act, 646.
 Certificate of authority, 208, 652, 654, 655.
 Charter, 207, 646, 649.
 Deposits, 646, 649, 652, 654.
 Directors, 209, 210.
 Emergency clause to statute, 649.
 Examination, 208, 646.
 Fee for filing copy of statement, 646.
 Fiduciary and depository business, may do, 646.
 Foreign, 646, 649.

Fidelity, Guaranty and Security Company—Continued.

Home companies, in Texas only, deposit, 649.
Inquiries, must answer, 205.
Interest on deposits, 649.
Investments, 208, 209, 219.
Liabilities, 649.
Loss, failure to pay, 654.
Name, 207.
Organization, 207, 218, 646.
Penalty for accepting bond made by unlicensed company, 655.
Penalty when bond is improperly canceled, 655.
Powers, 646, 649.
Publication of statement, 646.
Public use, charged with, 655.
Purpose for which incorporated, 646.
Receiver, may act as, 646.
Refusal to guarantee again, 655.
Reinsurance, 652.
Reserve, 197, 649, 652.
Resident agents, 223, 224.
Securities deposited, 646, 649, 652.
Service of process, 649, 653.
Surrender of certificate of authority, 652.
Surety or guarantor, may act as, 646, 649.
Taxation, 212, 213.
Trustee, may act as, 646.
Unlicensed companies, accepting bonds made by, 655.
Venue, suit on bonds, 649, 653.
Withdrawal from bond, 653, 655.

Fiduciary and Depository Business—

Fidelity, guaranty and surety companies may do, 646.

Fire Companies—

Agents, 220 to 227, 245, 252.
Annual statement, 232.
Assets shown in annual statement, 232.
Association of companies, 211.
Automobiles, may insure, 228.
Bond, 230, 231, 232.
Capital stock, 207, 208, 209, 229, 230.
Certificate of authority, 208, 211, 234, 239, 250.
Charter, 207, 208.
Co-insurance clause, 237, 238.
Companies subject to commission law, 239.
Directors, 209, 210.
Disbursements shown in annual statement, 233.
Dividends, 211.
Examination, 208, 245.
Excess insurance, 223, 234.
Expenses of Insurance Board, 213, 255.
Fees and taxes must be paid, 211.
Fire loss, may insure, 228.
Foreign, 230, 231, 232.
Impairment of capital stock, 229, 230.
Income shown in annual statement, 233.
Inquiries, must answer, 205.
Insurance board law repealed, 238.
Investments and loans, 208, 209, 219, 230, 404.

Fire Companies—Continued.

Joint policies, 211.
 Laws governing other companies, 218.
 Liabilities shown in annual statement, 233.
 Life and health business, cannot do, 200, 413.
 Losses, record and classification of, 242.
 Marine loss, may insure, 228.
 Mutual, 213, 254, 256, 257, 258, 259, 261, 262, 263, 264, 273, 451.
 Name, 207.
 Organization, 207, 675.
 Penalties, 211, 253, 671.
 Policy, 211, 236, 237, 248, 249, 253.
 Powers, 228, 230.
 Premium collections, 253.
 Premium rates, regulation of, 239, 241, 242, 246, 247, 248, 250, 252, 253.
 Publication of certificate of authority, 211.
 Real estate holdings, 230.
 Rebates and discriminations, 252, 253.
 Reinsurance, 228, 231, 235.
 Reserve, 197, 211.
 Resident agents, 223, 224.
 Risk, limit of one, 230, 234.
 Securities deposited in lieu of bond, 231.
 Surplus profits, 211.
 State fire insurance commission law, 213, 238 to 255.
 Taxation, 211, 212, 213, 668, 669.
 Technical provisions in policies, 236, 237.
 Unauthorized companies, 236, 673.
 Valued policy, 236.

Fire Losses—

Annual, to be ascertained and make record, 242.

Fire Marshal—

Authority and powers of, 243, 244, 245.
 Duties of, 242.
 State Fire Insurance Commission, 242, 243, 244, 245.

Foreign Companies—

Annual statement, 422, 633.
 Anti-trust laws, 691.
 Bond, 230, 231.
 Blue sky law, 680, 684, 685.
 By-laws, 423, 632.
 Charter, 423, 632.
 Children, protection of, 623.
 Conditions under which they operate, 219.
 Defined, 399.
 Directors, 423.
 Fidelity, guaranty and surety companies, 649.
 Fire companies, 230, 231, 232.
 Fraternal benefit societies, 632, 640.
 Investments, 219, 425.
 Life, policy may contain, 411.
 Losses, 412, 413.
 Mutual fire, lightning, hail and storm companies, 263.
 Officers, 423.
 Suits on policies, 412.

Forfeiture—

- Casualty companies, unlicensed, 666.
- Charter and franchise, 262, 422, 448, 450, 628, 636, 690, 691.
- Fraternal benefit societies, 628, 636.
- Mutual accident companies, 451, 653.

Form Number—

- Policies shall have printed thereon, 415.

Fraternal Benefit Societies—

- Accident, 622, 641.
- Accumulation basis of valuation, 637.
- Advanced payment during organization, 628.
- Affidavit relating to organization, 628.
- Age limit of members, 626.
- Agents, 643.
- Amendments to charter, constitution and laws, 626, 628, 631, 634.
- Annual license, 631, 632.
- Annual statements, 632, 635.
- Annual valuation, 622.
- Application for membership, 626, 628.
- Assessments, or premiums, 626, 628, 635, 637.
- Attorney for service, 632, 633.
- Attorney General, Commissioner report to, 639.
- Beneficiaries, 625, 626, 634.
- Benefits, 622, 626, 634, 637.
- Benefit not attachable, 634.
- Bond, 627, 628.
- Caption of Act, 621.
- Certificate of authority, 628, 631, 632, 636, 640, 643.
- Certificate of compliance, 632.
- Certificate or policy, 622, 626, 628, 632, 635, 637, 641.
- Charter, 626, 628, 631, 632, 634.
- Constitution, 621, 626, 627, 628, 631, 632, 635.
- Credits to individual members, 637.
- Death and disability benefits, 626, 637.
- Defined, 621.
- Deferred payments, 626.
- Disease, 622.
- Distribution of funds, 628.
- Dissolution, 639.
- Emergency clause, 645.
- Enjoined from carrying on business, 639.
- Examination, 628, 632, 639, 640.
- Exceeding its powers, 639.
- Exempt from certain laws, 212, 218, 433, 435.
- Exemptions, 212, 218, 433, 435, 622, 641, 642.
- Expenses, 626, 628, 639.
- Extra assessments may be levied, 635.
- Extended protection, 622.
- Failure to comply with law, 639, 640.
- Family protection, 623.
- False statements, 643.
- Fees, 631, 632, 643.
- Fixed liabilities, 626.
- Foreign, 632, 640.
- Forfeiture of charter, 628.
- Funds, 626, 627, 628, 631, 634, 635, 636, 637.

Fraternal Benefit Societies—Continued.

- Future security, provisions to insure, 635, 636, 637.
- Funeral benefits, 622.
- Governing body, 621, 628, 631, 634.
- Installments of claims, 626.
- Institutions as beneficiaries, 625.
- Investment of funds, 219, 433, 626, 627, 632.
- Laws of association, 621, 625, 626, 627, 628, 631, 632, 634, 635.
- Laws repealed, 645.
- Limitation as to amount of benefit certificate, 641.
- Loans by local lodges, 627.
- Loan on policy, 622.
- Local mutual aid societies, 641.
- Lodge system, 621.
- Maintaining a certain financial condition, 636.
- Medical examination, 626, 641.
- Meetings of governing body, 621, 634.
- Meetings of subordinate lodge, 621.
- Membership, 626, 628, 631, 634, 636, 637, 639, 641.
- Mergers and transfers, 631.
- Minimum assessment collection in organizing, 628.
- Misdemeanor, 643.
- Mortuary funds, 628.
- Name of association, 628.
- Notice of actions against, 639, 640.
- Number of members necessary, 628, 639, 641.
- Office location, 634.
- Officers and directors, 621, 628, 634.
- Old age, 622.
- One hazardous occupation, 641.
- Organization, 628.
- As beneficiaries, 625.
- Paid-up protection, 622.
- Payment of benefits, 634.
- Penalties, 640, 643.
- Periodical contributions, 626.
- Personal liability, officers, and members, 634.
- Power of attorney, appointing attorney for service, 632.
- Powers of associations, 628, 631.
- Preliminary certificate of authority, 628.
- Proceedings for dissolution, 636.
- Process, service of legal, 632, 633.
- Publication of affairs, 640.
- Proxy, cannot vote by, 621.
- Purpose of organization, 628.
- Quo warranto action, 639.
- Receiver appointed, 639.
- Refusal of license, 632.
- Reincorporation, 631.
- Reinsurance, 631.
- Religious or charitable societies, 641.
- Report of valuation, 635.
- Representative form of government, 621.
- Reserve, 622, 624 (Sec. 3), 626, 628, 637.
- Revocation or refusal of license, 632, 636, 640.
- Separate class of members or certificates, 636.
- Separate jurisdiction plan, 634.
- Solvency, 635, 637.

Fraternal Benefit Societies—Continued.

State organizations, 634.
Subordinate lodge, investments by, 627.
Supreme governing body, 621.
Surplus, 626, 637.
Tabular basis of valuation, 637.
Tables of mortality, 622, 626, 628, 635.
Taxation, 635.
Taxes, exempt from occupation, 642.
Term certificate, 622.
Temporary or permanent disability, 622.
Tombstones, 622.
Transfer or consolidation of membership, 631.
Valuation of policies, 626, 628, 635, 636, 637.
Waiver of constitution and laws forbidden, 634.
Withdrawal equities, 622.
Whole family protection, 623.

Fraudulent Insurance, 274.**Funds—**

Fraternal benefit societies, 626, 627, 628, 631, 635, 636, 637.
Handling of, by directors of officers, 419.
Mutual companies may invest, 267, 361.

Garnishment—

Compensation exempt from, 453 (Sec. 3).
Fraternal benefit society benefit exempt, 634.

General Basis Schedule—

State Fire Insurance Commission, 241, 245, 246, 247, 248, 250.

Governor—

Insurance Commission, appoints members, 240.
Reinsurance contracts, approves, 231.
Report of Commissioner, 199.

Government—

Representative form of, defined, 621.

Gross Premium Receipts—

Defined, 212.
Reported, 259, 429, 431.
Taxation, 212, 213, 429, 430, 431.

Guardian—

Fidelity, guaranty and surety companies may act as, 646.
Workmen's compensation act, 464 (Sec. 13).

Hall Companies—

Mutual, 200, 256 to 269.

Health Companies—

Annual statement, 403, 422, 425.
Association of companies, 211.
Capital stock, 400, 419, 421, 423.
Certificate of authority, 211, 402, 403.
Charter, 207, 400, 401, 423.

Health Companies—Continued.

Defined, 399.
 Deposits, 413, 424.
 Directors, 401, 406.
 Dividends, 211, 422.
 Fees and taxes must be paid, 211.
 Fire, marine, lightning, tornado and inland business cannot do, 211.
 Foreign, 422, 423, 424, 425, 426.
 Home office location, 207, 400.
 Incorporation of, 660.
 Industrial insurance, 421.
 Inquiries, 205.
 Investments and loans, 208, 209, 219, 425.
 Joint policies, 211.
 Losses, when payable, 412, 413.
 Mutual, 423, 449.
 Mutual accident companies, 449.
 Organization, 400, 660.
 Penalties, 211.
 Policies, suits on, 412.
 Policy, forms, 420.
 Publication of certificates of authority, 211.
 Real estate holdings, 405.
 Reinsurance, 407.
 Reserve, 197, 211, 666.
 Service of process, 412.
 Statutes repealed, 219.
 Surplus profits, 211, 422.
 Taxation, 211, 212 to 214, 412, 413.
 Venue in suits, 412.

Hearings—

Complaints to Insurance Board, 250.

Home Companies—

Annual statement, 403.
 Capital stock, 207, 208, 209, 218, 400, 675.
 Charter, 207, 208, 445.
 Defined, 399.
 Directors, 209, 210.
 Dividends, 211.
 Examinations, 208.
 Fidelity and surety companies, 218, 425.
 Investments, 208, 209, 219.
 Liability companies, 218.
 Losses, 412, 413.
 Mutual accident, 445 to 451.
 Policies, suits on, 412.
 Reserve, 211.
 Service of process, 412.
 Taxation, 412, 413.

Home Office of Companies—

Annual statement, 225.
 Defined, 399.
 Fraternal benefit societies, 626.
 Investments and loans, 427.
 Location named in charter, 207, 400, 445.
 Mutual accident companies, 445.

Impairment of Capital Stock—

- Commissioner's duty, 198, 229, 419.
- Fire and marine companies, 229.
- Life, health and accident companies, 419.

Indemnity Contracts—

- Reciprocal, 269 to 273.

Industrial Accident Board, 465 to 471.

- Average weekly wages computed, 475 (Sec. 1 (1)).
- Appointment, 465 (Sec. 1).
- Clerical help, 466.
- Expenses, 465 (Sec. 3).
- Members, 465 (Sec. 2).
- Officers and offices, 466.
- Notice to, 467 (Sec. 4a).
- Reports of injuries, 467 (Secs. 4a, 5).
- Refund of part premiums, 477 (Sec. 3).
- Rules and powers, 466 (Sec. 4), 467 (Sec. 5, 5a), 470 (Secs. 8, 9, 10), 471 (Sec. 12).

Industrial Life, Accident & Health Companies—

- Capital stock of company, 421.
- Organization of company, 421.
- Policy forms, 420.

Ineligibility of Certain Persons, 196.**Inquiries—**

- Companies must answer, 205.

Injuries—

- Action for, 453 (Sec. 3).
- Defense to action for, 452 (Sec. 1).
- Workmen's compensation, 457 to 460.

Insured—

- Defined, 399.

Interest on Deposits—

- Commissioner may permit collection, 417.
- State Treasurer may permit collection, 413, 666.

Investments and Loans—

- Capital stock and other funds, 208, 209, 219, 404, 419, 425, 426, 427, 429, 662, 667.
- Casualty companies, 219, 662, 667.
- Co-operative life companies, 219, 438, 439, 441.
- Directors, 419, 449.
- Exempt from investments, 433.
- Federal farm loan bonds, 219.
- Foreign companies, 425.
- Fraternal benefit societies, 433, 627, 632.
- Home companies, all kinds, 208, 209, 219, 404.
- Life companies, 219, 404, 419, 426, 427, 429, 432, 433, 437.
- Loaning funds only, 433.
- Mutual accident companies, 219, 449.
- Mutual fire, hail, storm and lightning companies, 219, 261.

Investments and Loans—Continued.

- Mutual hail companies, 219, 267, 268.
- Penalty for failure to make, 432.
- Taxes reduced by investments, 213, 429.
- Schedule to be filed, 429.
- Texas reserves, 426, 427, 433.
- Texas securities, 426, 427, 433.

Judgments—

- Deposits liable for, 424.
- Liability, under workmen's compensation law, 475 (Sec. 21).
- Must be paid, when, 205, 413, 654.

Laborers—

- Exemptions of certain, from workmen's compensation act, 452 (Sec. 2).

Legislature—

- Report to, 205.

Liability—

- Fraternal benefit societies, 626, 634.
- No personal, 627.
- Mutual accident company, 450.
- Mutual burglary and loss in transportation companies, 672.
- Mutual fire, lightning, hail and storm companies, 259.

Liability Insurance Companies—

- Agents, 220 to 227.
- Capital stock, 218.
- Organization, 218, 660.
- Resident agents, 223, 224.
- Workmen's compensation, 477 (Sec. 2).

License—

- Fraternal benefit societies, 631, 640.
- Mutual, fire, lightning, hail and storm companies, 262, 263.
- Mutual hail companies, 265.
- Revocation of license, 226, 440.
- Texas Employers' Insurance Association, 471.

Lien—

- Fire companies cannot avoid responsibility, 249.

Life Companies—

- Agents, 220 to 227, 419, 432.
- Annual statement, 403, 422, 429.
- Assessment, 218.
- Association of companies, 211.
- Attorney for service, 425, 426.
- Capital stock, 400, 419, 421, 423, 433.
- Certificate of authority, 211, 225, 402, 403, 427, 431, 432, 433, 436, 437.
- Charter 200, 400, 401, 423, 436.
- Commissions, shall not pay officers, 419.
- Co-operative, 419, 436 to 444.
- Corporation cannot be agent, 225.
- Deposits, 413, 414, 416, 417, 418, 419, 424, 433, 438.
- Defined, 399.
- Directors, 225, 401, 406, 419, 423, 436, 437.

Life Companies—Continued.

- Discrimination, 216.
- Disbursements, 408.
- Dividends, 211, 407, 422.
- Estimates on policies, 218.
- Examinations, 203, 402, 431, 437.
- Fees, 206, 211, 401, 403, 417, 435, 442.
- Fire, marine, lightning, tornado and inland business, cannot be, 200, 413.
- Foreign, 422, 423, 424, 425, 426.
- Form numbers, 415.
- Home office location, 400.
- Industrial insurance, 421.
- Inquiries, must answer, 205.
- Investments, and loans, 219, 404, 419, 425, 426, 427, 429, 432, 433, 438.
- Joint policies, 211.
- Laws govern other companies, 218.
- Legal reserve, 426.
- Loan business, only, 433.
- Losses, when payable, 412, 413.
- Misrepresentation of policies, 214, 215, 216, 218.
- Mutual, 423.
- Name, 400, 436.
- Officer to employ agents, 225.
- Officers, 423.
- Organization, 400, 436, 675.
- Penalties, 212, 671.
- Pension, shall not grant, 408.
- Policies, foreign company, 411.
- Policy, legal requirements of, 216, 409, 411.
- Policy, shall not contain, 411.
- Policies, shall contain, 216, 409.
- Policies, suits on, 214, 215, 216, 412.
- Policy forms, 415, 420, 440.
- Premiums, report of, 420, 430, 431.
- Preliminary term policy, 216, 440.
- Publication of certificates of authority, 211.
- Real Estate holdings, 405, 427, 438.
- Registration certificate of deposit, 415.
- Registration fees, 417.
- Rebating, 216.
- Reinsurance business only, 433.
- Reserve, 201, 211, 414, 416, 417, 418, 419, 439.
- Salaries of officers, 408.
- Service of process, 412, 425, 426.
- Special or board contracts, 216.
- Statutes repealed, 219.
- Sub-standard risks, 419.
- Surplus profits, 211, 422, 440.
- Taxation, 211, 412, 413, 429, 430, 431.
- Texas reserves, 426, 427, 429.
- Texas securities, 426, 427, 429.
- Voucher showing disbursements, 408.
- Venue in suits, 412.
- Withdrawn, desiring renewal license, 431.
- Withdrawn, may maintain agents, 432.

Lightning and Storm Companies—

Capital stock, 207, 208, 209.
 Certificate of authority, 208.
 Charter, 207.
 Directors, 209, 210.
 Examination, 208.
 Inquiries must be answered, 205.
 Investments and loans, 208, 209, 219.
 Laws govern other companies, 216.
 Life business, cannot do, 200, 413.
 Mutual, 256 to 265.
 Name, 207.
 Reserve, 197.

List—

Names of agents, etc., 225.

Live Stock Companies—

Capital stock, 241, 675.
 Certificate of authority, 208.
 Charter, 207.
 Directors, 209, 210.
 Examination, 208.
 Inquiries, must answer, 205.
 Investments and loans, 210, 219.
 Name, 207.
 Organization and operation, 675.
 Reserve, 197.
 Taxation, 212 to 214.

Local Mutual Aid Societies—

Advertising matter, 642.
 Annual reports, 642.
 Burial associations, 642.
 Business limited to certain territory, 642.
 Examinations, 642.
 Expenses, 642.

Location of Office—

Blue sky law, 680.
 Casualty companies, 661.
 Fraternal benefit societies, 634.
 Home insurance companies, 207.
 Mutual fire, lightning and hail companies, 257, 258.

Losses—

Agent shall be liable to policyholder for, 222.
 Classification by Insurance Board, 241.
 Co-operative life companies, 438, 439.
 Failure to pay, 413.
 Fidelity, guaranty and surety companies, failure to pay, 654.
 Fire, 242, 243.
 Mutual accident companies, 449, 450.
 Mutual burglary, robbery and transportation loss company, 671.
 Mutual fire, storm and lightning companies, 259.
 Mutual hail companies, 267, 268.
 Reciprocal indemnity contracts, 271.
 Shall be paid when, 412.

54—Ins.

Lump Sum Payment—

By Industrial Accident Board, 464 (Sec. 15).

Marine and Inland Companies—

Agents, 220 to 227.

Annual statement, 232.

Association of companies, 211.

Capital stock, 207, 208, 209, 229, 230.

Certificate of authority, 208, 211, 234, 238.

Charter, 207.

Directors, 209, 210.

Dividends, 211.

Examination, 208.

Excess insurance, 437, 673.

Fees and taxes, must be paid, 211.

Inquiries, must answer, 205.

Insurance Board, 238.

Investments and loans, 208, 209.

Joint policy, 211.

Laws govern other companies, 218.

Life business, cannot do, 200, 413.

Name, 207.

Organization, 207, 675.

Penalties for violating laws, 211, 220.

Powers, 228, 230.

Publication of certificate of authority, 211.

Real estate holdings, 230.

Reinsurance, 228, 231; 234.

Reserve, 198, 211.

Resident agents, 223 to 224.

Risk, limit of one, 232, 234.

Surplus, how invested, 209.

Surplus profits, 211.

Taxation, 212 to 214.

Unauthorized companies, 234.

Unearned premiums, 211.

Medical Examinations—

Co-operative life companies, 441.

Fraternal benefit societies, 626, 641.

Meetings—

Casualty companies, 661.

Co-operative life companies, 437, 443.

Fraternal beneficiary associations, 621, 634.

Mutual accident companies, 447.

Mutual fire, lightning, hail and storm, 259.

Policyholders, 437, 443, 447.

Texas Employers' Insurance Association, 471 (Secs. 7, 8).

Membership—

Fraternal benefit societies, 227, 628, 634, 637, 639.

Merger and Transfers—

Fraternal beneficiary association, 631.

Mutual fire, lightning, hail and storm company, 259, 262.

Misappropriation of Funds—

Mutual insurance companies, 262.

Misdemeanor—

Agents, 216, 221, 226, 227, 643, 685.
 Blue sky law, 685.
 Bond of fire company, 232.
 Co-operative life companies, 441.
 Fraternal benefit societies, 643.
 Insurance commission law, 254.
 Medical examination, 441.
 Mutual fire, lightning, hail and storm companies, 262.
 Rebates and discriminations, 216.
 Reciprocal indemnity contracts, 270.

Misrepresentation—

Application for policy must be material, 214, 215, 218.
 Blue sky law, 683.
 Fraudulently made, 215, 222.
 Notice of discovery of, 215.
 Policy forms, benefits, dividends or surplus, 218.
 Stocks, sale, 683.

Monopoly—

Defined, 690.
 Penalties, 690, 691, 692, 693, 694, 695.
 Prohibited, 690.

Municipal Occupation Tax—

Prohibited, 213.

Mutual Accident Companies—

Act, subject to this, 446, 450.
 Advanced funds, must be deposited in bank, 445.
 Admission fees, dues, and assessments, 446, 449.
 Affidavits of incorporators, 445
 Annual statement, 448.
 Applications, must have 200 to organize, 445, 449.
 Assessment plan, 445.
 Assessments, 446, 449.
 Attorney General, charter and affidavits presented to, 445.
 Beneficiary, change of, 450.
 Benefits, 449.
 By-laws, 446, 447, 449, 450.
 Capital stock, have none, 445, 447..
 Certificate of authority, 446.
 Charter, 445, 446, 448, 450.
 Commissioner's duties, 446, 447.
 Definition, 446.
 Directors, 445, 446, 447, 449.
 Dividends, 447.
 Examination, 447.
 Exempt from certain laws, 218.
 Expense fund, 449.
 Fees, 446, 448.
 Forfeiture of charter and franchise, 448, 451.
 Funeral benefit, 449.
 Health insurance, 449.
 Insurance in force at organization, 445.
 Investment and loans, 219, 449.
 Liability, limit of, 450.
 Lodge system, none, 446.

Mutual Accident Companies—Continued.

- Losses, 449, 450.
- Meetings, 447.
- Members, 447, 450.
- Name of company, 445.
- Notice of assessment, 450.
- Notice of by-law adoption, 447.
- Office location, 445.
- Organization, 445.
- Penalties, 451.
- Policy, 259, 449, 450.
- Powers, 446.
- Profits, 447.
- Reserve fund, 449.
- Salaries of officers, 447.
- Sickness or disease, may insure against, 449.
- Term of existence, 445.
- Workmen's compensation, 477 (Sec. 2).

Mutual, Burglary, Robbery and Loss in Transportation Companies—

- Admitted to do business, 671.
- Agents, 671.
- Annual report, 671, 673.
- Assessments, 672.
- Assets, 671, 673.
- Attorney for service, 673.
- Business limited, 672.
- Certificate of authority, 671.
- Charter, 671.
- Fees, 673.
- Impairment, 671.
- Liability of policyholders, 672.
- Limitation of business, 672.
- Organization, 671.
- Penalties, 673.
- Policyholders, 672.
- Premiums, 672.
- Prerequisites to transacting business, 671.
- Membership fees, 672.
- Reserve, reinsurance, 672.
- Service of process, 673.
- Statement, 671, 673.
- Taxes, 673.

Mutual Fire, Lightning, Hail and Storm Companies, 256 to 264.

- Affidavit, 257.
- Application for preliminary permit, 257.
- Application for policies, must have, 257.
- Annual premium, 259.
- Annual savings, ten per cent to surplus, 259.
- Annual statement, 259, 264.
- Assets of foreign companies, 200, 263.
- Assessments, 259, 262.
- Attorney General, report to, 258, 262.
- Benefits, shall share, 259.
- Bonds of officers, 259.
- Business office, 257.
- By-laws, 257, 259.

Mutual Fire, Lightning, etc., Companies—Continued.

- Caption to act, 256, 265.
- Certificate of authority, 257, 258, 262, 263.
- Charter, 257, 262.
- Commissioner's duties, 257, 258, 259, 262, 263.
- Corporation, authority for organizing, 256.
- Deposits, 261.
- Declaration, as to withdrawal of securities, 645.
- Directors, 257, 259.
- Dividend, 262.
- Emergency clause, 264.
- Examination, 258, 262.
- Expenses, 259, 261.
- Failure to report condition, 262.
- False statement, 262.
- Fees, 256, 257, 263.
- Felony, 262.
- Fire companies, laws governing stock, 263.
- Foreign mutual companies, 263.
- Forfeiture of charter, 258, 262.
- Funds, 261.
- Insolvency, 258.
- Insurance in force before granting charter, 257.
- Investment and loans, 219, 261.
- Liabilities, 259.
- Losses, 259.
- Meetings of policyholders, 259.
- Members, 259, 262.
- Misappropriation of funds, 265.
- Misdemeanor, 262.
- Name, 256, 257.
- Note for first assessment, 257.
- Number of risks, for granting charter, 257.
- Number who may incorporate, 256.
- Officers, election, term and bond, 259.
- Organization, 256, 265.
- Penalty, 262, 263.
- Policy, 256.
- Policyholders, 259, 262.
- Preliminary certificate of authority, 257.
- Premiums, 257, 259, 262.
- Profit or saving to members, 262.
- Renewal receipt, 256.
- Repeal of Chapter 10, Title 71, 264.
- Revocation of license, 258, 262, 263.
- Reserve, 262.
- Residence of incorporators, 256.
- Risk, largest single, 262.
- Securities, withdrawal of, 218.
- Solvency of company, 258, 262.
- Statement, 257, 262.
- Stock companies, subject to laws for, 263.
- Suit for penalties, 263.
- Surplus fund, 259.
- Suspension of license, 262, 363.
- Taxes, 263.
- Title must contain the word "mutual," 256.
- Votes of policyholders, 259.

Mutual Companies—

Accident companies, 423, 445 to 451.
Burglary, robbery and transportation loss companies, 671 to 673.
Commissioner shall admit, when, 200.
Cyclone, tornado, hail and storm companies (foreign), 200, 263.
Farmers and printers, 264.
Fire companies, 213, 254.
Fire, lightning, hail and storm companies, 256 to 268.
Inquiries, must answer, 205.
Insurance commission law, 254.
Licensed, 200.
Life, health and accident, 423.
Mutual hail companies, 265 to 268.
Printers' mutual fire and storm associations, 264, 273.
Taxes, exempt from occupation, 213.
Workmen's compensation, 477 (Sec. 2).

Mutual Hail Insurance Companies, 265 to 268.

Annual statement, 268.
Application for preliminary permit, 265.
Application for charter, 265, 266.
Assessments, 265.
Attorney General, 267, 268.
Bond of officers, 266.
Board of officers, 266.
By-laws, 266.
Caption of act, 265.
Certificate of authority, 265.
Deposits, 267.
Directors, 266, 268.
Dividend, 267.
Emergency clause, 268.
Examination, 268.
Expenses, 267, 268.
Fees, 266, 268.
Funds, 267.
Interest on investments, 267.
Investment, 219, 267, 268.
Liability of policyholder, 265.
Losses, 267, 268.
Name, 266.
Note for assessment, 265, 267.
Number of applicants, 265.
Number of counties, 265.
Officers, 266.
Organization, 265, 266.
Place of office, 266.
Policy, 267.
Policyholder, 267.
Preliminary certificate of authority, 265.
Premium, 265, 267, 268.
Rates, 268.
Reserve fund, 267.
Secretary of State, shall file charter, 265.
Settlement of losses, 267.
Suit on premium notes, 265, 267.
Title must contain word "mutual," 265.

Name of Insurance Company—

- Casualty, 207, 661.
- Co-operative life, 436.
- Fraternal beneficiary association, 628.
- Home companies, 207.
- Blue sky law, 630.
- Life, health and accident, 400.
- Mutual accident, 445.
- Mutual, fire, lightning, hail and storm companies, 257.
- Mutual hail company, 266.
- Reciprocal indemnity contracts, 269.

Negligence—

- Workmen's compensation law, defense and proof, 452 (Sec. 1).

Net Assets—

- Defined, 400.

Net Value—

- Companies must have on hand, 197.
- Policies calculated, 197, 200, 204, 415, 416.

Notice—

- Assessment or premium, 449.
- Fraternal benefit societies, 639, 640.
- Meetings, 471 (Sec. 7).
- Misrepresentation in policy application, 214.
- Mutual accident companies, 447, 450.
- Premium payment, 441, 449.
- Publication of, 212.
- Reasonable time, 214.
- State Fire Commission shall give, 246, 248, 250.
- Subscriber shall give to employees, 474 (Sec. 19).

Occupation Taxes—

- Amendment to previous act, 212.
- Caption to act, 212.
- Casualty companies, 212 to 214.
- Fidelity, guaranty and surety companies, 212 to 214.
- Fire companies, 212 to 214.
- Live stock companies, 212 to 214.
- No other shall be levied, 213, 430.
- Life companies, 429, 430, 431.
- General agent, 227.

Officers—

- Annual statement, 232, 425, 664.
- Blue sky law, 680, 681, 683, 684.
- Bond given by, 266, 437, 637.
- Casualty companies, 662, 668.
- Commissioner or clerk cannot be, 196.
- Commissions cannot be paid to, 419.
- Co-operative life companies, 437, 438.
- Directors, chosen by, 210, 266, 437.
- False statement, 425, 643.
- Foreign companies, 423, 425.
- Fraternal benefit association, 621, 628, 634.
- Interest in purchase, sale or lease of company, 406, 409, 662.
- List of authorized, and post address filed, 683.
- Misrepresentation of policy, 218.

Officers—Continued.

- Mutual accident companies, 451, 621.
- Mutual fire, hail, storm and lightning companies, 257, 259.
- Mutual hail companies, 266.
- Printers' mutual companies, 273.
- Service of process, 412, 668.
- Texas Employers' Insurance Association, 471 (Sec. 4).

Organization—

- Accident companies, 660.
- Beneficiary as, 625.
- Burglary and theft companies, 660.
- Casualty companies, 660.
- Companies to do more than one kind of insurance, 215.
- Co-operative life insurance companies, 436.
- Credit insurance companies, 660.
- Fidelity, guaranty and surety companies, 207, 646.
- Fire companies, 675.
- Fraternal beneficiary associations, 628.
- Insurance companies, all kinds, 207.
- Liability insurance companies, 660.
- Life, health and accident companies, 400, 675.
- Live stock companies, 675.
- Marine companies, 675.
- Mutual assessment accident companies, 445, 446.
- Mutual burglary, robbery and loss in transportation companies, 671.
- Mutual fire, hail, storm and lightning companies, 256, 257, 265.
- Printers' mutual companies, 273.
- Title insurance companies, 242, 660.

Penalties—

- Agent's false misrepresentations, 455.
- Agent's license revoked, 224, 254, 643.
- Agents without license, 220, 221 to 224, 226.
- Anti-trust laws, 690, 691, 692, 693; 694, 695.
- Blue sky law, 685.
- Bond of fire insurance companies, 232.
- Casualty companies, 666.
- Co-operative life companies, 438, 439, 441.
- Dividends unlawful, 211.
- Embezzlement, 227.
- Fraternal beneficiary associations, 640, 643.
- Life, fire and marine insurance laws, 430, 435.
- Misrepresentation by agent, 227.
- Mutual accident companies, 451.
- Mutual burglary, robbery and transportation loss companies, 673.
- Mutual fire, hail, storm and lightning companies, 263, 265.
- Rebates and discriminations, 216, 253.
- Resident agent's law, 224.
- State Insurance Commission, 245, 250, 253, 254.
- Surety company bond improperly canceled, 655.
- Surety company, for accepting unlicensed, 655.
- Venue for suits, 666.
- Workmen's compensation act, 468 (Sec. 5a).

Permit—

- Mutual fire, lightning, hail and storm companies, 257, 265.
- Mutual hail companies, 265.
- Stock sale, 681, 682, 683, 684.

Personal Property—

Taxation, 213.

Plate Glass Insurance—

Organization of company, 660.

Policies—

Age of insured, 409, 411.

Agent cannot change, 225.

Application for, 214, 215, 216, 445, 626.

Casualty companies, 665.

Classes of, 415.

Co-insurance clauses, 237, 249.

Co-operative life companies, 436, 439, 440, 441.

Entire contract, shall contain, 216, 409.

Extended insurance, 409.

Fee for valuing, 206.

Fire companies, 238, 248, 249, 253, 665.

Foreign life (may contain), 411.

Form number, 415.

Forms, 248, 420, 440.

Fraternal beneficiary associations, 622, 626, 632, 635, 637.

Hazardous occupations, 411.

Indisputable after two years, 216, 409.

Installments, table of, 409.

Joint, 211.

Laws of Texas, govern contract, 215.

Level premium, shall not be issued, 216.

Life, shall contain, 409.

Life, shall not contain, 411.

Limiting time of suit upon, 411.

Loans upon, 409, 441.

Misrepresentation in application, 214, 215, 218, 626.

Misrepresentations of, 214, 215, 218.

Mutilated, 416.

Mutual accident companies, 446, 449, 450.

Mutual hail insurance companies, 267.

Mutual burglary, robbery and loss in transportation companies, 671.

Mutual fire, hail, storm and lightning companies, 256, 257, 259, 261.

Net value calculated, 197, 419.

Preliminary term, limited to one year, 216, 440.

Premium reduction, 407.

Prerequisite to issuing, 665.

Reciprocal exchange, 226.

Registration, 416.

Reserve value of, 409.

Representations not warranties, 409.

Resident agents, must be written through, 223, 224.

Surrender value, 411, 441.

Settlement at less than face of, 411.

Stipulations contrary to Texas laws, void, 215.

State Treasurer's receipt, 413.

Suicide, 411.

Table of loan values and options, 409.

Technical provisions, 236, 237.

Terminations, record of, 415.

Valuation, 415, 439.

Valuation by commissioners of other States, accepted, 197.

Policies—Continued.

- Valued, a liquidated demand, 236.
- Venue in suits on, 412.
- Word "mutual" shall appear on first page of, 256.
- Workmen's compensation act, 472.

Policyholder—

- Annual and special meetings, 437, 443, 447.
- Complaints as to fire insurance rates, 250.
- Co-operative life companies, 437, 439, 440, 441, 443, 444.
- Defined, 399.
- Deposit, protection, 267, 413, 414, 424.
- Dividends, life companies, 412, 439.
- Examination, list in report of, 443.
- Loans to, 439.
- May maintain actions, 250, 404.
- Mutual burglary, robbery and transportation loss companies, 672.
- Mutual fire, storm and lightning companies, 259.
- Mutual hail companies, 267.
- Notice of premium payment, 441.
- Profit-sharing, 252, 259.
- Rates and schedules of fire insurance, 248.
- Surplus to, 440.

Policyholders' Fund—

- Mutual hail companies, 267.

Power of Attorney—

- Blue sky law, 685.
- Foreign life companies, 425.
- Fraternal beneficiary associations, 632.
- Reciprocal contracts, 269.

Powers—

- Fraternal beneficiary associations, 628, 631.

Preliminary Certificate of Authority—

- Co-operative life companies, 436, 437.
- Fraternal benefit society, 655.
- Mutual fire, hail, storm and lightning companies, 257.
- Mutual hail company, 265.

Preliminary Term Policy—

- Co-operative life companies, 440.
- Limited to one year, 216, 440.

Premium Receipts—

- Annual statement, 429, 431.
- Gross, defined, 212.
- Report of collection, 429, 430, 431.
- Taxation, 212, 213, 429, 430, 431.

Premium Notes—

- Mutual fire, lightning, hail and storm companies, 257.
- Mutual hail companies, 265, 266, 267.

Premiums—

- Collection of, 253, 441, 672.
- Co-operative life companies, 439, 441.

Premiums—Continued.

- Default in payment, 218, 441.
- Excess insurance, 234, 437.
- Fire insurance, 239, 241, 242, 245, 246, 247, 248, 250, 253.
- Fraternal benefit society, 626, 628, 635, 637.
- Grace for payment of, 409.
- Gross receipts, defined, 212, 668.
- Mutual accident companies, 447.
- Mutual burglary, robbery and transportation loss companies, 672.
- Mutual hail companies, 265, 267, 268.
- Mutual fire, storm and lightning companies, 257, 259, 262.
- Notice to policyholder, 441.
- Payable in advance, 414.
- Payable outside the State, 215.
- Report of collections, 429, 430.
- Reciprocal exchange, 271.
- Sub-standard risk, 419.
- Taxes, 212, 213, 263.
- Workmen's compensation, 473 (Sec. 16c), 474 (Sec. 17).

Printers' Mutual Fire and Storm Companies—

- Annual report, 264, 273.
- Bond of treasurer, 273.
- Certificate of authority, 273.
- Corporation may be formed, 273.
- Fee for filing statement, 273.
- Organization, 273.

Process, Service of Legal—

- Casualty companies, 668.
- Fidelity, guaranty and surety companies, 653.
- Fraternal beneficiary associations, 632, 633.
- Life companies (foreign), 425, 426.
- Life, health and accident companies (home), 412.
- Surety company bonds, 653.

Profits—

- Defined, 399.
- Dividends, 407, 422, 666.
- Mutual accident companies, 447.
- Sharing, 252, 254.

Promotion Fee—

- Blue sky law, 679, 680, 682, 684.

Publication—

- Capital stock, notice of increase or decrease, 666, 669.
- Certificate of authority, 211.
- Examination reports, 198, 640.
- Fidelity, guaranty and surety companies, reports, 646.
- Fraternal benefit society's examination, 640.
- No adverse, 640.
- When and how made, 211, 212.

Public Use—

- Surety companies, charged with, 655.

Rates of Fire Insurance—

- Anti-trust law, 688.
- Insurance Commission, regulations by, 239, 241, 242, 245, 246, 247, 248, 250, 252.
- Mutual hail companies, 267.

Real Estate—

- Casualty companies, 667, 668.
- Fire and marine companies, 230.
- Deposit held in trust, 414.
- Holdings, 230, 405, 438, 667, 668.
- Investment and loans, 208, 230, 404, 438, 662, 667.
- Life companies' holdings, 405, 427.
- Taxation, 213.

Rebates—

- Anti-trust law, 694.
- Fire companies, 252, 253.
- Life, health and accident companies, 216.

Receiver—

- Casualty companies, 665.
- Co-operative life companies, 443.
- Fidelity, guaranty and surety companies, may act as, 646.
- Fraternal benefit societies, 639.
- Life, health and accident companies, 419.

Reciprocal Indemnity Contracts, 268 to 270.

- Application, number necessary to begin business, 269.
- Annual reports, 271.
- Attorney for service, 270.
- Attorney in fact, 269, 270, 272.
- Caption to act, 269.
- Commercial rating of subscriber, 270.
- Corporations, may exchange, 269, 271.
- Certificate of authority, 272.
- Declaration of attorney, 269.
- Deposit, 269.
- Dividends, 271.
- Emergency clause, 273.
- Examination, 271.
- Expenses, 271.
- Fees, 272.
- Individuals may exchange, 269.
- Insurance laws do not apply, 272.
- Life insurance cannot be exchanged, 269.
- Maximum indemnity of single risk, 270.
- Misdemeanor, 272.
- Name or title of exchange office, 269.
- Office of attorney, 269.
- Partnerships may be exchanged, 269.
- Penalties, 272.
- Power of attorney to exchange indemnity contracts, 269.
- Policy or contract, 269.
- Repealing clause, 272.
- Reserve, 271.
- Service of process, 270.
- Subscribers, 269, 270.
- Who may exchange, 269.
- Workmen's compensation, 477 (Sec. 2).

Records—

- Agent for excess insurance, 236.
- Charters, 401, 446, 628.
- Commissioner, shall keep, 199.
- Directors shall keep, 210.
- Fee for certified copies, 206.
- Fire losses in this State, 242.
- Injuries to workmen, 469 (Sec. 7).

Registration—

- Fees, 417.
- Policies, 415, 416, 417.

Reincorporation—

- Fraternal beneficiary association, 631.

Reinsurance—

- Co-operative life companies, 443.
- Fidelity, guaranty and surety companies, 652.
- Fire and marine companies, 228, 231, 234.
- Fraternal beneficiary associations, 631.
- Life, health and accident companies, 407, 418.
- Reserve of 50 per cent, 672.

Reinsurance Reserve—

- How calculated, 197, 203, 211.

Repealing Clause—

- Fire insurance laws, 238.
- Fraternal benefit act, 645.
- Reciprocal insurance laws, 273.

Reports to Governor and Legislature—

- Commissioner shall make, 199, 205.
- Send to other States, 199.

Reserve—

- Accident and health companies, 197.
- Co-operative life companies, 419, 439, 441, 443, 444.
- Deposits, 414, 416, 417, 418, 419.
- Employers' liability insurance, 473 (Sec. 16a).
- Fidelity, guaranty and surety companies, 197, 649.
- Fire companies, 197, 211.
- Fraternal beneficiary associations, 622, 626, 628, 637.
- Life companies, 201, 414, 416, 417, 418, 419.
- Marine and inland, 198.
- Mutual accident companies, 449.
- Mutual burglary, robbery and transportation loss companies, 672.
- Mutual fire, hail, storm and lightning companies, 262.
- Mutual hail companies, 267.
- Report shall be filed, 429.
- Reciprocal exchange, 270.
- Sub-standard risks, 419.
- Taxation, 444.
- Value of policy, 409.

Reserve Liability (Home Companies)—

- How computed, 201.

55—Ins.

Resident Agents—

Policies must be written through, 223, 224.

Revocation of License or Certificate—

Fraternal beneficiary association, 632, 636, 640.

Reciprocal indemnity contracts, 272.

Mutual fire, lightning, hail and storm companies, 262, 263.

Life insurance companies, 432.

Fire and fire and marine, 235, 252, 253.

Risks—

Largest amount of, 232.

Rules and regulations for certain, 247.

Mutual fire, etc., single risk, 257, 262.

Must have not less than one hundred separate, 257.

Robertson Law—

Companies exempted from investment, 433.

Failure to comply with, 432.

Fraternal, exempt, 433.

Investments, taxes and legal process, inclusive, 425 to 435.

Penalties, 431, 432.

Salaries—

Industrial Accident Board, 465 (Sec. 3).

Insurance Board, 240, 242.

Life, shall not pay excessive, 408.

Mutual accident companies, 447.

Secretary—

Industrial Accident Board, 465 (Sec. 3).

State Fire Insurance Commission, 242.

Secretary of State—

Blue sky law, 680, 681, 682, 683, 684, 685, 686, 687.

Mutual hail insurance company, charter, 265.

Securities—

Custodian of, 417.

Deposits, 231, 413, 414, 416, 417, 418, 433, 662, 665, 666.

Fidelity, guaranty and surety companies, 649.

Foreign companies, 231, 424, 425.

How and where kept, 417.

Industrial companies, 421.

Investments and loans, 208, 209, 404, 667.

Mutual burglary, robbery and transportation loss companies, 671, 673.

Record of, 416.

Texas securities defined, 427.

Transfer to State Treasurer by Commissioner, 204.

Withdrawal of, 264, 417, 649, 662, 665, 666.

Service of Process—

Blue sky law, 685.

Casualty companies, 668.

Fidelity, guaranty and surety companies, 649, 653.

Fraternal beneficiary association, 632, 633.

Life companies, foreign, 425, 426.

Life, health and accident (home), 412.

Mutual, burglary, robbery and transportation loss company, 673.

Reciprocal exchange, 270.

Set of Books—

Blue sky law, 684.

Shares of Stock—

How divided, 208, 400.

Number of, 400.

Transferable, 402.

Sheriff and Other Peace Officers—

Will serve process issued by Commissioner, 200.

Special or Board Contracts—

Prohibited, 216.

State Fire Marshal—

Authority and powers of, 243, 244.

Duties, 242.

Expenses, 244.

Selection of, 242.

State Fire Insurance Commission—

Action may be brought against, 250.

Amendment of rates, 247, 248, 250.

Appointment and term of office of members, 240.

Appropriation, first year, 240.

Authority and powers of, 245, 246, 247, 248, 250.

Caption to act, 238.

Certificate of authority to companies, 239, 252, 253.

Clerical assistants, 240, 241.

Credits for reduction of hazard, 247.

Companies subject to commission law, 239.

Complaints, 250.

Emergency clause, 255.

Examination, 245.

Expenses, 213, 240, 241, 242, 244, 255.

Experts employed by Commission, 246, 247.

Extension of credit not forbidden, 253.

Fees of city and county clerks, 232, 246, 247.

Fire losses, to classify, 241.

Fire marshal, 242, 243, 244, 245.

General basis schedules, 241, 245, 246, 247, 248, 250.

Hearings, 250.

Lien does not render policy void, 249.

Losses, record and classification of, 242.

Members and term of office, 240, 242.

Mutual or profit-sharing companies, 254.

Notice of hearings, 248, 250.

Penalties, 245, 250, 253, 254.

Policies, establishing uniform, 248, 249, 252.

Policyholder, furnished with analysis of rates, 248.

Powers of, 241, 242, 245, 246, 247, 248.

Premium collections, 253.

Publication of schedules, 246.

Public, rates and schedules open to, 248.

Rates of fire insurance, 239, 241, 242, 245, 246, 247, 248, 250, 252, 253.

Rebates or discrimination, 252, 253.

Repealing former laws, 238, 240.

State Fire Insurance Commission—Continued.

Salaries of members, 240, 242.
 Secretary, 242.
 Statements from companies, 245.
 Suits against, 250, 252.
 Tax for support of, 213, 255.
 Testimony given, 254.
 Unconstitutional, if part of act is held, 255.

State Treasurer—

Bond, in lieu of securities withdrawn from deposit, 652.
 Deposits, 231, 264, 266, 413, 424, 433, 649, 652, 665, 666.
 Duties as to transfer of securities, 204.
 Fees to be turned over to, 204.
 Interest on deposits, 649, 666.
 Losses of surety companies, paid by, 654.
 Penalties recovered, 252, 666.
 Securities transferred, shall countersign, 204.
 Taxes, 213, 263, 430, 431.

Statutes—

Amended, 212, 228.
 Caption, 212, 228, 236, 237, 238, 256, 265, 269, 451, 621, 646, 660, 679.
 Casualty companies, applying only to, 668.
 Cumulative, 669.
 Fraternal beneficiary associations, exempt from certain, 213, 218, 433, 435, 622, 641.
 Govern different kinds of companies alike, 218.
 Mutual accident companies, subject to certain, 218, 446, 450, 477 (Sec. 2).
 Mutual fire, hail, storm and lightning companies, governing, 263.
 Policy contracts, governed by Texas laws, 215.
 Repealed, 214, 218, 238, 264, 273.
 Unconstitutional, if held, 255.

Stock of Corporations, Regulating the Sale of—

Blue sky law, 679 to 687.

Stockholders—

Amend charter, 401.
 Capital stock, impairment of, 229.
 Casualty companies, 661.
 Dividends to, 407.
 Elect directors, 209, 210, 401, 661.
 May maintain actions, 404.
 Meetings, 210, 401, 402, 661.
 Quorum, 210, 401.
 Records inspected by, 210.
 Transfer of stock, 402.
 Votes, 401.

Sub-Contractor—

Workmen's compensation, 468 (Sec. 6).

Subscribers to Reciprocal Contracts—

Attorney in fact, 269, 270.
 Attorney for service, 270.

Subscribers to Reciprocal Contracts—Continued.

- Commercial rating, 270.
- Declaration, 269.
- Deficiency of annual deposits, 271.
- Names and addresses, 271.

Subscriber Under Workmen's Compensation Law—

- Action against, 453 (Sec. 3).
- Assessment, 473, 474.
- First meeting of the subscribers, 471 (Sec. 7).
- Groups, distributed into, 473 (Sec. 16c).
- Number must not be below fifty, 472 (Sec. 9).
- Powers of, 471 (Sec. 3).
- Voting power of, 471 (Sec. 8).
- Who may become a, 471 (Sec. 6).

Suits—

- Against Commissioner, 432.
- Attorney General to forfeit charter, 258, 262, 691.
- Blue sky law, 683, 684.
- Commissioner may institute, 203.
- Damage for withdrawal from bond, 655.
- Fire Commission, 250.
- Mutual hail company's premium notes, 265, 267.
- Penalty for accepting unauthorized surety company, 655.
- Removal to Federal court, 200.

Suits on Policies—

- Life, health and accident (home and foreign), 412.
- Bond or any obligation, 653.
- Bond by reason of misrepresentation, 683.
- Misrepresentation in application, 214, 215, 216, 218.

Surety or Guarantor—

- Fidelity, guaranty and surety companies, may act as, 646, 649, 652.

Surplus Money—

- Casualty companies, 667.
- Dividends, 211, 407, 422, 440.
- Fraternal beneficiary associations, 626, 637.
- How invested, 209, 667.
- Mutual companies, 259, 423.

Surplus to Policyholders—

- Amount required to do business, 229, 419.
- Company must have, 197, 419.
- Co-operative life companies, 440.
- Foreign companies, 423.
- Life companies, 419, 440.
- Misrepresentation, 218.
- Requisite before issuance of certificate of authority, 200.

Taxation—

- Agents, 222, 227.
- Amendment to previous act, 212.
- Casualty companies, 212, 213.
- Certificate of State Treasurer, 213, 430.
- Collecting taxes, 213, 430.
- Commissioner's duties, 430, 433.
- Co-operative life companies, 444.

Taxation—Continued.

Excess insurance, 236.
Exceptions to life companies, 430.
Fidelity, guaranty and surety companies, 212, 213.
Fire companies, 212, 213, 255.
Fraternal beneficiary associations, 213, 642.
Gross premiums defined, 212.
Gross premiums reported, 212, 429, 431.
Home companies, 412, 413.
Laws amended and repealed, 212, 218.
Life companies, 429, 430, 431.
Live stock companies, 212.
Marine and inland companies, 212, 213.
Municipal and county occupation taxes prohibited, 213.
Must be paid, 211.
Mutual and co-operative fire companies, exempt, 216.
Mutual burglary, robbery and transportation loss companies, 673.
Mutual fire, hail, storm and lightning companies, 257, 263.
Premium receipts, 212, 429, 430, 431, 432.
Real and personal property, not exempt, 213.
Receipt for taxes, 430.
Reduced by investments, 213, 429.
State Fire Insurance Commission, support, 213, 255.
State Treasurer, 213, 430, 431.
Withdrawal companies, 431, 432.

Term of Office—

Commissioner, 195.
Industrial Accident Board, 465 (Sec. 1).
Fire Insurance Commission, 240.

Texas Employers' Insurance Association—

Assessments, 472 (Secs. 14, 15), 473 (Sec. 16a).
By-laws, 466, 472 (Sec. 14).
Certificate as to subscribers, 472 (Secs. 10, 11, 12).
Contingent liability of subscriber, 472 (Sec. 14).
Created, 471 (Sec. 1).
Commissioner's duties, 472 (Sec. 12), 474 (Sec. 17).
Corporate powers, 471 (Sec. 1).
Definition of association, 475 (Sec. 1).
Directors, 471 (Secs. 2, 5).
Dividends, 473 (Sec. 16).
Employers, 471 (Sec. 6).
Inspection, 472 (Sec. 12).
Liability for judgment, 475 (Sec. 21).
Meetings, 471 (Sec. 7).
Notice to employees, 474 (Secs. 19, 20).
Number of subscribers and employees, 472 (Secs. 10, 11).
Officers, 471 (Secs. 4, 5).
Policies, 472 (Secs. 9, 10).
Premiums, 473 (Sec. 16c), 474 (Sec. 17).
Refund of parts of premiums, 477 (Sec. 3).
Subscribers, 474 (Sec. 18a).
Voting power of subscribers, 471 (Sec. 8).

Title Insurance Companies—

Organization, 660.

Tornado Companies—

Agents, 220 to 227.
 Capital stock, 207, 208, 209.
 Certificate of authority, 208.
 Charter, 207, 208.
 Directors, 209, 210.
 Examination, 208.
 Excess insurance, 225.
 Inquiries, must answer, 205.
 Investments and loans, 208, 209.
 Laws govern other companies, 218.
 Life business, cannot do, 200, 413.
 Mutual, 200, 256 to 264, 273.
 Name, 207.
 Resident agents, 223, 224.

Townsite Corporations—

Blue sky law, 679, 680, 681.

Trust—

Defined, 688.
 Penalties, 690, 691, 692, 693, 694, 695.

Trustee—

Fidelity, guaranty and surety companies, may act as, 646.

Unauthorized Companies—

Excess insurance, 234.

Unconstitutionality—

Fire insurance commission law, 255.
 Workmen's compensation law, 478 (Sec. 4).

Vacancies—

Commissioner, 197, 201, 203, 415, 416, 439.
 Commissioners of other States, 197.
 Fraternal benefit society, 622, 628, 636, 637.

Valued Policy—

Liquidated demand, 236.

Venue—

Anti-trust suits, 440, 671, 672.
 Fidelity, guaranty and surety company, suit against, 649.
 Penalty suits, 666.
 Policy, suits on, 412.
 Surety company bonds, 649, 653.

Votes—

Policyholders in mutual companies, 259, 447.
 Stockholders, 401.

Water and Leakage Damage—

Organization of company, 660.

Waiver of the Provisions of the Laws—

Fraternal beneficiary associations, 634.
 Workmen's compensation act, 453 (Sec. 3a).

Whole Family Protection—

For members of fraternal benefit societies, 623.

Witness—

Compelled to testify and give information, 200, 693.

Willful Burning—See Arson, 274.**Workmen's Compensation, 451-478.**

Accident insurance companies, 477 (Sec. 2).

Action against employer, 453 (Sec. 3).

Appointment of Industrial Accident Board, 465 (Secs. 1, 2).

Appeal to the court, 467 (Sec. 5), 469 (Sec. 6a).

Assumed risk, no defense, 452 (Sec. 1).

Attachment, compensation free of, 453 (Sec. 3).

Attorney's fees, 455 (Secs. 7c, 7d).

Average weekly wages, 475 (Sec. 1).

Beneficiaries, 456 (Sec. 8), 464 (Sec. 17).

By-laws of association, 471 (3).

Caption of act, 451.

Cause of action, shall survive, 464 (Sec. 16).

Classification of premiums, 472 (Sec. 13).

Compensation, amount, how and when payable, 456 (Sec. 8), 457 (Secs. 8b, 9, 10, 11), 458.

Compensation, shall begin on the eighth day, 454 (Sec. 6).

Contributory negligence, no defense, 452 (Sec. 1).

Death, 456 (Sec. 8).

Decision of Industrial Accident Board, 467.

Defense to action to recover damages, what shall not be a, 452.

Defenses removed, 452.

Definitions, 475.

Disability, total, 457 (Sec. 10, 11a).

Disability, partial, 457 (Sec. 11).

Dividends, 473 (Sec. 16).

Domestic servants not subject to act, 452 (Sec. 2).

Emergency clause, 478 (Sec. 7).

Employer, 475 (Sec. 1).

Employment, of not more than five employes, 452 (Sec. 2).

Employer of labor, member of board, 465 (Sec. 2).

Employees, 475 (Sec. 1).

Examination of injured employe, 460 (Sec. 12b), 466 (Sec. 4).

Exemptions from workmen's compensation law, 452 (Sec. 2).

Exemplary damages, 454 (Sec. 5).

Expenses of Industrial Accident Board, 465 (Sec. 3).

Farm laborers not subject to act, 452 (Sec. 2).

Fellow servant's negligence, no defense, 452 (Sec. 1).

Filing claim for compensation, 453.

Five employees or less, firm or corporation employing exempt, 452 (Sec. 2).

Funeral benefit, 457 (Sec. 9).

Garnishment, compensation free of, 453 (Sec. 3).

Hospital services, 454 (Secs. 7, 7a).

Industrial Accident Board, 465 to 471.

Injuries, 457 (Sec. 11a), 460 (Sec. 12b), 476 (5).

Insurance companies, 477 (Sec. 2).

Judgment, 475 (Sec. 21).

Liability insurance companies, 477 (Sec. 2).

Lump sum payment, 464 (Sec. 15).

Workmen's Compensation—Continued.

- Members of Industrial Accident Board, 465 (Sec. 2).
- Medical aid, 454 (Secs. 6, 7, 7a), 462 (Sec. 12e).
- Medicine, 454 (Secs. 7, 7a).
- Meeting of the board of directors, 471 (Sec. 7).
- Minor or mentally incompetent employee, 463 (Sec. 12i), 464 (Sec. 13).
- Mutual contingent liability, 472 (Sec. 14).
- Mutual and reciprocal insurance associations, 477 (Sec. 2).
- Negligence, 452 (Sec. 1).
- Non-subscribing employer, 452 (Sec. 1 (4)), 454 (Sec. 4).
- Notice of meeting to subscribers, 471 (Sec. 7).
- Notice of injury, 467 (Sec. 4a, 5).
- Notice of action, 453 (Sec. 3a).
- Notice to employees, 474 (Secs. 19, 20).
- Number of subscribers and employees, 472.
- Officers and offices of Industrial Accident Board, 465 (Secs. 1, 2).
- Organization of company, 660.
- Partial incapacity, 458.
- Penalty, 468 (Sec. 5a).
- Policies, 472.
- Power and rules of Industrial Accident Board, 466.
- Period, to pay compensation, 456 (Sec. 8), 457 (Secs. 10, 11).
- Premiums, 463 (Sec. 12g), 473, 474.
- Railway employees, exempt, 452 (Sec. 2).
- Representative of deceased employees, 456 (Secs. 7d, 8a), 457 (Sec. 9), 464 (Sec. 16).
- Recovery of exemplary damages, 454 (Sec. 5).
- Record of injuries to workmen, 469 (Sec. 7).
- Refund of part of premium, 477 (Sec. 3).
- Regulations and rules for the condition on plants, 474 (Sec. 18).
- Salaries of members of Industrial Accident Board 465 (Sec. 3).
- Subcontractor or subscriber, 468 (Sec. 6).
- Subscriber, 475 (Sec. 1).
- Texas Employers' Insurance Association, 471 to 475.
- Time when law went into effect, 478 (Sec. 7).
- Total incapacity, 457 (Sec. 10-11a).
- Unconstitutionality of part of the law 478 (4).
- Voting power of subscribers, 471 (Sec. 8).
- Waiver of employee's rights, 453 (Sec. 3a), 464 (Sec. 14).
- Weekly payment of compensation, 465 (Sec. 18).

471
471

